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

W.P.(C) NO. 13239 OF 2015

BIPIN BIHARI SAHU ……..Petitioner

.Vrs.

STATE OF ODISHA ……..Opp. Party

CENTRAL MOTOR VEHICLES RULES, 1989 – Rule-18

Whether further test is required for existing drivers at the time of renewal of their driving license basing on the circular issued by the public authorities ? Since the circulars are contrary to the statutory provisions contained in the above rules, no further training is required for the existing drivers before considering the renewal application – Held, Impugned circulars are setaside – Direction issued to the STA to grant renewal of the driving license of the petitioner forthwith.

(Para 6)

For Petitioner : M/s. Gopal Krushna Mohanty Sr.Adv.
P.K.Panda, D.Mishra, S.Das & S.K.Ganayak.

For Opp. Parties : Mr. Bigyan Sharma (Standing Counsel)

Date of Hearing : 09.09.2015
Date of Judgment : 09. 09.2015

JUDGMENT

B. RATH, J.

1. Heard Mr. Gopal Krushna Mohanty, learned Senior Advocate for the petitioner and Mr. Bigyan Sharma, learned Standing Counsel for the Transport Department.

2. The petitioner, a driver being affected for non-renewal of his driving license for his not having the required training based on the circulars issued by the Office of the Transport Commissioner-cum-Chairman, State Transport Authority, Odisha, Cuttack bearing Circular No.2 of 2015 dated 13.05.2015 and Circular No.09 of 2015 dated 04.06.2015 under Annexures.2 and 3 respectively has sought to assail the action of the public authority on the premises that the said Circulars are contrary to the provisions contained in the Act and cannot be sustained. In filing the aforesaid writ petition, the petitioner while seeking quashing of Circulars vide Annexures-2 and 3 sought for appropriate relief by way of mandamus from this Court.

3. On his appearance, Mr. Sharma, learned counsel for the Transport Department for opposite party No.2 attempted to justify the action of the Public Authority by drawing our attention to the counter affidavit filed on behalf of opposite party No.2 and submitted that the circulars issued by the State Transport Authority are an outcome of the direction of the Hon'ble Apex Court in its decision in the case of *S. Rajaseekaran vs. Union of India and others, reported in (2014) 6 SCC 36.*

During course of argument, Mr. Sharma, learned Standing Counsel fairly conceded that there is no provision for putting the driver to test at the time of applying for renewal of their license following Rule 18 of the Central Motor Vehicles Rules, 1989. He, however, referring to the observations of the Hon'ble Supreme Court in the aforesaid decision, particularly, in paragraphs 13(f) and 14.9 therein contended that the circulars have been issued in strict compliance of the direction of the Hon'ble Apex Court.

In his opposition to the submission of Sri Sharma, learned counsel for the State Transport Authority, Sri Gopal Krushna Mohanty, learned Senior Counsel appearing for the petitioner submitted that the impugned Circulars not only remain contra Rule 1989 but also remain contra the direction of the Hon'ble Apex Court in the decision reported in (2014) 6 SCC 36.

4. Before proceeding to other aspects, it is necessary here to take note of the observations of the Hon'ble Apex Court made in paragraphs 13(f) and 14.9, which are quoted herein below:

> "13.(f) Directions to R-I regarding *licensing:*
>
> (i) There should be a cap on the number of licences that can be issued by the official concerned in one day, so that every application for a licence is strictly checked and evaluated. The petitioner suggests a cap of *four licences* issuable per official per day.
>
> (ii) Prescribe minimum education and qualification standards for drivers.
>
> (iii) Test the knowledge of safety standards, road rules, signboards, road markings, etc. in addition to mere ability to drive. Licences ought not to be issued, as presently done, on the basis of the criteria of ability to drive alone.
>
> (iv) Licensing should be based on biometrics to prevent multiple licences being issued to one person.

(v) Computerized licensing to track offences and introduce a point-based penalty system for offenders.

(vi) Bar coding of vehicles and licences to link the penalty system, the annual fitness certificate of the vehicle, and insurance forms for instant information.

(vii) Restrictions on the number of new vehicles registered and number of vehicles a family/person can own, methods to ensure road-worthiness of vehicle, periodic licence renewal, etc.

xx xx xx

14.9. Refresher training course for heavy vehicle drivers are being organized to inculcate safe driving habits and to acquaint the drivers with the rules to be followed while using the roads."

5. From reading of the above observation/direction of the Hon'ble Apex Court, we find the observation/direction contained in paragraph-13(f), no where prescribes imposition of further training to the existing drivers before considering their renewal application as contemplated in both the Circulars. Similarly, observation/direction whatever contained in paragraph-14.9 of the said judgment recommends for refresher training course for heavy vehicle drives to acquaint the drivers with the rules to be followed while using road.

6. Considering the submissions of learned counsel for the respective parties, we find the circulars issued under Annexures-2 and 3 are not only arbitrary but also contrary to the statutory provisions as provided under the Central Motor Vehicles Rules, 1989 and also runs contrary to the direction/observation made by the Hon'ble Apex Court in the case of ***S. Rajaseekaran*** *(supra)* and are arising out of misreading of the above decision. Consequently, this Court set aside both the Circular No.2 of 2015 dated 13.05.2015 and Circular No.9 of 2015 dated 04.06.2015 as appearing at Annexures-2 and 3 respectively and further direct that the State Transport Authority to grant renewal of driving licence of the petitioner forthwith.

7. The writ petition stands allowed. However, there is no order as to costs.

Writ petition allowed.

2015 (II) ILR - CUT- 843

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

W.P.(C) NO.6584 OF 2007

STATE OF ORISSA & ORS. ……..Petitioners

.Vrs.

BALABHADRA JAL ……Opp.Party

(A) DISCIPLINARY PROCEEDING – Delay in disposal – whether a charge sheet can be quashed due to delay in finalization of the proceeding ? Held, charge sheet in a disciplinary proceeding is not liable to be quashed on the ground that the proceeding initiated at a belated stage or could not be concluded in a reasonable period unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceeding or the delay creates prejudice to the delinquent employee. (Para 12)

(B) DISCIPLINARY PROCEEDING – Appeal against order passed by the disciplinary Authority – Whether the appellate authority has jurisdiction to award higher punishment ? – Held, the appellate authority has power to enhance punishment. (Para 19)

(C) WORDS & PHRASES – Per Incuriam – The latin expression Per incuriam literally means "through inadvertence" – A decision can be said to be given per incuriam when the Court of record has acted in ignorance of any previous decision of its own or a subordinate court has acted in ignorance of a decision of the Court of record – It is a settled rule that if a decision has been given "per incuriam" the Court can ignore it. (Paras 16,17)

For Petitioner : Mr. B. Pradhan, Addl. Govt. Advocate
For Opposite party : Mr. P. Chuli

Date of hearing : 05.01. 2015
Date of Judgment: 12.01. 2015

JUDGMENT

DR. A.K. RATH, J.

Whether a charge sheet can be quashed due to delay in finalization of the disciplinary proceeding is the sole question that hinges for our consideration ?

02. The opposite party was a Forester. A departmental proceeding was initiated against him vide the Office Order No.168 dated 31.7.1987 by the Divisional Forest Officer, Titilagarh (KL) Division, Titilagarh-petitioner no.2. He was charged with gross negligence in duty causing loss to the Government to a tune of Rs.34,560/-, suppression of fact and misappropriation leading to loss of Government property to a tune of Rs.34,560/-. Since the disciplinary proceeding was not completed, he approached the Orissa Administrative Tribunal, Bhubaneswar (in short, hereinafter referred to as "the Tribunal) in O.A. No.320 of 2001 to quash the same. By order dated 22.3.2001, the learned Tribunal disposed of the said application with the following observations:-

"xxx xxx xxx

Since the proceeding is lingering for more than 14 years, we direct that it shall be finalised by 31.8.2001 at the lattest and if no final decision is taken by that date, the charges shall be treated as quashed since they have already become stale charges after such a long period.

xxx xxx xxx"

03. Thereafter an application for extension of time was filed by the petitioners, who were respondents therein. As the proceeding was not finalized with the time fixed by the Tribunal, the opposite party filed a contempt proceeding vide C.P.(C) No.194 of 2001. The contempt proceeding was disposed of on 14.1.2004 granting liberty to him to file fresh Original Application.

04. While matter stood thus, after conclusion of enquiry, the disciplinary authority awarded the following punishment on the opposite party on 25.09.2001.

"1. The period of suspension shall be treated as leave due and admissible.

2. Two increments are stopped with cumulative effect.

3. The loss of Govt. money of Rs.37,056/- (Rs. Thirty seven thousand & fifty six) only shall be recovered from his pay bill in 74 (seventy four) instalments @ Rs.500/- P.M. & last being Rs.556/- P.M."

05. On an appeal filed by the opposite party, the appellate authority modified the same and awarded higher punishment as follows:

"1. The loss of Govt. money to the tune of Rs.37,056.00 shall be recovered from him as per installments fixed by DFO.

2. The period of suspension shall be treated as leave without pay.

3. Two increments are stopped without cumulative effect.

4. He is censured."

06. Thereafter the opposite party filed O.A. No.194 of 2005 to quash the order of punishment dated 25.9.2001 passed by the petitioner no.2 vide Annexure-6 and the order dated 6.1.2005 passed by the Conservator of Forests, Balangir (K.L.) Circle, the appellate authority, vide Annexure-9 awarding higher punishment. Taking a cue from the order dated 22.3.2001 passed in O.A. No.320 of 2001, learned Tribunal came to hold that the charges framed against the opposite party in the year 1987 be deemed to have been quashed and the period of suspension was to be treated as duty on the failure of the disciplinary authority to finalise the proceeding by 31.8.2001 and accordingly allowed the application on 11.04.2005. Aggrieved by and dissatisfied with the said order, the State of Orissa and its functionaries have filed the present writ petition.

07. Heard Mr. B. Pradhan, learned Additional Government Advocate for the State-petitioner and Mr. P. Chuli, learned counsel for the sole opposite party.

08. Mr. Pradhan, learned Additional Government Advocate submitted that the opposite party has committed malfeasance and misfeasance for which the disciplinary proceeding was initiated against him. After affording opportunity of hearing to him, the disciplinary authority came to hold that the charges have been proved and awarded punishment. On an appeal filed by the opposite party, the appellate authority awarded higher punishment keeping in view the gravity of the charges. Thus, the learned Tribunal committed a manifest illegality and impropriety and holding that the charges are deemed to have been quashed in view of the order dated 22.3.2001 passed in O.A. No.320 of 2001.

09. Per contra, Mr. Chuli, learned counsel for the opposite party, argued with vehemence that the order passed by the learned Tribunal is conformity in consonance with law and no interference is called for. He submitted that the disciplinary proceeding initiated against the opposite party on 31.7.1987, but the same was not completed in time for which the learned Tribunal by

order dated 22.3.2001 passed in O.A. No.320 of 2001 has directed to complete the disciplinary proceeding by 31.8.2001, failing which the charges would be deemed to have been quashed. He further submitted that the opposite party has retired from services on attaining the age of superannuation long since and not getting full pension. He further submitted that the appellate authority committed a manifest illegality in awarding higher punishment. To buttress his submission, Mr. Chuli submitted that the appellate authority had only three options, i.e., either the appeal filed by the opposite party should have been allowed or dismissed or lesser benefit could be imposed. He relied on a Division Bench decision of this Court in the case of ***Keshab Chandra Sahu v. State of Orissa and others,*** (2003) CLR-527.

10. Having regard to the pleadings of the parties and rival submissions made at the Bar, really two points arise for our consideration.

(1) Whether the learned Tribunal is justified in directing the disciplinary authority to complete the proceeding within a particular time, failing which the charges would be deemed to have been quashed ?

(2) Whether the appellate authority has jurisdiction to award higher punishment ?

Point No.1

11. The law regarding quashment of charge sheet in a disciplinary proceeding is no more res integra. After a survey of the earlier decisions, the apex Court in the case of ***Secretary, Min. of Defence and others v. Prabash Chandra Mirdha,*** (2012) 11 SCC 565, the Bench speaking through Hon'ble Dr. Justice B.S. Chauhan (as his Lordship then was) held as follows:

> **"Para-8**. Law does not permit quashing of charge-sheet in a routine manner. In case the delinquent employee has any grievance in respect of the charge-sheet he must raise the issue by filing a representation and wait for the decision of the disciplinary authority thereon. In case the charge-sheet is challenged before a court/ tribunal on the ground of delay in initiation of disciplinary proceedings or delay in concluding the proceedings, the Court/Tribunal may quash the charge-sheet after considering the gravity of the charge and all relevant factors involved in the case weighing all the facts both for and against the delinquent employee and must reach the conclusion which is just and proper in the circumstances (vide : The State of

Madhya Pradesh v. Bani Singh & Anr., AIR 1990 SC 1308; State of Punjab & Ors. V. Chaman Lal Goyal, (1995) 2 SCC 570; Deputy Registrar, Co-operative Societies, Faizabad v. Sachindra Nath Pandey & Ors., (1995) 3 SCC 134; (1995) AIR SCW 3028); Union of India & Anr. V. Ashok Kacker, 1995 Supp (1) SCC 180; Secretary to Government, Prohibition & Excise Department v. L. Srinivasan, (1996) 3 SCC 157; State of Andhra Pradesh v. N. Radhakishan, AIR 1998 SC 1833; Food Corporation of India & Anr. v. V.P. Bhatia, (1998) 9 SCC 131; Additional Supdt. of Police v. T. Natarajan, 1999 SCC (L & S) 646; M.V. Bijlani v. Union of India & ors., AIR 2006 SC 3475; P.D. Agrawal v. State Bank of India & Ors., AIR 2006 SC 2064; and Government of A.P. & Ors. v. V. Appala Swamy, (2007) 14 SCC 49); (AIR 2007 SC (Supp) 587).

Para-9 "In Secretary, Forest Department & Ors., v. Abdur Rasul Chowdhury, (2009) 7 SCC 305 : (AIR 2009 SC 2925), this Court deal with the issue and observed that delay in concluding the domestic enquiry is not always fatal. It depends upon the facts and circumstances of each case. The unexplained protracted delay on the part of the employer may be one of the circumstances in not permitting the employer to continue with the disciplinary proceedings. At the same time, if the delay is explained satisfactorily then the proceeding should not be permitted to continue."

Para-10 "Ordinarily, a writ application does not lie against a charge-sheet or show-cause notice for the reason that it does not give rise to any cause of action. It does not amount to an adverse order which affects the right of any party unless the same has been issued by a person having no jurisdiction/competence to do so. A writ lies when some right of a party is infringed. In fact, charge-sheet does not infringe the right of a party. It is only when a final order imposing the punishment or otherwise adversely affecting a party is passed, it may have a grievance and cause of action. Thus, a charge-sheet or show-cause notice in disciplinary proceedings should not ordinarily be quashed by the Court. (Vide : State of U.P. v. Brahm Datt Sharma AIR 1987 SC 943; Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh & ors. (1996) 1 SCC 327 : (AIR 1996 SC 691); Ulagappa & Ors v. Div. Commr., Mysore & Ors., AIR 2000 SC 3603 (2); Special Director & Anr. V. Mohd. Ghulam Ghouse & anr.,

AIR 2004 SC 1467; and Union of India & Anr. V. Kunisetty Satyanarayana, AIR 2007 SC 906)"

Para-11 "In State of Orissa & Anr. V. Sangram Keshari Mishra & anr. (2010) 13 SCC 311 : (2010) AIR SCW 6948), this Court held that normally a charge-sheet is not quashed prior to the conclusion of the enquiry on the ground that the facts stated in the charge are erroneous for the reason that correctness or truth of the charge is the function of the disciplinary authority.

(See also : Union of India & Ors. v. Upendra Singh, (1994) 3 SCC 357) : (1994) AIR SCW 2777)"

Para-12 "Thus, the law on the issue can be summarized to the effect that charge-sheet cannot generally be a subject matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings. Neither the disciplinary proceedings nor the charge-sheet be quashed at an initial stage at it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings."
(emphasis ours)

12. On the anvil of the decisions cited supra, we have examined the present case. The opposite party has not challenged the charge-sheet on the ground that the authority issuing the same is not competent to initiate the disciplinary proceeding. A disciplinary proceeding is not liable to be quashed on the ground that the proceeding had been initiated as a belated stage or could not be concluded in a reasonable period, unless the delay creates prejudice to the delinquent employee. While passing the order, the learned Tribunal has not kept the aforesaid principles in view. In view of the same, we are of the opinion that that order dated 22.3.2001 passed by the learned Tribunal in O.A. No.320 of 2001 is not in consonance with law. The learned Tribunal travelled beyond its jurisdiction in passing the order.

Point No.2

13. Rule 29 of the Orissa Civil Services (Classification, Control & Appeal) Rules, 1962 provides for consideration of appeals. The same is quoted hereunder.

"**29. Consideration of Appeals—**(1) In the case of an appeal against an order imposing any of the penalties specified in Rule 13 the appellate authority shall consider –

(a) whether the procedure prescribed in these rules has been complied with and, if not whether such non-compliance has resulted in violation of any provisions of the Constitution or in failure of justice;

(b) whether the findings are justified; and

(c) whether the penalty imposed is excessive, adequate or inadequate; and, after consultation with the Commission if such consultation is necessary in the case, pass orders –

(i) Setting aside, reducing confirming or enhancing the penalty; or

(ii) remitting the case to the authority which imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case;

Provided that –

(i) the appellate authority shall not impose any enhanced penalty which neither such authority nor the authority which made the order appealed against is competent in the case to impose;

(ii) no order imposing an enhanced penalty shall be passed unless the appellant is given an opportunity of making any representation which be may wish to make against such enhanced penalty; and

(iii) if the enhanced penalty which the appellate authority proposes to impose is one of the penalties specified in Clauses (vi) to (ix) of Rule 13 and an inquiry under Rule 15 has not already been held in the case the appellate authority shall, subject to the provisions of Rule 18, itself hold such inquiry or direct that such inquiry be held and, thereafter on consideration of the proceedings of such inquiry and after giving the appellant an opportunity of making any representation which he may wish to make against such penalty, pass such orders as it may deem fit.

(2) In the case of an appeal against any order specified in Rule 23 the appellate authority shall consider all the circumstances of the case and pass such orders as it deems just and equitable."

14. On a conspectus of sub-clause (i) of Clause (c) of sub-rule (1) of Rule 29 of the Orissa Civil Services (Classification, Control & Appeal) Rules, 1962, it is evident that the appellate authority can pass orders enumerated in sub-clause (i). To wit, the appellate authority can set aside, reduce confirm or enhance the penalty as the case may be subject to the proviso made thereunder.

15. However, in ***Keshab Chandra Sahu*** *(supra)*, the said rule was not brought to the notice of the Bench for which the Division Bench came to hold that the appellate authority had only three options, i.e., either the appeal filed by the delinquent employee should have been allowed or dismissed or a lesser punishment could be imposed.

16. The latin expression *per incuriam* literally means 'through inadvertence'. A decision can be said to be given *per incuriam* when the Court of record has acted in ignorance of any previous decision of its own, or a subordinate Court has acted in ignorance of a decision of the Court of record.

17. In this regard, we may refer to a passage from A.R. Antulay v. R.S. Nayak, 1988 (2) SCC 602, wherein Sabyasachi Mukharji, J. (as his Lordship then was) observed thus:- "…..'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong." At a subsequent stage of the said decision it has been observed as follows: - "….It is a settled rule that if a decision has been given per incuriam the court can ignore it.

18. Thus, we hold that the decision in the case of ***Keshab Chandra Sahu*** (supra) is per incuriam and not a binding precedent.

19. Though we hold that the appellate authority has power to enhance punishment, but in the facts and circumstances of this case, it is difficult to sustain the order so far as punishment awarded in respect of period of suspension and stoppage of increments. The order of the appellate authority is bereft of any reasons. It is settled principles of law that even in respect of

administrative orders, reasons should be recorded. We may quote a passage from the judgment of the apex Court in the case of ***MMRDA Officers Association Kedarnath Rao Ghorpade v. Mumbai Metropolitan Regional Development Authority and another,*** (2005) 2 SCC 235.

"5. Even in respect of administrative orders Lord Denning, M.R. in *Breen v. Amalgamated Engg. Union* observed : (All ER p. 1154*h*) "The giving of reasons is one of the fundamentals of good administration." In *Alexander Machinery (Dudley) Ltd.* v. *Crabtree* 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 the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance (*Chairman and Managing Director, United Commercial Bank* v. *P.C. Kakkar*)."

We affirm the order of the disciplinary authority.

20. Before the disciplinary authority, the opposite party gave a writing to pay an amount of Rs.37,056/- as would be evident from the finding of the Conservator of Forests, Balangir (K.L.) Circle, the appellate authority vide Annexure-9.

21. In the wake of the aforesaid, the order dated 11.04.2005 passed in O.A. No.194 of 2005 by the learned Tribunal vide Annexure-10 is quashed. Taking into consideration the fact that the opposite party has retired long since on attaining the age of superannuation and has admitted to pay an amount of Rs.37,056/-, we direct that the petitioners to deduct the said amount from the retiral dues of the opposite party. We further direct that the retiral dues of the opposite party shall be calculated and paid to him within a

period of two months from the date of production of certified copy of this order. The writ petition is allowed to the extent indicated above.

Writ petition allowed.

2015 (II) ILR - CUT-852

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

JCRLA NO.2 OF 2002

BIJAYA NAIK ……..Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

CRIMINAL TRIAL – Murder of wife – Incident occurred on the street in wee hours of a wintry morning – If appellant desired to murder his wife he could have done it in his house – Appellant alone present near the deceased till arrival of police at 10 AM – No attempt to escape or to conceal his identity – Had the appellant been the assailant he would not have allowed such a meek surrender to police specially when he had the alleged motive to marry again and doubted chastity of the deceased – Since the deceased and the appellant were pulling on well, the motive alleged is disproved – Preparation of F.I.R. as well as the evidence of p.w.s. 1,6 & 12 found to be suspicious – No evidence that the alleged weapons belonged to the appellant and blood on such weapons do not tally with the deceased – Held, the deceased was done to death much prior in time as alleged by the prosecution by unknown assailants and the appellant being the husband tried to console her – The prosecution has miserably failed to establish the charge of murder against the appellant who deserves conferment of benefit of doubt – The impugned judgment of conviction and sentence is set aside. (Paras 18 to 23)

For Appellant : Mr. Pulakesh Mohanty
For Respondent : Mr. Jyoti Prrakash Patra, Addl. Standing Counsel

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Date of hearing : 01.07.2015
Date of judgment: 21.07.2015

JUDGMENT

VINOD PRASAD, J.

Appellant Bijaya Naik is in appeal before us, u/s 374(2) Cr.P.C. challenging his conviction u/s 302 I.P.C. and sentence of life imprisonment therefore dated 17.6.2002, imposed by Sessions Judge, district Berahampur in S.C. No. 266 of 2000, State versus Bijaya Naik (arising out of G.R.Case No. 11 of 2000, J.M.F.C. Digapahandi, district Berahampur).

2. Prosecution case, stated concisely, as was got slated in the FIR Ext.6 by the informant Ballabh Naik/PW3 and subsequently unfurled during the trial by the prosecution witnesses, evinces that the appellant Bijaya Naik, his wife Shanti Naik(the deceased), Ballabh Naik informant/PW3, his wife Basini Naik/PW4 and other witnesses all were residents of village Basudevpur under Digapanadi police station district Ganjam, and were very well known to each other and in fact appellant is the nephew of the informant and his wife. On the ill fated incident day, 22.1.2000, at about 4 a.m. informant/PW3 and his wife/PW4, while they were sleeping, heard the shrieks of the deceased *'Marigali-Marigali'* and when they rushed out of their house, they spotted in the moon light that the deceased lying in an injured condition and the appellant standing by her side holding a blood stained *Kati/* M.O.III *(sharp edged cutting weapon)* and a crowbar/ M.O.II. Accused appellant accosted PWs 3 & 4, informant and his wife, as *"I am killing my own wife If anybody intervenes will also be similarly killed"*. Such a fear loaded threat forbade the informant and his wife /PW4 to approach the appellant and the deceased any further, who then retreated and bolted themselves inside their house. Meanwhile other people gathered at the spot, therefore after 5-10 minutes the informant could muster courage to come out.

3. Incident information was relayed to the police station Digapahandi at 9 a.m. by Medha Shyamghan/PW1, president of village committee, on phone, which was received by A.S.I. Anadi Charan Pradhan who penned it down in the station diary vide entry no. 472 and then he entrusted A.S.I. Sachidnanda Subudhi/PW13, Havildar P.C.Das, Const. G.Buludu/PW7, Shyama Naik, and village watchman Ishwar Naik to inquire into the matter. Arriving at the village at about 10-10.15 a.m., A.S.I. Sachidananda Subudhi/PW 13 received a written FIR/Ext.6 from the informant/PW3 slated by Narasingha Sethi/PW2, which he treated as the actual FIR and consequently commenced investigation on it's basis after instructing Havildar P.C. Das to carry Ext.6

to the police station for registration of the case and the formal FIR, Ext/6/2, which was registered at the police station on 22.1.2000 at 11 a.m. as P.S. Case No. 10 of 2000, u/s 302 I.P.C. by the same A.S.I.

4. Setting investigation a foot I[st] I.O./PW13 recorded informant's and scribe statements and then examined other witnesses Basini Naik/PW4, Trinath Naik/PW10, Pano Naik/PW11, Iswar Naik/PW6, Khalli Naik/PW5, and Bana Naik/PW12 and then came to the incident spot at 12.30 p.m. where Const. P.C.Das, informed him regarding registration of formal FIR, Ext 6/2 as already mentioned above. Inquest Ext.1 was performed over the cadaver of the deceased between 1 p.m. to 2.30 p.m. and inquest memo/ Ext.1 was slated. Spot map Ext. 15 was sketched. Corpse of the deceased was dispatched to M.K.C.G. Medical College & Hospital for autopsy through Constable G.Buludu/PW7 and village watchman Ishwar Naik/PW6 with dead body chalan Ext.8. Blood stained earth, sample earth, broken bangles and *mali (Pasara mali)* were seized vide seizure memo Ext.2. Accused appellant was arrested same day at 4 p.m. at the spot itself and it is alleged that, while in custody, after making a confessional statement, Ext.5, the appellant got incriminating articles *Goda Khola*(small iron crowbar) one *khanati* , one *kati* and one small knife recovered from inside his house after opening the lock in the presence of the witnesses. Ext.4 is the seizure memo of all these articles. Wearing attires of the accused consisting of One *Lungi* stained with blood (M.O.I), one *Chaddar* (*Gamacha*/M.O.VII), were also seized vide Ext 3. Vide requisition Ext. 10/2, nail clippings of the accused was required to be taken which was taken by Dr. Ram Mohan Panda/ PW9 whose report is Ext. 10 and seizure of nail clipping by the I.O. is Ext. 11. Deceased apparels were also seized by the I.O./PW13 vide seizure list Ext.12. Further investigation from 25.1.2000 was carried out by R.K.Senapati/ PW 14 who examined other witnesses, received post mortem examination report/ Ext.9 and dispatched incriminating articles for forensic expert examination to Dy. Director, RFSL vide Ext. 13 through J.M.F.C. Digapahandi. On 6.4.2000, II[nd] I.O./PW 14 handed over further investigation to his successor S.I. B.B. Mohanti who wrapped up the investigation by forwarding charge sheet against the accused appellant on 18.5.2000.

5. Dead body post mortem examination was conducted on 20.3.2000 at 11.45 a.m. by Dr. Sachchidananda Mohanti/PW8, lecturer in F.M.T. Dept., M.K. C.G.Medical College & Hospital and hereinafter noted ante mortem physical injuries were detected on the cadaver of the deceased:-

(1) Lacerated wound of size 4 cm x 0.75 cm x vault deep situated transversely above the mastoid process starting 2 cm behind the upper pole of left ear extending backwards.

(2) Lacerated wounld of size 2 cm x 0.75 x vault deep situated 1 cm below the external injury No.1 extending transversely backwards.

(3) Lacerated wound of size4 cm x 1.5 cm x vault deep situated obliquely behind the roof of left ear involving pinna where a portion of pinna grossly crushed and detached from the stump.

(4) Lacerated wound of size 1 cm x 0.5 cm x muscle deep, situated over the left ear lobule where lobule is separated and the external injury merged with the external injury No.3 posteriorly.

(5) Two lacerated wounds of varying sizes which merged with each other and measured 6.5 cm x 3 cm x vault deep situated 1 cm behind the left ear lobule extending backwards and upwards.

(6) Linear split laceration of size 3 cm x 0.5 cm x muscle deep situated just behind the left mandible starting 2.5 cm below and left to symphysis menti extending left laterally.

(7) Contused abrasion of size 3 cm x 1 cm situated over the left shoulder 4cm below the lateral end of clavicles.

(8) Contusion of size 3cm x 1 cm situated 3cm behind external injury No.7 and 2 cm below left shoulder tip.

Internal dissection of the corpse revealed that scalp tissue underneath and surrounding the injury involving left side vault was contused with linear facture of 8 cm involving masto temporal bone. Pole of right tempo parietal region had soft arachnoid haemorrhage, upper neck involving sternocleidomastoid at the level of thyroid cartilage and above was contused in an area of 8 cm x 2 cm. All the injuries were ante mortem inflicted by hard and blunt object and cumulatively were fatal to result in death which, in fact, had occasioned due to coma precipitated by injury to the brain. 24 to 30 hours had passed when the death had occurred. Deceased autopsy examination report, as noted above, is Ext.9.

6. Observing necessary procedural formalities u/s 207 of the Code of Criminal Procedure, appellant was sent up for trial before Sessions Court vide committal order dated 21.8.2000 by J.M.F.C., Digapahandi resulting in

registration of S.C. No. 266 of 2000, State versus Bijaya Naik, in the court of Sessions Judge, Berahampur who later on charged the appellant with offence u/s 302 I.P.C. on 8.11.2000 and since the appellant abjured that charge, to establish his guilt, trial proceeded according to Sessions case procedure.

7. Prosecution rested its case by examining in all 14 witnesses, out of whom Ballabh Naik, the informant/PW3, his wife Basini Naik/PW3, Ishwar Naik/PW6 and Trinath Naik/PW10 are the fact witnesses. M. Shyamghan/PW1, Narsingh Sethi/PW2, Khilla Naik/PW5, Pana Naik/PW11 and Bana Naik/PW12 are the post occurrence witnesses, G. Buludu/PW7 is a police constable, Dr. Sachchinanda Mohanti/PW8 is post mortem doctor and Dr. Ram Mohan Panda/PW9 is nail clipping doctor. First I.O. is A.S.I. Sachchidananda Subudhi/PW13 and second I.O. is A.S.I. Rajendra Kumar Senapati/PW14. Besides, prosecution also tendered fifteen documentary exhibits and seven material exhibits to fasten appellant's guilt.

8. Without examining any defence witness, appellant was satisfied by mere denial of all the incriminating circumstances appearing against him in the prosecution evidences and pleaded innocence and false implication in his u/s 313 Cr.P.C. statement.

9. As recorded in the opening paragraph learned Sessions Judge believed the prosecution story and its witnesses and determined that the charge against the accused appellant has been anointed convincingly without any ambiguity, resultantly he convicted him (the appellant) u/s 302 I.P.C. and sentenced him to life imprisonment vide impugned judgment and order which decision has generated the instant appeal questioning the said verdict.

10. On the above slated facts that we have heard Sri Pulukesh Mohanti, learned counsel for the appellant and Sri Jyoti Prakash Patra, learned Additional Standing Counsel for the respondent State and have perused the evidences and vetted through the trial court record.

11. Snipping the impugned judgment and castigating it vociferously learned appellant's counsel harangued that the learned trial court committed manifest illegality and completely misdirected itself in concluding that the prosecution has established its case to the hilt and guilt of the appellant has been proved. All important, pivotal and significant evidences have either been eschewed or they were ignored while recording appellant's conviction. From motive till actual happening of the incident, nothing has been proved by the prosecution and the entire premise of the impugned judgment is based

on pure conjecture and surmises without having any credible and reliable evidence to that effect. There is no eye witness to the actual infliction of injury on the deceased nor any witness has deposed so and hence to conclude that the appellant was the author of injuries to the deceased is a fallible conclusion. FIR is the outcome of manipulation and fabrication and is a figment of imagination to arraign the appellant as perpetrator of the crime. Conduct of the appellant, as deposed, does not inspire any confidence and is most surreal and unnatural. Medical report is incongruent vis-a-vis ocular narration about the incident and hence, in essence, prosecution has miserably failed to anoint appellant's guilt who should be acquitted of the framed charge and present appeal be allowed and appellant be set at liberty by setting aside his conviction and sentence. Various testimonies were cited and circumstances explained to articulate above submissions by appellant's learned counsel to which we shall refer while delineating and deliberating during course of our discussion hereinafter.

12. Submitting conversely, learned Additional Standing Counsel urged that during the course of the incident, which occurred in wee hours of a wintry morning, presence of only the appellant with the deceased is an indisputable fact and since appellant alone was present near the injured deceased with blood stained weapon of assault, nobody else could have committed the offence. Proclamation by the appellant amidst happening of the incident do not require any further proof to establish the charge. Witnesses had no cogitative reason to depose falsely and recovery of crime weapons at the behest of the appellant cements his guilt and his appeal sans merits and be dismissed with affirmation of his conviction and sentence.

13. We have pondered over rival contentions and have searchingly vetted through the trial court record in that light. What is of significance which emerges is that the defence had opted out not to challenge some vital and significant aspects of the incident and facts in issue and hence prosecution story qua those aspects has an element of truth and authenticity. These aspects, which include date and place of the incident, presence of the appellant and the deceased at the scene of the murder and deceased having being met homicidal death because of physical assault on her, therefore are too well proved to be suspicious and doubted and consequently prosecution version cannot be discarded on these scores and we find these aspects to be genuinely proved. The solitary resultant question which, therefore, remains to be determined is as to whether it was the appellant who is the culprit or

somebody else had done it as mere presence of the appellant and his utterances will not conclusively establish the charge, as we will discuss later on? Critically appreciating prosecution evidences keeping in mind appellant's castigation and State's rebuttal, it emerges that criticism by the appellant has got potential significance to caste a doubt on the prosecution story and hence we proceed to examine and record those circumstances and reasons.

14. Ab initio, concerning time of the incident, prosecution case remains suspicious and unconvincing and it seems, from the evidences of eye witnesses that occurrence did not take place at 5 a.m. as was deposed during the trial and it probably occurred much earlier in complete darkness with no body as eye witness and later on time was changed to create a suspicious story against the appellant. This opinion is further strengthened from the facts firstly that albeit the incident occurred in the early hours of the wintry morning at 5 a.m. with both informant and his wife being eye witnesses along with many co-villagers being immediate post incident witnesses, yet the information to the police station was conveyed very belatedly at 9 a.m., after five hours and for this unsatisfactory delay, which, as suggested by the appellant was utilised to fabricate and concoct a story against the accused appellant, prosecution has not come forward with any explanation at all for such a lapse and has therefore created suspicion on the authenticity of it's version. Secondly that prosecution itself has brought into existence un-corroborative and doubtful evidences through testimonies of witnesses which negates its claim of informing the police on phone at 9 a.m. and what emerges is that the police was informed much earlier and it had already arrived in the village at 5 a.m. and by that time the incident had already occurred. Requirement of establishing the charge to the hilt was on the shoulder of the prosecution and hence it should have taken care and precaution to obliterate each and every evidences and circumstances of immense doubtful character liable to damage its story which it miserably failed to furnish. Why the eye witnesses embellished incident time from 4 a.m. as was slated in the FIR to 5 a.m. is a critical question having no answer to it and supposedly it seems, that it was done to bring twilight at the time of the incident so as to make it feasible for the witnesses to see the incident, otherwise no source of light of any other kind was spelt out by the witnesses during trial although in the FIR there is a reference of moon light, and importantly, during investigation also, prosecution forgot to patch up this all significant aspect. It is worthwhile to note that PW 12 has stated about

presence of electric pole and electric light in the glow of which he had seen the appellant and the deceased but his such a belated solitary disclosure is belied by all other witnesses especially by PW4 and the site plan prepared by the I.O. Claim of PW 12 regarding existence of electric light is ostensibly an afterthought fabrication and concoction liable to be discarded without any detailed discussion. Incident day being a wintry morning, absence of light can be heuristically inferred at 4/5 a.m. in the glow of which the assailant could have been identified, and therefore complicity of the appellant and his identification, especially when time of the incident is in grave doubt, becomes a very pivotal unsatisfactory feature of the prosecution case and we are in grave doubt about the prosecution version of the incident having occurred at 5 a.m. in the morning and the appellant proclaiming that he had murdered the deceased who was his wife at that moment. Thus the entire genesis of the prosecution story is shrouded in mystery.

15. As already mentioned our suspicion concerning genuineness of the prosecution story gets credence also from the contradictory and irreconcilable nature of evidences regarding information given to the police and registration of FIR/Ext.6. According to the Ist I.O./PW13 at 9 a.m. A.S.I. A.C.Pradhan received a phone call at the police station from Medha Shyam, President village Committee of Basudevpur, PW1, that one Bijay Naik of his village had killed his wife Shanti Naik. The said information was reduced into writing in the Station Diary by the said A.S.I. as entry no. 472 and then PW13 and other police personnel were deputed to enquire into the matter. However Medha Shayamghan/ PW1, President of Village Committee, when was cross examined by the defence, unambiguously refuted such a claim by the police and stated categorically in para-5 of his depositions that- "*I never made any telephone to the police about the incident. Though I know the deceased I cannot tell her name."* There is also a third story regarding this important aspect spelt out by Iswar Naik/PW6, village watchman and agnatic brother of the appellant, in his examination-in-chief that *"Seeing this I rushed to the police station and intimated the matter before the IIC."*. This information ostensibly must have been conveyed to the police at around 6/7 a.m., at a distance of 10 KMs South but no record of such a claim was furnished before the trial Judge and more so how come then that PW13 had not made any reference to such an evidence and the police claim that they received information only on phone call by PW1 and that too at 9 a.m.? PW 1 completely demolished I.O.'s deposition and has stated in his cross examination, in para 4, that "*The gramrakshi Iswar Naik told me that the*

police had sent for me. It was about 5.00 a.m. at that time. I immediately came to the spot and by then the police was already present there. I and the sarpanch together reached the spot. By the time of my arrival at the spot, about thirty persons have already gathered there. Around 5.15 a.m. I was examined by the police." What information was sent to the police and at what time so that they arrived at the incident spot at 5 a.m. is a mystery with no explanation from the prosecution is an additional analogous doubtful circumstance eroding truthfulness of the prosecution story. Arrival of the police at 5 a.m. has also been spelt out by Khali Naik/PW5 who deposed *"About one year ago at 5.00 a.m. police came to our village and called me. I went to the village street and saw the dead body of the wife of the accused lying on the street in front of the house of Sukumari Naik."* Village watchman Iswar Naik/ PW6 has mentioned time of incident as 4 a.m. and after the incident, he had rushed to the police station and the police had arrived in the village at 5 a.m. Thus time of incident, the very inception of the prosecution case, information to the police and registration of FIR all are doubtful aspects and it cannot at all be conclusively held that the incident had occurred at 5 a.m. and the police came to know of it only at 9 a.m. through a phone call.

16. Over and above penning down of the FIR is also a disproved fact. According to the informant's statement in his examination–in-chief, *"After the arrival of the police, I narrated the incident before them. The police reduced it into writing which was read over and explained to me* (him)" and thereafter the informant had put his signature. The I.O. conversely evidenced that when he arrived at the spot, the FIR slated by Narsingh Sethi/PW2 was handed over to him. However, original transcript of the FIR does not mentioned writing of it by PW2 and this important circumstance creates grave suspicion regarding preparation of FIR and consequently possibility of it being outcome of deliberation and concoction cannot be ruled out. When PW2 entered into the witness box, he has not spelt out at all that FIR was scribed by him as claimed by PW13, the Ist I.O. Who then scribed the FIR is a begging question requiring an answer from the prosecution which is missing. This is indicative of the fact that all is not true and authentic and there is an element of fabrication and manipulation at the instance of the police in joint agreement with the informant and other witnesses. This is also apparent from the statement of PWs 1 & 6 in their cross examination as reproduced herein above. Thus in essence, change of time of the incident from 4 a.m. to 5 a.m., unconvincing nature of evidence concerning

information conveyed to the police, time about registration of FIR, scribe of the FIR/Ext.6 by the police or by Narasingh Sethi/PW2, registration of the same at 9 a.m., all these doubtful evidences do not inspire and instil any confidence in the prosecution version to the benefit of the accused appellant. Iswar Naikl/ PW6, village watchman *(gramrakshi)* has deposed in para-2 of his deposition that " *I reported the matter in the police station verbally. The police party arrived at the village at about 5.00 A.M."*

17. Another damaging feature of the prosecution story is that motive alleged by the prosecution is oxymoron and incongruent. According to FIR version and deposition of PW2, appellant had disclosed that he had killed his wife because he wanted to have a second wife. However according to PW1 vide his examination-in-chief when the police asked the appellant, he informed that he had annihilated her because he had suspected her character. During cross examination, PW1 contrarily deposed that eldest child of the accused is aged about 17 to 18 years and he "*did not know if there was any ill feeling between the accused and his wife"*. Firstly disclosure of motive by the appellant to the police on asking is a part of his confessional statement hit by section 25 of the Evidence Act and is in admissible and secondly is not a believable story. PW2 has also made similar statement in his cross examination when he deposed that "*To my knowledge the accused and the deceased were pulling on well as husband and wife."* Informant/PW3 and his wife Basini Naik/ PW4, Iswar Naik/ PW6, and Trinath Naik /PW7 have not evidenced about the motive at all. Since there is ipse dixit of only two witnesses which are incongruent and contradictory without having any additional evidence to support such a claim, it is very difficult to accept the prosecution case that appellant had any motive to do away with the deceased with whom he had spent at least 18 years of his life. Thus, motive as spelt out by the fact witnesses is oxymoron without having any credible material on that score. No worthwhile evidence was testified that the appellant had any extra marital relationship with any lady nor it was proved that the deceased was a trollop so as to prompt the appellant to do away with her because of her licentious conduct.

18. Other unconvincing circumstances having deleterious effect on the prosecution version, as is apparent from the record, are of assaulting the wife outside the periphery of house in open at the mid hour of the night in winter. If the appellant desired to murder his wife, four corners of his house would have been the best place. Hence it is difficult to swallow that the crime has

been committed by the appellant and this circumstance is also a disquieting feature of the incident which has not been explained satisfactorily. It is evidenced that both the appellant and the deceased were pulling on well and hence motive alleged by the prosecution is a disproved fact.

19. Yet another reason to discard the prosecution story which surfaces from the evidence of witnesses is the conduct of the appellant to remain present at the spot after committing murder. Nobody had witnessed the actual infliction of injury on the deceased. At what time she sustained that is unknown. All the witnesses testified that they had arrived at the scene of the incident after hearing shrieks of the deceased as *Marigali-Marigali,* spotted the appellant present with blood stained crowbar and *Kati* and the deceased lying in an injured condition. Why after fatally assaulting the deceased, the appellant will remain at the spot only to be spotted and caught hold of and convicted for murder is something which is totally unbelievable and unnatural. Adding to it is another unsatisfactory conduct of the appellant that he remained at the spot till the arrival of the police at 10 a.m. and was arrested from the spot itself only at 4 p.m. No attempt was made by him to escape or to conceal his identity. His proclamation that he had murdered his wife is also a bizarre conduct unless of course we hold that he is a mentally unstable person, for which conclusion there is no evidence. For a common man of ordinary prudence to resort to such an apparently weird conduct required an explanation from the prosecution to satisfy inquisitive judicial analysis and since there is no evidence on that score, we are of the view that had appellant been the assailant, he would not have allowed such a meek surrender to the course of law especially when he had the motive to marry again or had doubted chastity of the deceased. Real life is different from heroic celluloid depiction and fiction of unreal life and we say no more.

20. Turning to the presence of the appellant, his proclamation, recovery of weapon and confessional statement are concerned, since we are of the opinion that no such incident as alleged by the prosecution occurred at 5 a.m. and since FIR is a manipulated document recorded ante time and the entire prosecution version is hazy and unsupportive of reliable evidence, no credence can be attached to such questions which become irrelevant and insignificant. Appellant resided with the deceased and hence his presence at the spot cannot be dubbed as incriminating unless other evidences of unimpeachable character disclosing his complicity in the crime is convincingly brought on the record and in this appeal, prosecution has

miserably failed in that attempt. Confession and recovery has been denied by the appellant. It is quite likely that after hearing shrieks of the deceased like other witnesses, he also came out of his house and was arraigned as accused later on because real culprit could not be identified. It is because of this reason that he was arrested only in the evening at 4 p.m. and not prior to it. The alternative theory projected during critical scrutiny of evidences compels us to discard the prosecution case as unreliable and unconvincing.

21. In our examination, it seems that the deceased was done to death much prior in time as alleged by the prosecution by unknown assailants and the appellant being her husband tried to console her and because of her innocence presence by the side of his wife, he was adjudged as culprit because of reasons best known to the prosecution witnesses and was arraigned as accused. Blood on the crowbar and the Kati without tallying it with the deceased is of no help to the prosecution as in villages people do get cut wounds while performing agragerian work. Moreover there is no evidence that the alleged recovered weapons belonged to the appellant and he has also denied having made any confessional statement. Since no part of actual confession has been proved, there is no evidence u/s 27 of the Evidence Act against the appellant.

22. Turning to the impugned judgment, we find that the learned trial court had tried to justify each and every unsatisfactory feature of the prosecution evidence and its version on very flimsy reasoning. Instead of independently and dispassionately vetting through the entire evidence to separate the grain from the chaff and to unearth the truth, learned trial court convicted the appellant by ignoring above to referred unsatisfactory nature of prosecution evidence without analyzing and critically appreciating facts and circumstance.

Pedantic acceptance of prosecution story and eschewing evidences casting a doubt on its genuineness is no analysis. It is not every discrepancy, concoction, embellishment or contradiction which matters to discard prosecution story but when overall picture presented by the prosecution convincingly projects truncated prosecution story galore with discrepancies and fabrications and concoctions, then to discard the defence case by resorting to unacceptable reasons is negation of justice.

23. In our ultimate opinion, we find that the prosecution has miserably failed to establish its charge of murder against the appellant and anoint his

guilt convincingly. Appellant deserves conferment of benefit of doubt and we hereby confer on him the same. Resultantly, this appeal is allowed and conviction and sentence of the appellant through impugned judgment and order is set aside and he is acquitted to the charge of murder and is set at liberty. Appellant is in jail. He shall be set free forthwith, unless he is required in connection with any other crime.

24. Let the trial court be informed.

Appeal allowed.

2015 (II) ILR - CUT-864

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

CRLA NO. 22 OF 1984

HARERAM SATPATHY & ANR. ……..Appellants

.Vrs.

PREMLAL SUNA & ORS. ……..Respondents

CRIMINAL PROCEDURE CODE, 1973 – S.378(4)

Appeal against acquittal – If the judgment of the trial court is based on no material and there was non-consideration or mis-appreciation of the evidence on record, the High Court as a Court of first appeal can review, re-appreciate and reconsider the entire evidence and reverse the order of acquittal – No limitation on exercise of such power.

In the present case though prosecution has successfully brought home the guilt of the accused persons the learned trial court misread the evidence and by giving undue benefit acquitted them – There has been flagrant miscarriage of justice by pronouncing the order of acquittal and there is compelling reasons to interfere with the same in order to prevent miscarriage of justice – Held, the order of acquittal is set aside and the respondents are found guilty of the offence U/ss. 302/149 I.P.C – Respondent Nos. 3, 7 & 9 are sentenced to life imprisonment and fine of Rs. 5000/-, in default to serve additional imprisonment of one year. (Paras 17,18,19)

Case Laws Referred to :-

1. AIR 1981 SC 1400 : Rafiq & Anr. -V- Munshilal & Anr.
2. 2013 (Suppl-II) OLR 612 : Badani Parida -V- Smt. Mahanga Parida
3. 2013 (12) SCC 649 : Esha Bhattacharjee -V- Raghunathpur Nafar Academy
4. AIR 2012 SC 1506 : Postmaster General & Ors. -V- Living Media India Ltd. & Anr.
5. AIR 2014 SC 746 : Basawaraj & Anr. -V- The Special Land Acquisition Officer

For Appellants : Mr. S.S.Swain
For Respondents: Mr. Subir Palit
For State : Add. Standing Counsel

Date of Argument :18. 03.2015
Date of Judgment : 04.05.2015

JUDGMENT

S.K.SAHOO, J.

This appeal under Section 378 Cr.P.C. has been filed by the appellants challenging the impugned judgment and order dated 30.06.1980 of the learned Sessions Judge, Bolangir-Kalahandi, Bolangir passed in Sessions Case No.37-B of 1976 and Sessions Case No.36-B of 1978 in acquitting all the nine respondents of the charges under sections 120-B, 147, 302/34 and 302/149 Indian Penal Code so also the respondent no.1 of the charge under section 302 Indian Penal Code.

At the time of hearing, it was stated at the Bar that respondent no.1-Premlal Suna, respondent no.2-Jagyan Puruseth, respondent no.4-Gunanidhi Ghasi @ Banchhor, respondent no.5-Prafulla Bhoi, respondent no.6-Sugyan Sandh and respondent no.8-Tikaram Agrawalla are dead. The learned counsel for the State on taking instruction from the concerned police station also confirmed the death of the aforesaid respondents. In view of such submissions, this Criminal Appeal stands abated as against respondent nos.1, 2, 4, 5, 6 and 8 in view of the provisions under Section 394 (1) Cr.P.C.

Thus the Criminal Appeal now survives only in respect of respondent no.3-Dhobai Podh, respondent no.7-Prasanna Kumar Pal and respondent no.9-Artatrana Singhdeo.

2. The appellants preferred an application under sub-sections (3) and (4) of section 378 Cr.P.C. for grant of leave to appeal from the impugned judgment and order of acquittal before this Court on 26.09.1980 which was registered as Criminal Misc. Case No.423 of 1980. The said application was dismissed at the stage of admission on 12.01.1982. The appellants preferred an appeal by Special Leave before the Hon'ble Supreme Court against the order dated 12.01.1982 of this Court for summarily dismissing the application for grant of leave. The appeal before the Hon'ble Supreme Court was registered as Criminal Appeal No.711 of 1983. The Hon'ble Supreme Court vide order dated 02.12.1983 granted leave under Section 378(4) Cr.P.C. and directed this Court to hear the appeal on merits and dispose of the same in accordance with law. After receipt of the order of the Hon'ble Supreme Court, Criminal Misc. Case No.423 of 1980 was re-registered as the present Criminal Appeal No.22 of 1984.

3. The prosecution case, in short, is that the accused-respondents were the members of Yuva Congress Party and they were political adversaries of the deceased Parsuram Satpathy (hereafter "the deceased"), who was the brother of appellant no.1 Hareram Satpathy. The deceased was a Journalist by profession and a staunch supporter of Bharatiya Lok Dal. There was political rivalry between the parties and several criminal litigations cropped up between them prior to the date of occurrence. A case and counter case was instituted between the parties on 16.11.1974 and in that connection the deceased was arrested on 16.11.1974 and he was released on bail on 22.11.1974. Two days prior the occurrence i.e. on 27.11.1974, some of the respondent-accused persons had threatened the informant Hareram Satpathy (appellant no.1).

It is the further case of the prosecution that the occurrence took place on 29.11.1974 at about 7.30 p.m. on the road in between P.P. Academy Chhak and Bhagirathi Chhak of Balangir Town. At that time, the deceased and P.W.1 Bibhudananda Udgata were proceeding towards Bhagirathi Chhak. P.W.1 was holding his cycle. The respondents were waiting near P.P.Academy Chhak in a Congress Party Jeep. Someone sitting inside the jeep informed the other occupants about the arrival of the deceased in a loud voice. Being apprehensive of danger, the deceased took the cycle from P.W.1 and speedily proceeded towards Bhagirathi Chhak. The respondents chased the deceased in the Jeep and dashed the Jeep against the cycle of the deceased. The deceased fell down on the ground but even thereafter the respondents in order to kill the deceased brought the Jeep back by reverse

gear and deliberately ran over the Jeep on the deceased for which the deceased sustained severe injuries on his person and eventually succumbed to the injuries.

It is the further prosecution case that P.W.1 Bibhudananda Udgata, P.W.12 Hrudananda Nanda and P.W.18 Hareram Satpathy (appellant no.1) reached at the spot where the deceased was lying in a pool of blood. On the request of P.W.1, one Advocate of Bolangir namely Shri Hari Bandhu Swain informed the incident to Sadar Police Station, Bolangir over phone. On the basis of such telephonic communication, Station Diary Entry No.691 dated 29.11.1974 (Ext. A) was made. P.W.19 Pabitra Mohan Das, Sub-Inspector of Police along with other police officials proceeded to the spot. At the spot, P.W.18 Hareram Satpathy lodged a written report (Ext. 12/2) at 7.40 p.m before P.W.19. The report was sent by P.W.19 to Sadar Police Station, Bolangir for registration and accordingly Bolangir Sadar P.S. Case No.281 of 1974 was registered on 29.11.1974 at 7.50 p.m. under Section 147/302/149/120-B Indian Penal Code. P.W.19 arranged a police jeep for shifting the cadaver of the deceased to the District Headquarters Hospital, Bolangir in the same night. P.W.19 found the cycle lying in a damaged condition and also skid marks of a vehicle at the spot. After making arrangement to guard the spot till the morning, P.W.19 examined some witnesses, searched for the accused persons in their houses but he could only be able to arrest two accused persons, namely, respondent no.3-Dhobai Podh and respondent no.4-Gunanidhi Ghasi @ Banchhor (since dead). On 30.11.1974 P.W.19 conducted inquest over the dead body of the deceased at Bolangir Hospital in presence of the witnesses and prepared inquest report Ext.30. He also sent the dead body for post mortem examination through constables. He further visited the spot and seized blood stained earth and sample earth from the place of occurrence and some human hairs in the presence of the witnesses vide seizure list Ext.15. The cycle was seized under seizure list Ext.16.

On 30.11.1974 P.W.22 Arjun Behera who was the Circle Inspector of Police, Sadar, Bolangir took over charge of investigation from P.W.19. He also visited the spot, arrested respondent no.8- Tikaram Agrawalla, received post-mortem report Ext.2, seized the Jeep bearing registration no.DLH-9836 on 2.12.1974 from the garage of the Congress Party which was locked from outside and the lock was sealed and the garage was guarded by the police. The photographs of the Jeep were taken and scientific experts from F.S.L.,

Rasulgarh, Bhubaneswar also technically examined the Jeep. On requisition of P.W.22, the M.V.I. (P.W.6) also examined the Jeep. The Jeep was seized under seizure list Ext.1.

On 11.12.1974 P.W.22 handed over the charge of investigation to P.W.20 Gadadhar Das, Inspector of Police, CID (C.B.), Cuttack as per the orders of D.I.G., (CID and Railways). P.W.20 also visited the spot, examined the witnesses and after completion of investigation submitted charge-sheet on 10.02.1975 only against six accused persons i.e. respondents no.1 to respondent no.6. So far as the respondents no.7, 8 and 9 were concerned, the police submitted a final report saying that from the investigation carried on by it, no offence appeared to have been made out against them.

4. A protest petition was filed before the learned S.D.J.M., Bolangir and on perusal of the materials available on record, finding a prima facie case made out against the respondents no.7, 8 and 9, process was issued against them vide order dated 20.11.1975.

The order of the learned S.D.J.M., Bolangir was challenged before this Court in Criminal Revision Nos.344 and 365 of 1975. A single Judge of this Court after detailed and meticulous scrutiny of the statements, allowed the revision petitions vide order dated 25.8.1976 and set aside the order of issuance of process against the respondents no.7, 8 and 9 holding that there was no material on record to make out a prima facie case against those respondents and the order of the Magistrate issuing process was without jurisdiction. Being dissatisfied with the order of this Court, the appellant no.1-Hareram Satpathy preferred an appeal by Special Leave before the Hon'ble Supreme Court in Criminal Appeal No.551 of 1976. The Hon'ble Supreme Court vide order dated 25.8.1978 set aside the judgment and order of this Court and accordingly respondents no.7, 8 and 9 also faced trial alongwith respondents no.1 to respondent no.6.

The appellant no.2-Sitaram Satpathy who is another brother of the deceased during pendency of the protest petition, filed a complaint petition before learned S.D.J.M., Bolangir against 13 accused persons including the nine respondents which was registered as I.C.C. Case No.6 of 1975. The complaint petition was eventually dismissed on 14.2.1977 by the learned S.D.J.M., Bolangir.

5. The defence plea of the respondents nos. 3 and 7 was one of denial. Respondent no.9 took plea of alibi. He pleaded that he was absent from

Bolangir at the relevant time and had been to Tusra and other places to arrange meetings for the then Chief Minister who was to visit the area shortly.

6. In order to prove its case, the prosecution examined 22 witnesses.

P.W.1 Bibhudananda Udgata, P.W.12 Hrudananda Nanda, P.W.14 Sankar Tripathy and P.W.18 Hareram Satpathy are the eye witnesses to the occurrence.

P.W.2 Bharat Chandra Gouintia was the Executive Magistrate, Balangir who is a witness to the seizure of the Jeep and other articles from the garage of the District Congress Office of Bolangir under seizure list Ext.1.

P.W.3 Dr. Rajkumar Mukharjee conducted post mortem over the dead body of the deceased and proved the post mortem report Ext.2. He also gave his opinion on the query of the Investigation Officer separately vide Ext.3 and Ext.4.

P.W.4 Arjun Singh was the photographer S.I. of F.S.L., Rasulgarh, Bhubaneswar and he proved some photographs.

P.W.5 Kalia Mishra was the constable attached to Bolangir Sadar Police Station who accompanied the dead body for the purpose of post mortem examination and produced the wearing apparels of the deceased before the I.O. after post mortem examination.

P.W.6 Ramachandra Das was the Motor Vehicle Inspector, Bolangir who examined the Jeep on the requisition of the Investigating Officer and submitted his report Ext.8.

P.W.7 Dasarathi Satpathy is a witness to the seizure of the Jeep and other articles from the garage of the District Congress Office, Bolangir.

P.W.8 Bilwa Mangal Das was the constable who carried the dead body for post mortem examination.

P.W.9 Arjun Rana was the Building A.S.I. of Police at Bolangir who prepared the sketch map Ext.11.

P.W.10 Akhya Kumar Tripathy was the A.S.I. of Bolangir Police Station who drew up formal F.I.R. Ext.12.

P.W.11 Kunja Bihari Puruseth is a formal witness.

P.W.13 Kamadev Sethi is a witness to the seizure of bloodstained earth, sample earth and some human hairs under seizure list Ext.15 and he is also a witness to the seizure of a cycle under seizure list Ext.16.

P.W.15 Dibakar Tandi is a witness to the seizure of front wheel of the Jeep bearing registration no. DLH 9836 at Bolangir District Congress Office under seizure list Ext.17.

P.W.16 Ashok Kumar Misra stated about the extra judicial confession of respondent no.8 inside Bolangir Jail.

P.W.17 Panchunath Sahu was the Assistant Regional Transport Officer of Baripada who stated that the Registration Nos. ORM-2184 and DLH-9836 are of the same vehicle.

P.W.19 Pabitra Mohan Das was the Sub-Inspector of Police attached to Bolangir Sadar Police Station who is one of the Investigating Officers.

P.W.20 Gadadhar Das, Inspector of Police, C.I.D., Crime Branch was another Investigating Officer.

P.W.21 Sarat Chandra Mallick proved a letter vide Ext.43. P.W.22 Arjun Behera was the Circle Inspector of Police, Sadar, Bolangir who was also one of the Investigating Officers.

During course of trial, the prosecution has exhibited 47 documents. Ext.1 is the seizure list, Ext.2 is the post mortem report, Ext.3 and 4 are the opinions of P.W.3 to the query made by I.O., Exts.5 to 5/9 are the photographs, Ext. 6 to 6/9 are the negative photographs, Ext.7 is the command certificate, Ext.8 is the report of M.V.I., Ext.9 is the seizure list, Ex.10 is the command certificate, Ext.11 is the sketch map, Ext.12 is the formal F.I.R., Ext.13 is the carbon copy of complaint petition filed by P.W.11, Ext.14 is the statement of P.W.12 in 202 enquiry in 1.C.C.No.6 of 1975, Ext.15 is the seizure list of blood stained earth etc., Ext.16 is the seizure list of cycle from the spot, Ext.17 is the seizure list of the wheel of the jeep, Ext.18 is an affidavit, Ext.19 is the Temporary Registration Certificate of the Jeep, Ext.20 is the registration book, Ext.21 is the F.I.R. in S.C. No.19-B of 1974, Ext.22 is the certificate issued in favour of Parasuram Satpathy, Ext.23 and 24 are the station diary entries, Ext.25 is the carbon copy of petition to the Governor of Orissa, Ext.26 is the endorsement and signature of deceased, Ext.27 is the original petition dated 28.11.74, Ext.28 is the letter of P.W.18 to the Collector of Bolangir, Ext.29 is the requisition for medical

examination, Ext.30 is the inquest report, Ext.31 is the dead body challan, Ext.32 to 36 are the station diary entries, Ext.37 is the order sheet, Ext.38 is the P.R. in Crl. M.C. No.480 of 1972, Ext.39 is the order sheet dated 29.12.1972, Ext.40 is the forwarding letter for chemical examination, Ext.41 and 42 are the carbon copy and original statement of A.K. Patnaik respectively, Ext.43 is the letter dated 2.12.1974, Ext.44 is the opinion of the chemical examiner, Ext.45 is the opinion of the serologist, Ext.46 is the certified copy of order dated 16.7.1976 in T.S. No.31/75 and Ext.47 is the carbon copy of the petition dated 28.7.1976.

The prosecution also proved 11 material objects. M.O.I is a pair of boot, M.O.II is the blue suit (A coat and a full pant), M.O.III is the cycle, M.O.IV is the Godrej Lock, M.O.V is the Tiger Lock, M.O.VI is the Turkish Towel, M.O.VII is the Sishu Lathi, M.O.VIII is the left side wheel of Jeep (front), M.O.IX is the human hairs, M.O.X is the Jeep, M.O.XI is the under-wear of deceased.

7. In order to substantiate the defence plea, the respondents examined nine witnesses.

D.W.1 Sradhananda Panigrahi proved certain leaflets.

D.W.2 Lalit Mohan Nanda proved the plaint copy in T.S. No.31/75 of the Court of Munsif, Bolangir.

D.W.3 Narsingh Prasad Nanda was a member of Rajya Sabha who was examined in support of the plea of alibi taken by respondent no.9.

D.W.4 Bimal Prasad Rath proved a letter issued by Municipal Council, Bolangir.

D.W.5 Lingaraj Padhi was an Advocate of Bolangir who proved some documents under the signatures and handwritings of Hari bandhu Swain, Advocate.

D.W.6 Ambika Charan Sharma proved some news items published in an Oriya weekly magazine.

D.W.7 Kusa Nag was the Tax Daroga, Bolangir Municipality who stated that no licence for any cycle was issued during 1973-74 and 1974-75.

D.W.8 Niranjan Das is a formal witness.

D.W.9 Hrudananda Das was the Officer-in-Charge of Bolangir Town Police Station who stated to have conducted some confidential inquiry on an affidavit of Shri Ashok Misra as per the direction of S.P., Bolangir.

The defence also exhibited certain documents. Ext.A and B are the station diary entries, Ext.C is the copy of protest petition, Ext.D is the certified copy of Vakalatnama, Ext.E is the certified copy of order in I.C.C. No.42 of 1975, Ext.F is the certified copy of Suit register, Ext.G is the certified copy of Misc. Case register, Ext.H of the signature of Sri Mrutyunjaya Panda, Principal, Ext.I is the photo of Governor of Orissa in Rajendra College, Ext.J is the L.I.C. receipt granted in favour of Tikaram Agrawala, Ext.K is the licence no.2 in favour of Tikaram Agrawala to act as Insurance agent, Ext.L is the signature of P.W.14 on the memorandum of Bhagawat Kalaparisad, Ext.M is the signature of P.W.14 on the Minute of proceeding of Bhagabat Kalaparisada, Ext.N is the certified copy of order sheet, Ext.P is the complaint petition in I.C.C. No.6 of 75 of the Court of S.D.J.M., Bolangir, Ext. Q to Q/4 are the statement of Hareram Satpathy U/s. 202 Cr.P.C. in I.C.C. No.6 of 1975, Ext.R is the statement u/s. 161 Cr.P.C. of Kamdeb Seth, Ext.S is the order sheet dated 27.07.74 in Crl. M.C. No.480 of 1972 of the Court of Executive Magistrate Bolangir, Ext.T is the show-cause in complaint proceeding in I.C.C. No.6 of 75, Ext.U is the order-sheet dt.4.3.75 in I.C.C. No.6 of 75, Ext.V & V/1 are the statement under Section 161 Cr.P.C. of Shankar Prasad Tripathy, Ext.W is the leaflet regarding Bolangir Municipality Election dated 31.3.73, Ext.W/1 is a pamphlet of Janata Party for Bolangir Municipality Election, Ext.X is the plaint in T.S. No.31 of 1975 of the Court of Munisif, Bolangir, Ext.Y is the letter no.3105 dated 27.11.1979 of the Executive Officer, Bolangir, Ext.Z to Z/3 are the signatures of H.B. Swain in the memorandum in Crl. Rev. No.365 of 75 of the Hon'ble Court, Ext.AA is the affidavit filed by Hareram Satpathy in Crl. Rev. No.365 of 75 before the Hon'ble Court, Ext.BB is the news and views item in a weekly, Ext.BB/1 and Ext.BB/2 are the captions, Ext.CC is the signature of Sri C.S. Rao, Advocate on the paper book, Ext.DD is the order sheets in 1.C.C. No.6 of 75 and Ext.EE is the order sheet in G.R. Case No.437 of 74 of the S.D.J.M., Bolangir.

Cause of death of the deceased

8. Adverting at the outset as to the whether the prosecution has proved that the deceased Pursuram Satpathy died a homicidal death, we found that the prosecution, apart from relying upon the Inquest Report (Ext.30), has

examined P.W.3 Dr. Rajkumar Mukharjee who had conducted post-mortem examination over the cadaver of the deceased on 30.11.1974. The doctor had noticed the following ante mortem injuries:-

(i) An abrasion on the right side of the face and forehead measuring 5 ½" x 4 ½" extending from the angle of the forehead transversely extending from a point 1" anterior to the right ear to a point medial angle of the eye-brow;

(ii) An abrasion of the size of 2 ½" x ¼" on the extensor aspect of the left arm situated vertically extending from lateral epicondyle to above;

(iii) Multiple abrasions within 2" and ½" on the extensor aspect of the left hand over the third, fourth and fifth knuckle;

(iv) An abrasion of the size of 1/10" x 1/10" over the second, fourth and fifth fingers from the extensor aspect of left hand on the first interphalangeal joints;

(v) An abrasion of the size of ½" x ½" on the middle of the extensor aspect of the left arm 6" above the olecranon;

(vi) An abrasion of the size of 1 ½" x ½" on the left patella;

(vii) An abrasion of the size of 2 ½" x 1" over the medial aspect of the left leg 6" above medial malleolus;

(viii) An abrasion of the size of ½" x ½" on the posterior aspect of the left lateral malleolus;

(ix) An abrasion of the size of ¼" x ¼" on the left leg over the head of the fibula;

(x) An abrasion of the size of ½" x ¼" on the right palm on the thenar eminence;

(xi) An abrasion of the size of ½" x ¾" on the right knee just above patella;

(xii) An abrasion of the size of 1" x ½" on the right side of the back at the level of 10^{th} thoracic spine 1" lateral to the mid line.

On dissection of the face and skull injury, P.W.3 found that blood clots were present over the pericranium and the frontal bone and both the parietal bones were fractured into pieces with laceration of the meningeal and

underlying brain tissue. The injuries were all ante-mortem in nature and in the opinion of the doctor, the death of the deceased was due to compression and laceration of the brain as a result of fracture of the skull. Ext.2 is the P.M. report.

To the query of the I.O., P.W.3 opined under Ext.3 that the cause of the injury on the head of the deceased by running over of the wheel of a jeep cannot be ruled out. To the further query, the doctor has opined under Ext.4 that the head injury was grievous and might have been caused by hard and blunt substance.

The prosecution put some questions to the doctor for clarification who opined that before the head injury was caused, the deceased must have been lying on the ground. He further opined that his head must have been bent towards the right side and lying in a standstill position when it was sandwitched by two heavy hard and blunt substances. He further opined that the head injury on the deceased could not be caused by an accidental dash of a Jeep. According to him, if after the dash of Jeep, the injured falls down on the ground and the Jeep is drawn backwards by reverse gear and again it is run over the head of the injured, then the head injury could be caused.

To the Court's questions, the doctor opined that in case of dash of a Jeep to the victim while riding a cycle, the first impact would result in the fall of the victim on the ground and the head injury as described in the post mortem report of the deceased would be caused only after the wheel of the Jeep is dashed for the second time and runs over a part of the head. The doctor further opined that if a man was dashed against a Jeep and the man fell down on the ground and becomes immobile due to shock, injury or otherwise, the head injury of the type on the deceased might be caused if the head of the victim only comes in direct contact with the wheel of the Jeep and crushed between the hard ground and the wheel.

The defence put a pertinent question to the doctor as to whether the head injury as sustained by the deceased was possible if a vehicle is dashed against a person from behind while he was riding a cycle at a great speed and the cyclist violently falls down on the ground at a distance of about 30 ft. and a part of his face comes in violent contact with the ground tangentially? The doctor has given a specific reply that even then also the head injury as sustained by the deceased could not be possible.

The learned trial Court after discussing the evidence of the doctor and post mortem report held that from the nature of injuries and medical opinion, the death of the deceased appears to be homicidal and it was due to the head injury i.e., the compression and laceration of the brain as a result of the fracture of the skull and the head injury was sufficient in ordinary course of nature to cause death.

However, the learned trial Court in the ultimate analysis summarized his findings in Para-40 of the judgment wherein he has held that the death of the deceased took place as a result of head injury which might have been caused by running over of a vehicle *or by any other mode*.

The learned counsel for the appellants Mr. Swain contended that the conclusions of the learned trial Court that the death of the deceased took place *"or by any other mode"* is nothing but a mere assumption without any reasonings or materials available on record to that effect. It is further contended that the defence has neither elicited anything from the doctor's evidence nor brought any independent materials to arrive at such a finding that the death was possible by any other mode.

The learned counsel for the respondents Mr. Palit on the other hand contended that the opinion evidence of the doctor is hardly decisive and it is advisory in nature and not binding upon the Court. He further contended that the Court has to form its own opinion considering the material data available on record. The learned counsel placed some extracts by specialist authors to challenge the medical evidence.

It is the settled principle of law that if the defence/prosecution intends to contradict the version of the medical expert by some opinion expressed in any text books or literature then such materials should be confronted to the concerned medical expert. The Hon'ble Supreme Court in **Sunder Lal –v- State of Madhya Pradesh reported in AIR 1954 SC 28** and **Bhagwan Dass -v- State of Rajasthan reported in AIR 1957 SC 589** held that findings of an expert cannot be set aside by a Court by making a reference to some literature/book without confronting the expert with them and directing his opinion on it. In the case of **Gambhir -v- State of Maharashtra reported in AIR 1982 SC 1157**, it was held that the Court should not usurp the function of an expert by arriving at its own conclusions contrary to the one given by the expert witness. In the case of **State of Madhya Pradesh -v- Sanjay Rai reported in 2004 Criminal Law Journal 2006**, the Hon'ble Supreme Court observed at Para 17 of the judgment as follows:-

> "17. It cannot be said that the opinions of these authors were given in regard to circumstances exactly similar to those which arose in the case now before us nor is this a satisfactory way of dealing with or disposing of the evidence of an expert examined in this case unless the passages which are sought to be relied to discredit his opinion are put to him. This Court in Sunderlal -v- The State of Madhya Pradesh AIR 1954 SC 28, disapproved of Judges drawing conclusions adverse to the accused by relying upon such passages in the absence of their being put to medical witnesses. Similar view was expressed in Bhagwan Das and Anr. -V- State of Rajasthan [1957] 1 SCR 854. Though opinions expressed in text books by specialist authors may be of considerable assistance and importance for the Court in arriving at the truth, cannot always be treated or viewed to be either conclusive or final as to what such author says to deprive even a Court of law to come to an appropriate conclusion of its own on the peculiar facts proved in a given case. In substance, though such views may have persuasive value cannot always be considered to be authoritatively binding, even to dispense with the actual proof otherwise reasonably required of the guilt of the accused in a given case. Such opinions cannot be elevated to or placed on higher pedestal than the opinion of an expert examined in Court and the weight ordinarily to which it may be entitled to or deserves to be given".

Thus it should always be kept in mind that the opinions given in books are not circumstance-specific and they will have only persuasive value and they cannot be made binding unless the experts are confronted to give answer to such opinions of authors expressed by them in their textbooks. It cannot be forgotten that the experts of certain specialized field are expected to be well conversant with the opinions of authors expressed in various textbooks, to suitably answer the questions, if asked to them in their cross-examination. No doubt, opinions expressed in the text books by specialist authors are of considerable assistance but such opinions cannot be relied upon unless put to the said expert witness during his cross-examination.

In the present case, since the literature produced before us by the learned counsel for the respondents were not confronted to P.W.3 for his opinion, we cannot rely upon the same.

After going through the evidence of P.W. 3, post mortem report Ext.2, the opinion of the doctor to specific queries of the I.O., Public Prosecutor and

the trial Court so also giving our anxious consideration to the submissions made by the respective parties, we are of the opinion that there is no inherent defect in the medical evidence and as such the learned trial Court was not justified in substituting its own opinion in addition to the opinion given by the doctor and coming to the conclusion that the death of the deceased took place as a result of head injury *"or by any other mode"*.

We are of the view that the prosecution has successfully established that the death of the deceased took place due to compression and laceration of the brain as a result of fracture of skull which was sufficient in ordinary course of nature to cause death and the head injury had been caused not on account of any accidental dash of the vehicle but after the deceased fell down on the ground due to dash, the head of the deceased was ran over by the vehicle again by drawing the vehicle backwards by reverse gear and therefore the death of the deceased is homicidal in nature.

Date, Time and Place of occurrence

9. According to the prosecution case, the occurrence took place on 29.11.1974 at about 7.00 p.m. to 7.30 p.m. on the road running from Puja Mandap Chhak in the East to Bhagirathi Chhak on the West locally known as Dhobapada under Sadar Police Station in the district of Balangir. The Investigating Officer P.W.19 arrived at the spot on 29.11.1974 immediately after receipt of the telephonic message which according to him was less than a furlong from Sadar Police Station, Bolangir. At the spot, he found the deceased was lying on the Kalamandala Road (Dhobapada Road) near the house of Indrajit Seth. The road was leading from east to west and the deceased was lying on the southern side of the road outside the pitch portion of the road. The face of the deceased was towards south and right side of the body touched the ground and left side was upwards. Blood was coming out from the head of the deceased. He also found a cycle in a damaged condition lying at the spot as well as a skid mark of a vehicle on the spot. On the next day i.e. on 30.11.1974, P.W.19 revisited the spot and found the spot to be guarded by police personnels. According to P.W.19, the place of occurrence was on the road running from Puja Mandap Chhak in the East to Bhagirathi Chhak on the West. On both the sides of the pitch portion of the road, the width of the non-mental road was 5 ft. and according to him, the deceased was lying at a distance of 2 ft. from the end of the pitch road on the southern side. He also marked flow of blood up to the length of 6 ft. from north to south. Some hairs were found at the spot, at a distance of 9 ft. towards the

east of blood stains. A black coloured old cycle was lying in a damaged condition at a distance of 35 ft. from the blood stain on the east which was at a distance of 1 ½ ft. on the southern side of the pitch portion. P.W.19 also marked the right wheel mark on the pitch road at a distance of 5 ft. from non-mental portion of the southern side. The length of the wheel mark was 85 ft. i.e. 60 ft. length on the eastern side of the blood stain and 25 ft. on the western side of the blood stain. He also found another skid mark at a distance of 18 ft. from the place where the cycle was lying on the north-eastern side and skid mark was on the pitch road away from the non-mental portion by 1 ½ ft. on the northern side. P.W.19 also seized some blood stained earth and some sample earth from the place of occurrence and some human hairs (M.O.IX) under seizure list Ext.15. He also seized the damaged cycle M.O.III under seizure list Ext.16.

P.W.4 was the photographer S.I. of F.S.L., Rasulgarh, Bhubaneswar who took photographs on 2.12.1974 as per the direction of S.P., Balangir. He proved the photograph Ext.5/6 of the damaged cycle lying at the place of occurrence and some skid marks. Ext.5/4 and 5/5 are the photographs of the place of occurrence from both the sides of the road. Ext.5/7 is the photograph of blood stains on the place of occurrence. Ext.5/8 is the view of the place of the occurrence and Ext.5/9 is the photograph of the skid mark.

P.W.9, the Building A.S.I. of Police at Bolangir prepared the sketch map of the place of occurrence on 6.12.1974 vide Ext.11 and according to him the blood stains were found at a distance of 5 ft. from the pitch road on the southern side and there was mark of wheel on the pitch road which was 85 ft. long which he had shown in the map.

P.W.6 was the M.V.I. of Bolangir visited the spot on 2.12.1974 and according to him skid mark of the length 4 ft. was visible on the right side of the road.

From the evidence of the four eye witnesses i.e. P.Ws.1, 12, 14 and 18, it is apparent that the occurrence has taken place on 29.11.1974 at about 7 p.m. to 7.30 p.m. at Dhobapada on the road running from Puja Mandap Chhak to Bhagirathi Chhak. Apart from the ocular testimonies of the eye witnesses, from the evidence of P.W.4, P.W.6, P.W.9 and P.W.19 also coupled with the sketch map and photographs, it is very clear that so far as the date, time and place of occurrence is concerned, there is no infirmity in the prosecution case. The learned counsel for the respondents during

argument did not seriously challenge on such aspects. Thus, we are of the view that from the evidence on record, it is clear that the occurrence took place on the road running from Puja Mandap Chhak in the East to Bhagirathi Chhak on the West locally known as Dhobapada near the house of Indrajit Seth on 29.11.1974 at about 7.00 p.m. to 7.30 p.m.

Involvement of the Jeep M.O.X

10. Coming to the involvement of the Jeep M.O.X in the occurrence in question, we found that the learned trial Court has discussed the evidence on record for the purpose of deciding whether the Jeep was used at the material time or not in para-6 of the Judgment.

The Jeep M.O.X was used by Congress Party Members in Bolangir Town. D.W.3 has stated that the Jeep bearing Registration No.DLH-9836 belonged to Chaitanya Prasad Majhi who was the Ex-Congress M.P. and he had acquired the Jeep from the Military disposal and spared the vehicle for use by Congress Party. The learned trial Court has held that it was no more controversy that the Jeep M.O.X at the material time was used by the Congress Party Members in Bolangir Town.

So far as the seizure of the Jeep is concerned, P.W.22, Circle Inspector of Police, Sadar, Bolangir who took over the charge of investigation on 30.11.1974 has stated that he seized the Jeep bearing No.DLH-9836 on 2.12.1974 from the garage of Congress and the garage was locked from outside and the lock was sealed previously. The garage was guarded by police and in presence of a Magistrate P.W.2, he broke open the lock, opened the garage and seized the Jeep. P.W.2 was the Executive Magistrate posted at Bolangir Town who has also stated about the breaking open of the doors of garage and seizure of Jeep from inside the garage under seizure list Ext.1.

P.W.19, the first investigating officer has stated that on 29.11.1974 between 11.00 p.m. to 12.00 mid-night, he was searching for the Jeep involved in the occurrence and on that day, it was not brought to his notice that the Jeep suspected to have been involved in the occurrence was kept under seal in a garage which he came to know on the next day.

There is absolute no evidence on record as to who kept the Jeep in question inside the garage and sealed the lock of the garage.

P.W.19 seized the rear wheel of the Jeep (M.O.VIII) which appeared to have contained human blood. The scraping of the tyre was sent for chemical examination. The serologist report Ext.45 indicates that the stain from the rear tyre shows human blood although blood group could not be determined.

P.W.6 who was the M.V.I. examined the Jeep and visited the place of occurrence and his opinion was that the incident might have taken place for the reasons other than the mechanical defects of the vehicle.

At the time of seizure of the Jeep, it was found that canvas hood of the Jeep was intact as per the photographs vide Ext.5/2 and 5/3. The learned counsel for the respondents Mr. Palit contended that since as per the evidence of the eye witnesses, the Jeep which was used in the crime was without any canvas hood but the Jeep which was seized from the garage was having canvas hood, the involvement of the Jeep (M.O.X) is highly doubtful. We are not at all impressed by such contentions raised by Mr. Palit inasmuch as there was sufficient time and opportunity for the accused persons to place the canvas hood of the Jeep and it is the common knowledge that much time is not taken for placing such canvas hood.

The learned counsel for the respondents Mr. Palit pointing out the evidence of P.W.6 contended that use of the vehicle in the crime is falsified in as much as P.W.6 has stated that there was no scratch and violence or any mark of damage, injury or assault externally visible on the Jeep and further stated that the vehicle is bound to leave some scratch or mark, if running in a high speed, it hits any hard substance. We are not inclined to accept the contentions raised by Mr. Palit as P.W.6 has stated that scratch or mark on the Jeep would depend on the weight, size and volume of the hard substance. P.W.6 had noticed the reflector and the socket of the Jeep in a damaged condition. Merely because P.W.6 has not noticed any scratch or mark of violence externally on the Jeep, it does not improbabilise the prosecution case regarding the dashing of the Jeep with the cycle.

We are of the view that the learned trial Court was not justified in holding that, absence of any mark of impact on the frontal portion of the jeep militates against the theory of dashing of jeep M.O.X against cycle M.O.III and that the absence of any mark of violence or black mark of the cycle on the jeep supports the defence contention that the jeep was not used in the incident in question. The learned trial Court should have taken note that the

reflector and the socket of the Jeep were in a damaged condition. There is no evidence as to which particular portion of the jeep came in contact with the cycle at the time of dashing though due to impact of dashing, the cycle which was lying in a damaged condition at the spot was seized by police.

The learned trial Court also equally erred in observing that the wheel running over the head of the victim was expected to have contained not only blood but also some portion of flesh and hair of the head which was found to be not sticking to the left rear wheel of the jeep M.O.X. We are bewildered with such observations in as much as the jeep had moved from the place of occurrence at least to the garage from where it was seized. The possibility of removal of hairs or flesh etc. during such movements of the vehicle and also the probability of the culprits removing such incriminating materials from the rear wheel to cause disappearance of evidence can also not be ruled out.

P.W.19, the first Investigating Officer who immediately reached at the spot getting information over telephone found not only the deceased was lying with bleeding injuries at the spot but also the damaged cycle lying at the spot. He also found the skid mark of a vehicle at the spot. He made arrangement to guard the spot as it was night time. On the next day he found the right wheel mark on the pitch road at a distance of 5' from non-metal portion of the southern side. The wheel mark was found at a distance of 5 feet from the edge of the pitch road and the length of the wheel mark was 85 ft. The length of the wheel mark was 60 ft. on the eastern side of the blood stain and 25 ft. on the western side of the blood stain. He found another skid mark at a distance of 18 ft. from the place where the cycle was lying on the north-eastern side and that skid mark was on the pitch road away from the non-metal portion by 1½ ft. on the northern side.

P.W.6, the M.V.I. on his visit to the place of occurrence also found skid mark of length of 4 ft. visible on the right side of the road. The visible skid mark was 5 ½ ft. wide and according to him the same might have been due to reversing of the rear wheel and the skid mark was that of the type of a wheel of a Jeep.

The photographer P.W.4 of F.S.L. who took photographs at the spot stated that Ext.5/6 is the photographs of the damaged cycle lying at the place of occurrence and some skid marks and Ext.5/9 is the photograph of the skid mark.

P.W.9 who prepared the sketch map Ext.11 stated that there was mark of wheel on the pitch road which was 85 ft. long and he has shown its position in the map.

P.W.20, the I.O. who took over the charge of investigation on 11.12.1974 stated that he found wheel mark of a Jeep starting from the southern end on the pitch road from the eastern side and running towards the western side of the pitch road for a distance of 85 ft.

The concept of skid marks has been explained in Forensic Science in "Criminal Investigation & Trial" by Dr. B.R. Sharma. The relevant para of same is reproduced as under:

"**16.6.3. Skid Marks**

> When brakes are applied to a vehicle, they lock the wheels and stop them from revolving. When a vehicle traverses a certain distance with locked wheels, the vehicle is said to skid. The marks created by the tyres without revolving are called skid marks. The friction between the tyres and the surface abrades the tyres and black tyre material is deposited at the surface, which makes the skid marks easily discernible and conspicuous. When the vehicle is moving on soft earth, the sudden application of brakes ploughs through the earth. The skid marks in such cases are identified from the displacement of earth from the track. When a vehicle is moving in dust or dirt, the skidding tyres removes the dirt from its path and creates the marks. If the tyre is moving on a tarry road, it creates the marks in the tar, by pushing away the tar from its path".

The concept of the skid marks has also been explained in the book title as "Introduction to Criminalistics" by Charles E. O'Hara & Dr. James W. Osterburg, published by the Macmillan Company, New York in the following manner:

"SKID MARKS

> When the brakes of a moving car are forcefully applied, the friction between tire and roadway heats the rubber, depositing a thin layer in the path of the tyres. Sometimes a black mark is formed by displaced surface materials-dust, tar, etc. Some synthetic tires of high heat resistance exert a cleaning action on the road surface. These lines are called skid marks. In a motor vehicle accident, the problem which

confronts the investigator is the determination of deficiencies in the brakes or of negligence on the part of the driver due to excessive speed. Usually the only evidence present is a set of skid marks. These marks may be shown to be a measure of the probable stopping distance".

Summing up of the evidence on record to decide the involvement of the Jeep M.O.X in the crime, we found that apart from the ocular testimonies of the eye witnesses, the visible skid marks of the vehicle at the spot, the condition in which the deceased was found lying at the spot, the seizure of the damaged cycle at the spot, the blood stains found on the tyre of the jeep and above all the findings of the post-mortem report indicating the possibility of the injuries on the deceased by the jeep, we are of the view that death of the deceased had taken place due to dashing of the Jeep M.O.X in the manner projected by the prosecution.

The finding of the learned trial Court that the Jeep M.O.X has not been proved to the hilt to be the vehicle used for running over the deceased is contrary to the evidence on record and such a finding is manifestly erroneous, quite unreasonable, and suffers non-application of mind.

Omission of registration number of jeep in FIR and in the Station Diary Entry

11. The learned trial Court has given undue importance to the non-mentioning the registration number of the jeep either in the station diary entry Ext. A or in the FIR Ext.12/2.

It is pertinent to quote the station diary entry No.691 dated 29.11.1974 of Bolangir Police Station in extenso:-

" **691-7.35 p.m.**

(Phone message)

A phone message is received from Haribandhu Swain, Advocate, Bolangir that, the Bolangir Congress Jeep ran over Parsuram Satpathy on the road at Dhoba Pada as informed by Bibudananda Udgata of Club Pada. Parsuram Satpathy is lying on the road side at the spot.

On this S.I. P.M. Das with A.S.I. M. Tripathy, A.S.I. H.B. Sahoo, C/307 J.R Hota and the G.R. proceeded to spot in Jeep ORR 790 for verification and necessary action".

Not only in the station diary entry Ext. A but also in the FIR Ext.12/2, it is clearly mentioned that Congress Jeep was used in killing the deceased. The learned trial Court has observed that since the registration number of the Jeep was not mentioned in the FIR as well as in the station diary entry, the inference that can legitimately be drawn is that P.Ws.1, 12 and 18 did not actually see the registration number of the Jeep involved in the incident and the second inference is that the Jeep M.O.X was not the jeep involved in the incident.

When the informant P.W.18 was lodging the FIR within few minutes after the death of his brother occurred in a ghastly manner, it was not expected of him to maintain calm and composure in a highly grave and provocative situation to narrate everything in the FIR including mentioning the registration number of the Jeep. Such omission of the registration number cannot be given undue importance as given by the learned trial Court.

The principal object to the First Information Report is to set the criminal law into motion. Any telephonic message about commission of cognizable offence irrespective of nature and details of such information cannot be treated as FIR if the telephonic message is cryptic in nature and the Officer-In-Charge proceeds to the place of occurrence on the basis of such information to find out the details of the nature of the offence itself, as happened in this case. The telephonic message was given not to lodge the FIR but to request the police officials of the police station to reach the place of occurrence. It is the further settled principle of law that FIR is not the encyclopedia or be all and end all of the prosecution case. It is not a verbatim summary of the prosecution case. Non-mentioning of some facts or details or meticulous particulars is not a ground to reject the prosecution case.

In case of **Rattan Singh –v- State of H.P. reported in 1997 Supreme Court Cases (Criminal) 525**, it is held as follows:-

> "Criminal Courts should not be fastidious with mere omissions in the first information statements, since such statements cannot be expected to be a chronicle of every detail of what happened, nor to contain an exhaustive catalogue of the events which took place. The person who furnishes first information to authorities might be fresh with the facts but he need not necessarily have this skill or ability to reproduce details of the entire story without anything missing therefrom. Some may miss even important details in a narration.

> Quite often the police officer, who takes down the first information, would record what the informant conveys to him without resorting to any elicitatory exercise. It is voluntary narrative of the informant without interrogation which usually goes into such statement. So any omission therein has to be considered along with the other evidence to determine whether the facts so omitted never happened at all".

In our opinion, the omission of the registration number of the jeep either in the station diary entry Ext.A or in the FIR Ext.12/2 are not of much importance in the facts and circumstances of the case and such omission does not falsify the involvement of the Congress Jeep bearing registration No. DLH 9836 in the crime.

Extrajudicial confession

12. The learned trial Court discussed the extrajudicial confession of the respondent no.8 Tikaram Agrawalla before P.W.16 inside Bolangir Jail and held that in view of the political differences between P.W.16 and the respondent Tikaram Agrawalla, it is very difficult to believe that such a disclosure was made. P.W.16 also did not disclose about the extrajudicial confession either to his lawyers or to others immediately after his release from Jail. There was no corroboration to the evidence of P.W.16. The learned trial Court held that the evidence of P.W.16 is not worthy of any credit and the story of the extrajudicial confession as put forth by the prosecution is extremely difficult to be believed.

It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence and requires appreciation with a great deal of care and caution. Extra-judicial confession must be established to be true and made voluntarily and that to in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the Court should find out whether there are other cogent circumstances on record to support it. If an extrajudicial confession is surrounded by suspicious circumstances or comes from the mouth of witnesses who appear to be biased or inimical to the accused or in respect of whom it is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, needless to say that its credibility becomes doubtful and consequently it loses its importance.

Analysing the evidence of P.W.16 with utmost care and caution and the reasonings assigned by the learned trial Court, we found that the learned trial Court has properly assessed the evidence of P.W.16 and rightly disbelieved his evidence relating to the extrajudicial confession and we concur with the view of the learned trial Court that the evidence relating to extrajudicial confession does not inspire confidence.

Political dispute between parties

13. There is no dispute that there was previous hostile relationship between the parties and they belonged to different political parties. The accused persons belonged to Congress Party and the deceased was a member of Bharatiya Lok Dal and he was in-charge of the Youth Wing of the party. The deceased had passed M.A. in Political Science and was a Diploma Holder in Journalism. It has also come on record that the deceased was very popular among the young people for which the Youth Congress Workers were jealous. While it is the prosecution case that due to political hostility, the accused persons committed the murder of the deceased, it is the case of the accused persons that due to political hostility, they have been falsely entangled in the case.

Where there are party fractions, there is a tendency to include the innocent persons with the guilty and it is extremely difficult for the Court to guard against such a danger. The only real safe-guard against the risk of condemning the innocent with the guilty lies in insisting on acceptable evidence which in some measure implicates such accused and satisfies the conscience of the Court. **(Ref:- AIR 1973 SC 1204, Bajwa –V- State of U.P., AIR 1952 SC 159, Kashmira Singh -V- State of M.P., AIR 1949 P.C. 257, Bhuboni Sahu -V- The King).**

Previous enmity between the parties is admitted. There is an incurable tendency in the factionists to rope in the innocent persons of the opposite faction along with the guilty and to twist and manipulate the facts in regard to manner of occurrence, so as to make their case appear true so far as innocent members of the opposite factions are concerned. It cannot be assumed that interested witnesses are necessarily false witnesses. However, the evidence of such witnesses must be subjected to close scrutiny and no evidence should be discarded simply because it came from the interested party.

Perfunctory investigation

14. Before discussing the evidence of the oral testimonies of the eye witnesses P.Ws.1, 12, 14 and 18, it is to be kept in mind that the Congress Party was in power in the State at the time of occurrence and the accused persons are also the members of Congress Party. One of the Investigating Officer i.e. P.W.20 who took charge of the investigation on 11.12.1974 and submitted charge-sheet on 10.12.1975 against six accused persons was declared hostile by the prosecution for conducting perfunctory investigation and cross-examined by the prosecution at length.

P.W.20 admits that the finger print expert detected some finger prints from the mirror of the Jeep and he received message on 23.1.1975 from the Director of the Finger Print Bureau, Rasulgarh, Bhubaneswar to send the finger prints of all the suspects of the case but he did not send the same as the Jeep belonged to the Congress Party and the suspected persons were workers of the Congress Party. He further submits that he did not search the house of any of the accused persons during the period of his investigation and before filing charge sheet, he did not request the Court to issue non-bailable warrants or other process against the accused persons who had not been arrested. He did not send any message to other police stations for search of the accused persons who had not been arrested. Suggestion was given by the prosecution to P.W.20 that during his investigation, he attempted to demolish the prosecution. Lengthy cross-examination of P.W.20 by the prosecution has brought on record how he had conducted perfunctory investigation in a sensational case just because of political pressure and it appears that it is because of the political pressure from the ruling party, he has conducted such perfunctory investigation. The observations of the learned trial Court that the police investigation cannot be said to be wholly perfunctory and at any rate no benefit accrues to the prosecution is thoroughly misconceived and not sustainable in the eyes of law.

Law is well settled as held in case of **Dr. Krishna Pal –v-State of U.P. reported in 1996 Criminal Law Journal 1134 (SC)** that it would not be proper to acquit the accused in case of defective investigation if the case is otherwise established conclusively as it would tantamount to be falling in the hands of an erring investigating officer. In case of **State of Rajasthan –v-Kishore reported in 1996 Supreme Court Cases (Criminal) 646**, it is held that it would not cast doubt on the prosecution case proved by trustworthy and reliable evidence even if I.O. committed irregularity and illegality during investigation. It is held in case of **Paras Yadav –v- State of Bihar reported**

in 1999 Supreme Court Cases (Criminal) 104 that lapses on the part of the investigating officer should not be taken in favour of the accused. Prosecution evidence should be examined dehors such omissions to find out whether the said evidence is reliable or not. It is held in case of **State of Karnataka –v- K. Yarappa Reddy reported in 1999 (4) Crimes 171 (SC)** that if the court is convinced that the testimony of a witness to the occurrence is true, the Court is free act on it albeit investigating officer's suspicious role in the case. It is held in case of **Dhanaj Singh –v- State of Punjab reported in 2004 Supreme Court Cases (Criminal) 851** that accused cannot be acquitted solely on account of defective investigation were ocular testimony is found credible and cogent. In the case of a defective investigation, the Court has to be circumspect in evaluating the evidence. In case of **Kasinath Mondal-v- State of W.B. reported in (2012) 3 Supreme Court Cases (Criminal) 467**, it is held that irregularities or deficiencies in conducting investigation by the prosecution is not always fatal to the prosecution case. If there is sufficient evidence to establish the substratum of the prosecution case, then irregularities which occur due to remissness of the investigating agency, which do not affect the substratum of the prosecution case, should not weigh with the Court. In case of **Sheo Shankar Singh -V- State of Jharkhand reported in (2011) 49 Orissa Criminal Reports (SC) 485** that deficiencies in investigation by way of omissions and lapses on the part of the investigating agency cannot in themselves justify a total rejection of the prosecution case.

The observation of the learned trial Court that the police investigation cannot be said to be wholly perfunctory and at any rate no benefit accrues to the prosecution is contrary to the materials available on record as well as the settled principle of law. The investigation of the case was deliberately conducted in a perfunctory manner under political pressure to create grounds for acquittal for the accused persons and the same is to be kept in mind while assessing the testimonies of the eye witnesses.

Testimonies of the eye witnesses

15. Analysing the oral testimonies of the four eye witnesses P.Ws.1, 12, 14 and 18, the learned trial Court has held that their testimonies are unworthy of credit and does not inspire confidence.

The learned trial Court has discussed the evidence of P.W.1 in paragraphs 23 and 24 of the judgment, P.W.12 in paragraph 25 of the

judgment, P.W.14 in paragraph 26 of the judgment and P.W.18 in paragraph 27 of the judgment.

The complicity of the respondents no. 3, 7 and 9 now rests upon the credibility of the aforesaid eye witnesses P.Ws.1, 12,14 and 18.

Three distinct theories of occurrence

The learned trial Court while discussing the evidence of the eye witnesses relating to the manner in which the occurrence had taken place, has held that three distinct theories have been set up by the prosecution from the initiation of the prosecution till the trial stage.

The learned trial Court held that in the initial stage, when the FIR was drawn up, it was a case of single impact. We are bewildered as to how the learned trial Court has made such an observation which is apparently an error of record. P.W.18 who has lodged the FIR has mentioned that while the deceased was speedily riding the cycle of P.W.1 on Dhobapada Road in order to save his life, the accused persons shouting to kill the deceased, followed him in a Jeep and killed him by running over the Jeep on the deceased. In the FIR, there is no mention that it was a case of single impact.

The learned trial Court has further held that in the complaint petition, it is stated that the deceased was first knocked down by dashing of the Jeep and then he was done to death by severe assaults by means of lethal weapons. It is pertinent to note that one Sitaram filed the complaint petition who has not been examined during trial. The contents of the complaint petition have been confronted to P.W.18 by the defence during cross-examination and the contradictions have been utilized by the learned trial Court. Law is well settled that the contents of a first information report or complaint petition are to be confronted to the maker thereof. We are of the view that permission should not have been granted by the learned trial Court for confronting the contents of the complaint petition filed by one Sitaram to P.W.18 and the contradictory statements in the complaint petition should not have been utilized to disbelieve the version of the eye witnesses.

The approach of the learned trial Court is wholly illegal. The earlier statement made by the complainant in a complaint petition, sworn initial statement of the complainant recorded under section 200 Cr.P.C. or his statement, if any, recorded under section 202 Cr.P.C. by the Magistrate or recorded during an investigation being directed under Section 202 Cr.P.C.

can be used as previous statements for the purpose of contradicting the complainant in view of the provisions under section 145 of the Evidence Act, to impeach his credit under Sec. 155(3) of the Evidence Act, to corroborate his testimony under Section 157 of the Evidence Act and to refresh his memory under Sec. 159 of the Evidence Act, if the complainant is examined during trial. In absence of examination of the complainant during trial, the use of such statements by the learned trial Court to discredit the prosecution version is quite unjustified.

The learned trial Court has further held that P.W.1 has stated about the single impact whereas the other eye witnesses P.Ws.12, 14 and 18 have spoken regarding reverse gear theory. On careful reading of the evidence of P.W.1, we found that he has stated that after the deceased speedily proceeded towards Bhagirathi Chhak, the accused persons followed the deceased in the Congress Jeep. P.W.1 further stated that after he proceeded 10 to 12 steps, he heard the sound collusion of the Jeep and the cycle and then he ran to the spot and found that after the collusion, the Jeep sped away towards Bhagirathi Chhak. Thus it appears that P.W.1 arrived at the spot just after the dashing of the Jeep and he has not seen the actual dashing of the Jeep with the cycle.

Thus we are of the view that the observations of the learned trial Court that three distinct theories have been set up by the prosecution is wholly inappropriate, perverse and quite unreasonable.

Electricity at the spot

The learned trial Court while discussing on the question of identification of the accused persons inside the Jeep, has held that though there were three electric light poles on the road, there was bar light in one pole, electric bulb in another and the third pole was without any bar light or bulb. The learned trial Court further held that since there was lunar eclipse on the date of occurrence, it would be very difficult for the passer-by to identify the persons sitting in the speeding vehicle.

P.W.1 has stated that the date of occurrence i.e. 29.11.1974 was Kartika Purnima day and there was lunar eclipse and by the time of occurrence the lunar eclipse had not set in. P.W.12 has stated that just before the lunar eclipse set in, the occurrence took place. He has further stated that because of burning street light and as it was a moonlit light, he could identify the persons who were sitting on the front side of the Jeep, whom he had known earlier. P.W. 14 has stated that the lights on the light posts along the

road up to Bhagirathi Chhak were burning so also the light of Puja Mandap. At the Puja Mandap Chhak, two to three such bar lights were burning and near the place where the injured was lying, a street light was burning.

Thus when the date of occurrence was a full moon night and lunar eclipse had not set in at the time of occurrence and there was electric lights on and around the spot and the accused persons were well known to the witnesses and the Jeep was an open one without canvas hood, it cannot be said that there would have been any difficulty on the part of the witnesses to identify the occupants of the open Jeep.

Analysis of the evidence of P.W.1

The learned trial Court has discarded the evidence of P.W.1 on the following grounds:-

(a) He had not accompanied the deceased to his place of destination and left him alone in a cycle;

(b) He has not gone to police to report about the incident;

(c) He stated to have deposed in police cases on two to three occasions prior to the case in question and therefore, he is a stock witness of the police;

(d) He was not cited as a witness in the complaint petition lodged by Sitaram;

(e) There was delay in examination of P.W.1 by police;

(f) The evidence of P.W.1 that he heard occupants of the Jeep uttering to kill the deceased is highly improbable.

The reasonings assigned by the learned trial Court to hold that the version of P.W.1 is unworthy of credit and cannot be believed is highly perverse and not acceptable.

P.W.1 allowed the deceased to escape from the spot and provided him cycle on request. The conduct of P.W.1 is quite natural. Escaping of one person in a cycle was easier than carrying another person in the cycle. That might have been the consideration for P.W.1 not to accompany the deceased. Moreover P.W.1 was returning home from his relation's house at that point of time and therefore it was not expected of him to accompany the deceased in the cycle.

Similarly when on arrival of police immediately at the spot after the occurrence, P.W.18 lodged the FIR before P.W.19 and immediately thereafter P.W.19 examined P.W.1 in the police station, it cannot be said that there was any delay in the examination of P.W.1 or his evidence is to be discarded as he had not lodged the FIR.

Merely because P.W.1 deposed as witness in the police cases on two to three occasions, it cannot be said that he was a stock witness of the prosecution and his evidence should be discarded for that reason. A stock witness is a person who is at the back and call of the police. He obliges police with his tailored testimony. A person may get several opportunities during his life time to depose in Court in different circumstances and the evidence of such a person cannot be discarded as an untruthful witness. If an independent witness joins police proceedings having some knowledge about the crime, then he cannot be labeled as a stock witness of the police. No suggestion has been given by the defence to the Investigating Officer that P.W.1 is a stock witness.

Why complainant Sitaram has not mentioned the name of P.W.1 as a witness in his complaint petition, it is he who could have thrown light on such aspect. Sitaram has not been examined during trial. In absence of examination of Sitaram during trial, creating doubt on the version of P.W.1 by the learned trial Court is highly illegal and suffers from perversity.

P.W.1 has specifically stated as to what he had heard from the occupants of the Jeep while he was close to the Jeep and there is nothing improbability in the same. He has stated that when he and the deceased were proceeding, someone from the occupants of the congress Jeep shouted, “Sala! Parsu has come. Turn the vehicle”. Again he has stated that when the Jeep proceeded towards Bhagirathi Chhak, he heard the occupants of the Jeep saying, “Let us go and run over the vehicle”.

Therefore the reasonings assigned by the learned trial Court in discarding the evidence of P.W.1 as not credit worthy is not at all acceptable in the eye of law and we are of the view that P.W.1 is a truthful witness.

Analysis of the evidence of P.W.12

The learned trial Court has discarded the testimony of P.W.12 as unworthy of credit and unreliable on the following grounds:-

(a) P.W.12 admits that he had been to the office of B.L.D. at Bolangir on more than ten occasions in the years 1973 and 1974. This shows the interestedness of the witness for the prosecution party.

(b) P.W.12 with a view to claim a status for him has deposed blatant falsehood.

(c) It would appear from the spot map Ext.11 that P.W.12 saw the incident from a distance of not less than 350 ft. It is extremely difficult to believe that this witness could have seen the incident in such details as narrated by him from such a distance.

(d) When there was short cut route from Rugudipada to Tikarapada via Pratapasagarpada, it is not understood as to why P.W.12 did not chose this route while returning from his sister's house Rugudipada to his house at Tikarapada via Bhagirathi Chhak.

(e) P.W.12 was examined for the first time by the second I.O. P.W.22 on 30.11.1974 i.e. about 24 hours after the incident. No reasons have been ascribed by the prosecution as to why the first I.O. P.W.19 did not examine him on 21.11.1974.

(f) There is a substantial difference between the statement of P.W.12 made in the Court and the statement made by him before the I.O. The explanation given by P.W.12 that he did not state the full facts before the police because the police wanted him to speak the gist of the fact relating to the occurrence cannot be accepted.

(g) P.W.12 did not state before the Magistrate in his statement recorded under Section 202 Cr.P.C. vide Ext.14, the facts stated by in para 1 to 4 of his chief examination. He has also not stated about the facts mentioned in para 6, 7, 8 and 9 of his chief examination before the police or in his examination during inquiry under Section 202 Cr.P.C. The explanation given by P.W.12 can hardly be accepted.

(h) There are material omissions in his statement made in Court vis-à-vis before the Investigating Officer.

When admittedly the prosecution case as well as the defence plea is that the occurrence has taken place due to political hostility between the parties, merely because a witness belongs to a particular political party cannot be a ground to discard the evidence if his evidence is otherwise acceptable on close scrutiny.

Even if P.W.12 has made some wrong statements regarding his election dispute with one Himanshu Sekhar Mishra as President of Rajendra College Students' Union in 1974-75, that by itself is not sufficient to discard the evidence of P.W.12.

It appears from the evidence of P.W.12 that he has seen the occurrence from a very close distance. P.W.12 has stated that when he saw the Jeep, it was at a distance of 30 to 40 cubits from the place of alleged occurrence and the deceased was at a distance of 15 to 20 cubits from the R.C.M.S. Office. In case of **Rameswar Dayal -V- State of U.P. reported in AIR 1978 Supreme Court 1558**, it is held that documents like inquest report, seizure list or the site plans consists two parts- one of which is admissible and the other is inadmissible. That part of such documents which is based the actual observation of the witness at the spot being direct evidence in the case is clearly admissible under Section 60 of Evidence Act whereas the other part which is based on information given to the Investigating Officer or on the statement recorded by him in the course of investigation is inadmissible under Section 162 Cr.P.C. except for the limited purpose mentioned in that section. In case of **Jagdish Narain -V- State of U.P. reported in 1996 (1) Crimes 174,** it is held as follows:-

> "9……While preparing a site plan, an investigating police officer can certainly record what he sees and observes, for that will be the direct and substantive evidence being based on his personal knowledge; but as, he was not obviously present when the incident took place, he was to derive knowledge as to when, where and how it happened from person who had seen the incident. When a witness testify about what he heard from somebody else, it is ordinarily not admissible in evidence being hearsay, but if the person from whom he heard is examined to give direct evidence within the meaning of Section 60 of the Evidence Act, the former evidence would be admissible to corroborate the latter in accordance with Section 157 Cr.P.C…….That necessarily means that if in the site plan P.W.6 had even shown the place from which the shots were allegedly fired after ascertaining the same from the eye witnesses, it could not have been admitted in evidence being hit by section 162 Cr.P.C.

In case of **State of Rajasthan –v- Bhabani reported in (2003) 26 OCR (SC) 358,** it is held as follows:-

> "10……..The High Court has extensively relied upon the site plan prepared by the Investigating Officer for discarding the prosecution case and for this purpose has referred to the place from where the accused are alleged to have entered the Nohera, the place from where they are alleged to have fired upon the deceased and also has drawn an inference that the place wherefrom the accused are alleged to have fired upon the deceased, the shot could not have hit the houses on the eastern site of the Nohera. Many things mentioned in the site plan have been noted by the Investigating Officer on the basis of the statements given by the witnesses. Obviously, the place from where the accused entered the Nohera and the place from where they resorted to firing is based upon the statement of the witnesses. These are clearly hit by Section 162 Cr.P.C. What the Investigating Officer personally saw and noted alone would be admissible".

In view of the settled principle of law, we are of the view that merely because in the spot map Ext.11, the I.O. has shown that P.W.12 saw the incident from a distance of not less than 350 ft., it was not proper on the part of the learned trial Court to reject the testimony of P.W.12 particularly when the evidence of P.W.12 indicates that he was very close to the place of occurrence at the relevant point of time.

Why P.W.12 had chosen a particular route to return to his house from his sister's house could have been answered by him alone if he would have been specifically asked about the same. When the same has not been done by the defence and nothing has been elicited from P.W.12 on this point, it was not proper for the learned trial Court to say that P.W.12 is a chance witness. When the occurrence had taken place on the public road, the passerby are the natural witnesses and their evidence cannot be discarded on the ground that they are chance witnesses.

In the case of **Ranapratap -V- State of Hariyana reported in A.I.R.1983 SC 680,** it is held as follows:-

> "3……We do not understand the expression 'chance witnesses'. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passersby

> will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witnesses' is borrowed from countries where every man's home is considered castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country where people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are 'chance witnesses', even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence.

It appears that the first I.O. P.W.19 took up investigation after receipt of the FIR at the spot and he was extremely busy not only in making arrangement for removal of the deceased from the spot to Bolangir Hospital but also examining witnesses, instructing other police officials to guard the spot as well as the dead body, in searching the houses of the accused persons, in holding inquest over the dead body and sending the same for post-mortem examination, visiting the spot, making necessary seizures at the spot, arresting the accused persons and forwarding them to Court on 29.11.1974 and 30.11.1974 and P.W.22 who took over the investigation of the case on 30.11.1974 at 4.00 p.m. from P.W.19, examined P.W.12 on 30.11.1974. Therefore it cannot be said that there was any inordinate delay in the examination of P.W.12 and on that score, his evidence is to be discarded.

The contradictions/omissions which appear in the evidence of P.W.12 are mainly relating to the election dispute of College Union, the political disputes between the parties as well as the position of the spot. So far the occurrence part is concerned, the evidence is clear, cogent and trustworthy and whatever contradictions/omissions have been elicited, do not affect the prosecution case in any manner.

Therefore, we are of the view that the conclusions arrived at by the learned trial Court in discarding the testimony of P.W.12 is quite unreasonable and not reasonably probable and suffers from non-application of mind.

Analysis of the evidence of P.W.14

The learned trial Court has discarded the testimony of P.W.14 holding that the credibility of this witness was at the lowest ebb on the following grounds:-

(a) Though P.W.14 stated to have heard the dashing sound and found the Jeep speeding forward towards Bhagirathi Chhak but he has not tried to identify the Jeep or the occupants of the Jeep.

(b) The credibility of this witness is open to grave doubt, as he has deposed to certain vital facts at the trial though omitted the same before the investigating officer.

(c) The evidence of P.W.14 that street lights were burning near the spot is not acceptable as the I.O. P.W.20 states that there was interruption of electricity in the Palace line which was supplied by Feeder No.1 between 5.45 p.m. and 9.20 p.m.

(d) P.W.14 ran away from the place after the incident without waiting to see what had happened or without disclosing the fact to anyone or to any public authority, although he was not chased or threatened by any of the miscreants.

P.W.14 has stated that he had not known either the deceased or any of the accused persons as on the date of occurrence and further stated that after the Jeep was driven in a high speed towards Titilagarh Chhak, it was taken to the left hand side of the road and then he heard a dashing sound and thereafter the Jeep was drawn backwards by reverse gear and ran forward when he heard dashing sound again and then the Jeep ran towards Titilagarh Chhak and then he found a cycle was lying on the ground and the Jeep had run over the cycle and a man was lying in a senseless and bleeding condition. When the occurrence took place all on a sudden while P.W.14 was passing on the road and after the crime was committed, the Jeep left the spot speedily, merely because P.W.14 was unable to say the description or colour of the Jeep or about the identity of the occupants of the Jeep with whom he had no prior acquaintance, it cannot be said that he had no idea about the incident.

The omissions pointed out by the defence during cross-examination of P.W.14 are very insignificant and trivial in nature and such omissions do not affect the credibility of the witness.

P.W.14 has specifically stated that there was no failure of electricity and there was electric light on the roads as well as in the houses. P.W.20 has stated that in between 5.30 p.m. to 7.04 p.m. on 29.11.1974, there was interruption of electricity at Dhobapada on four occasions and on each occasion, the interruption was for less than 5 minutes. Similarly so far as

Feeder No.1 is concerned, which was interrupted according to him from 5.40 p.m. to 9.20 p.m., he has stated that he has not mentioned specifically as to the start and end of the area to which Feeder No.1 supplied energy. When none from the electricity officials has been examined and no document regarding specific time for interruption of electricity has been proved and when there is absolutely no material that the place of occurrence was in darkness due to electricity failure at the time of occurrence, the observation of the learned trial Court that the evidence of P.W.14 on electricity aspect is not at all acceptable is highly ridiculous. Apart from electricity light, it was a full moon light and the lunar eclipse had not set in at the time of occurrence and therefore there would not have been any visibility problem.

P.W.14 has stated that after reaching home, he told the incident what he saw to his wife and similarly on the next day he disclosed the incident to his colleagues in the office. He has further stated that when he was still at the place of occurrence, the police reached at the spot but he had not voluntarily gone to the police station to report about the incident till his statement was recorded on 2.12.1974. The conduct of P.W.14 cannot be said to be unnatural, impairing the creditworthiness of his evidence. The post-event conduct of a witness varies from person to person. It cannot be a cast iron reaction to be followed as a model by everyone witnessing such event. Different persons would react differently on seeing any serious crime and their behaviour and conduct would, therefore, be different. The observation of the learned trial Court that P.W.14 ran away from the spot and did not disclose the incident before anybody is an error of record.

Therefore, we are of the view that the conclusion arrived at the learned trial Court in discarding the testimony of P.W.14 is manifestly perverse, contrary to the evidence on record and suffers from non-application of mind.

Analysis of the evidence of P.W.18

The learned trial Court has discarded the testimony of P.W.18 holding that he is not a witness who can be implicitly believed on the following grounds:-

(a) P.W.18 has not given the number of the Jeep in the FIR though he is the informant in the case.

(b) There are lot of contradictions between his statement made in Court vis-à-vis the statements made before the I.O. and his statement recorded under section 202 Cr.P.C. in the complaint case.

(c) Non-approaching the police and lodging Station Diary Entry is a circumstance to belie the assertion of P.W.18 that threats were given to the deceased by some of the accused on 26.11.1974 and 27.11.1974.

We have already held that non-mention of the registration number of the Jeep in the FIR by P.W.18 is not at all fatal to the prosecution case considering his state of mind at the relevant point of time.

We have gone through the contradictions and omissions in the statement of P.W.18 that was given in Court as well as in 161 Cr.P.C. and statement recorded under Section 202 Cr.P.C. These contradictions are mainly relating to the background of the case in which the occurrence has taken place so also the post-occurrence details. So far as the main part of the occurrence is concerned, the contradictions/omissions are very insignificant and therefore the learned trial Court should not have given undue weight to the same to discard the evidence of P.W.18.

P.W.18 has specifically stated that on 24.11.1974 when the deceased was released on bail, one Bikramananda Bohidar told him that boys of Yuva Congress were planning to murder him and that he should be cautious and on 27.11.1974 the deceased made a Station Diary Entry at Bolangir Police Station to the above effect. Ext.23 is the Station Diary Entry dated 27.11.1974 made by the deceased. He has further stated that one Durga Charan Behera who belong to Bharatiya Lok Dal also made a Station Diary Entry at Bolangir Police Station which was written by the deceased and Ext.24 is that the Station Diary Entry. Thus the observation of the learned trial Court that nobody approached the police in spite of the occurrence dated 26.11.1974 and 27.11.1974 is an error of record.

Therefore, we are of the view that the conclusions arrived at by the learned trial Court in discarding the testimony of P.W. 18 is wholly perverse, quite unreasonable and suffers from non-application of mind.

Identification of respondents no. 3, 7 and 9

16. Out of the four eye witnesses, admittedly P.W.14 has not identified any of these three respondents who are now alive. (i) P.W.1 has stated that

the Jeep was driven by Premlal Suna (R-1, dead). At the extreme end of the front seat was sitting accused Tikaram Agrawala (R-8, dead). He has further stated that in between R-1 and R-8, two more persons were sitting on the front seat but he could not identify them. He has further stated that when the Jeep proceeded towards Titilagarh Road, he saw accused Dhobai Podh (R-3), Gunanidhi Ghasi (R-4, dead), Jagnya Puruseth (R-2, dead), Sugyan Sandh (R-6, dead) and Prafulla Bhoi (R-5, dead) were sitting on the backside of the Jeep.

Thus, out of the three surviving respondents, P.W.1 has named only respondent no.3 Dhobai Podh to be present in the Jeep at the time of occurrence and sitting on the backside of the Jeep alongwith respondents nos. 2, 4, 5 and 6 (all dead) and respondent no.8 (dead) to be on the front seat.

(ii) P.W.12 has stated that when the Jeep crossed him, he saw that it was driven by accused Premlal Suna (R-1, dead) and he could identify that accused Tikaram Agrawalla (R-8, dead), Prasanna Kumar Pal (R-7) and Artatrana Singdeo (R-9) were sitting on the front side of the Jeep. He has further stated that he could identify the persons who were sitting on the front side on the Jeep as he had known them earlier.

Thus, out of the three surviving respondents, P.W.12 has named respondent no.7 Prasanna Kumar Pal and respondent no.9 Artatrana Singdeo to be present in the Jeep and sitting on the front side of the Jeep alongwith respondents nos. 1 and 8 (both dead).

(iii) P.W.18 has stated that the Jeep was driven by accused Premlal Suna (R-1, dead) and in the front seat accused Artatrana Singhdeo (R-9), Prasanna Kumar Pal (R-7) and Tikaram Agrawal (R-8, dead) were sitting. He has further stated that on the back seat of the Jeep, accused Dhobei Podh (R-3), Jagnya Puruseth (R-2, dead), Gunanidhi Ghasi (R-4, dead) and two to three other persons were sitting. P.W.18 has stated the names of these persons on number of occasions.

Thus, out of the three surviving respondents, P.W.18 has named respondent no.7 Prasanna Kumar Pal and respondent no.9 Artatrana Singhdeo to be present in the Jeep and sitting on the front seat of the Jeep alongwith respondents nos. 1 and 8 (both dead) and respondent no.3 sitting on the back seat of the Jeep alongwith respondents nos. 2 and 4 (both dead).

Analysing the evidence of P.Ws.1, 12 and 18, we find that that there was sufficient source of light at the spot to identify the culprits. The fact that the accused persons were closely known to these witnesses and they were moving in an open Jeep, there would not have been any identification problem. It appears that the identification of respondents no.3, 7 and 9 are not based on single identification but each of them has been named by two eye witnesses. We are of the view that from such evidence, it is clear that at the time of occurrence the respondents no.7 and 9 were sitting in the front seat of the Jeep alongwith respondents nos. 1 and 8 (both dead) and respondent no.3 was sitting on the back seat of the Jeep alongwith respondents nos. 2, 4, 5 and 6 (all dead). The finding of the learned trial Court that the identification of the accused persons in the Jeep at the material time could not have been possible is fallacious and based on speculation.

Thus the prosecution has successfully established the identity of all these three respondents i.e. respondents no.3, 7 and 9 to be the occupants of the Jeep M.O.X at the relevant time alongwith other six respondents (all dead) and further established that being the members of an unlawful assembly and in prosecution of their common object, they committed murder of the deceased firstly by dashing the Jeep against the deceased while he was riding the bicycle and then after he fell down on the ground, in bringing the Jeep by reverse gear and running over the deceased as a result of which he succumbed to the injuries at the spot.

Principle in appeal against acquittal

17. It is the settled principle of law as held in the case of **Main Pal and Anr. –v- State of Haryana and Ors. reported in AIR 2004 SC 2158** that there is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. As a matter of fact, in an appeal against acquittal, the High Court as the court of first appeal is obligated to go into greater detail of the evidence to see whether any miscarriage has resulted from the order of acquittal, though has to act with great circumspection and utmost care before ordering the reversal of an acquittal. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount

consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not.

In the case of **Basappa -v- State of Karnataka reported in (2014) 2 Supreme Court Cases (Cri) 497**, it is held that the exercise of the power under section 378 Cr.P.C. by the court is to prevent failure of justice or miscarriage of justice. There is miscarriage of justice if an innocent person is convicted and if the guilty let scot-free. If the judgment of the trial Court is based on no material and it suffers from any legal infirmity in the sense that there was non-consideration or mis-appreciation of the evidence on record, only in such circumstances, reversal of acquittal by the High Court would be justified.

In case of **Chandrappa and Ors. -Vs.- State of Karnataka reported in (2007) 2 Supreme Court cases (Criminal) 325,** it is held as follows:-

> "42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge:
>
> (1) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court".

Thus there can be no limitation on our part as an appellate court to review the entire evidence upon which the order of acquittal has been passed and to come to our own conclusion and review the trial Court's conclusion on both facts as well as law.

18. Keeping the ratio laid down by the Hon'ble Supreme Court in the matter of interference in case of appeal against acquittal, we analysed the evidence on record with all care and caution and after deep scrutiny, we are of the view that the conclusions arrived at by the learned trial Court are not possible and such conclusions are perverse, against the weight of evidence, quite unreasonable, palpably wrong, manifestly erroneous and suffers from misreading of evidence. We are quite conscious of the fact that the order of acquittal was passed on 30.06.1980 and out of the nine respondents, six respondents are already dead and three surviving respondents are septuagenarians but merely because of delay in adjudicating the appeal even though it is pending before this Court since 1984 after remand by the Hon'ble Supreme Court in 1983, the same cannot be a ground not to interfere with the illegal order of acquittal. In case of **Shyam Babu -V- State of U.P. reported in AIR 2012 SC 3311**, it is held that the Limitation Act, 1963 does not apply to criminal proceedings unless there is express and specific provision to that effect. It is also settled law that a criminal offence is considered as a wrong against the State and the Society even though it is committed against an individual.

We are satisfied that there has been flagrant miscarriage of justice by pronouncing the order of acquittal substantially and compelling reasons are there to interfere with the conclusions arrived at by the trial Court and

therefore in order to prevent miscarriage of justice, the finding of acquittal should be disturbed.

19. In view of what we have found from the evidence and our analysis leads us to conclude that the prosecution has successfully anointed to the guilt of the accused-respondents for the charge under sections 302/149 IPC and therefore, we do not find any viable reason to absolve respondent Nos.3, 7 and 9 who are only surviving of the aforesaid offences. Prosecution has successfully brought home their guilt without any doubt and learned trial Judge not only erred but also misread the evidence and gave undue benefit to the respondents while acquitting them and therefore in our view the impugned judgment of acquittal qua respondent No.3 Dhobai Podh, respondent No.7 Prasanna Kumar Pal and respondent No.9 Artatrana Singh Deo deserves to be set aside and is hereby set aside and they are found guilty of the offence under sections 302/149 IPC.

Adverting to the question of sentence, it is indisputable that occurrence had occurred four decades ago. The respondents are septuagenarians. It is not one of the rarest of rare cases which falls in the category to impose death penalty on the accused-respondents. There are very mini-mollifying circumstances, which need not be recorded as we are of the opinion that the minimum statutory possible sentence should be awarded to the accused-respondents and therefore we hereby sentence to each of the accused-respondents i.e. respondent No.3 Dhobai Podh, respondent No.7 Prasanna Kumar Pal and respondent No.9 Artatrana Singh Deo to the minimum possible sentence of life imprisonment with fine of Rs.5000/- and in default of payment of fine to serve additional imprisonment of one year.

The respondent No.3 Dhobai Podh, respondent No.7 Prasanna Kumar Pal and respondent No.9 Artatrana Singh Deo are on bail by virtue of the order of this Court dated 6.2.1985. The bail bonds furnished by the respondents are cancelled. They are directed to be arrested forthwith and lodge in jail to serve out the sentence awarded hereinabove.

Let a copy of the judgment be communicated to the trial Judge forthwith for compliance, who is directed to report the compliance of the order within a period of two weeks from today. The appeal is allowed as above.

Appeal allowed.

2015 (II) ILR - CUT- 905

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

W.P.(C) NO. 3537 OF 2012

SURESH CHANDRA MISHRA ……..Petitioner

.Vrs.

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

BIHAR AND ODISHA EXCISE ACT, 1915 – S.26 (2)

Temporary closure of Arisol C.S. Shop from 09.6.2010 to 30.3.2011 by the Collector – Writ petition filed for a direction to O.P. Nos. 1 & 3 to return the consideration money and the MGQ duty paid by the petitioner for the above period – Admittedly the site, where the petitioner was operating his Shop for the last six years was an unobjectionable site – Due to public agitation direction issued for such closure U/s. 26(2) of the Act and to relocate the Shop room which was done w.e.f. 31.3.2011 – Held, direction issued to O.P. Nos. 1 & 3 to effect refund or adjust the amount deposited against any future dues of the petitioner who is continuing his excise license under the state.

(Paras 6,7,8)

Case Laws Relied on :-

1. 86 (1998) CLT, 637 : Krushna Ch. Sahu & Anr. -V- State of Orissa & Ors.

For Petitioner : M/s. Achyutananda Routray, U.R.Bastia, B.N.Swarnakar & Mrs. M.Routray

For Opp.Parties : Mr. B.Bhuyan (Addl. Govt. Adv.)

Date of hearing : 03.08.2015

Date of judgment : 03.08.2015

JUDGMENT

I. MAHANTY, J.

The petitioner who is a licensee in respect of Arisol C.S. shop has filed the present writ application with a prayer to direct the opposite parties 1 and 3 to return the consideration money and the MGQ duty amount paid by him for the period of closure of the shop from 9.6.2010 to 30.03.2011, or in the alternative, to adjust the aforesaid amount refundable to him towards his excise dues for operating Arisol C.S. shop at Manatina.

2. The admitted facts in the present case are that the petitioner has been a licensee for Arisol C.S. shop since 2005 and his license was renewed from time to time at the self-same location till 17.5.2010 where the Collector, Puri, apprehending law and order problem in that area, directed temporary closure and thereafter, since the law and order situation continued due to agitation and the "Rasta Roka" etc. by the local residents, by Order dated 9.6.2010 under Annexure-2 directed that the C.S. Shop is hereby closed from the said date, under Section 26(2) of the Bihar & Odisha Excise Act until further orders. This order remained in force till 27.8.2010 under Annexure-3 wherein the proposal for shifting of the petitioner's shop to a location at Mangalpur was rejected and the petitioner was directed to locate another unobjectionable site at Delanga Block area. Thereafter, the petitioner took steps to locate an unobjectionable site in Delang Block and the said site was duly approved by the Excise Commissioner, Odisha under cover of letter dated 28.3.2011 and communicated to the licensee by Collector, Puri vide letter dated 30.3.2011. Thereafter, the petitioner re-started his operation at the re-located site i.e. at Manatina w.e.f. 31.3.2011.

3. Mr.Routray, learned counsel for the petitioner submits that the petitioner had to deposit the consideration money as well as the MGQ for the closure period under circumstantial compulsion in order to enable him to obtain the license of the C.S.shop at the re-located site w.e.f. 31.3.2011. He further submits that, had the petitioner not deposited the demanded amount, the question of renewal of his licence for the re-located site, would not have been possible. Hence, the said payment was made under protest and refund/adjustment of the same is the subject matter to be adjudicated in the present writ application.

4. The counter affidavit has come to be filed by the Inspector of Excise, Office of Superintendent of Excise, Puri on behalf of opposite parties. On perusal of the same, it appears that the State also admit that due to the public agitation against Arisol C.S. Shop, the district administration was compelled to go for temporary closure under Section 26(2) of the B & O Excise Act and the said order of temporary closure continued from 09.06.2010 till 30.03.2011. Therefore, the question that arises for consideration herein as to whether the petitioner's claim for refund/adjustment of the consideration money and MGQ deposited by him for the closure period, is justified under law or not ?

In this respect, learned counsel for the petitioner placed reliance on the judgment of this Court in the case of Krushna Chandra Sahu and another v. State of Orissa and others, 86 (1998) CLT, 637 wherein this Court considering the facts in the said case came to hold as follows:

> "7. xx xx xx Once the Government finds that it is not possible to open shop in the proposed area covered by the relevant notification, we cannot hold that the equity stands against the petitioners who bonafidely participated in the auction and deposited the amount vide Annexure-1. If, law and order situation do not permit opening of such a liquor in the entire village and that duty and obligation have not been carried by the opposite party No.1 or is strongly opposed to by them, the petitioners cannot be blamed and the State Government who is supposed to act fairly and equitably, have to refund the licence fee collected from the petitioner."

5. Mr.Bhuyan, learned Addl. Govt. Advocate for the State fairly submits that on the factual aspects of this case, there appears to be no dispute. However, he places reliance on the averment made in Para-9 of the counter affidavit, the same is quoted hereinbelow:

> "Once a shop is settled in favour of an individual, it becomes the responsibility of the licensee in entirety to see that the shop is opened and consequently, he submits that the petitioner is liable under the contract entered into with the State for both the consideration money as well as the MGQ for the period even if the shop remains closed."

6. For adjudicating the aforesaid issue, Section 26(2) of the B & O Excise Act, 1915 is hereby extracted:

> "Section 26 - Power to close shops temporarily
>
> (2) If any riot or unlawful assembly is apprehended or occurs in the vicinity of any shop in which any [Substituted by A.L.O. 1937.] [intoxicant] is sold, any Magistrate or any police officer above the rank of constable, who is present, may require such shop to be kept closed for such period as he may think necessary."

On a plain reading of the aforesaid provision of law, it is clear that authorities of the State have the power to close the shop temporarily and the licensee is bound statutorily to abide by such directions. In the present case

and the facts situation narrated hereinabove, it is clear therefrom that the Collector, Puri, in exercise of power under Section 26(2) of B & O Act, 1915 directed temporary closure of the shop until further orders. Such order continued to remain in operation from 9.6.2010 till 30.3.2011. Therefore, it cannot be contended or argued that the petitioner, on his own volition, ceased operation of the shop. On the contrary, it is clear that the petitioner was duty bound to effect closure of the shop though temporarily for the duration during which, direction under Section 26(2) of the B & O Act remained in operation.

7. Another important fact is to be noted hereunder is that the petitioner was operating his C.S. license at Arisol since 2005 right till the date of temporary closure i.e. 09.06.2010. It is admitted by the learned counsel for the State that the site where he was operating his C.S.shop was not an unobjectionable site as contemplated under the B & O Act. In other words, it is the admitted fact that the site, where the petitioner was operating his shop originally for over a period of six years, was an unobjectionable site. However, due to public agitation by the local residents, the District Administration sought to exercise its authority under Section 26(2) of the B & O Act and directed temporary closure and also directed the petitioner to re-locate the shop room. Such re-location has taken place w.e.f. 31.3.2011. It is also a statutory duty for the licensee to abide by the administrations' direction in the larger public interest. But, in the fact situation of the present case, it cannot be stated that the petitioner's original shop has been located at an objectionable site and the petitioner had to lawfully comply with the direction issued under Section 26(2) of the B & O Act. Therefore, we are of the clear view that the Judgment rendered by the Division Bench of this Court in the case of *Krushna Chandra Sahu* (supra), equity in the present case, lies in favour of the petitioner and against the State.

8. As a consequence of the aforesaid finding, we are of the clear and categoric view that there has been no omission on the part of the petitioner to comply with the direction of the State authority and on the contrary, while complying with the direction of the State authority, insofar as temporary closure is concerned, no penal action nor penalty or claim for consideration money/MGQ can be levied on the petitioner though he may be a licensee under the State Excise Act.

Accordingly, we direct Opposite Parties 1 and 3 to effect refund or adjust the amount deposited by the petitioner as detailed under Annexure-4

against any future dues of the petitioner who it is stated to be continuing his excise license under the State.

9. With the aforesaid observation and direction, the writ application is allowed.

Writ petition allowed.

2015 (II) ILR - CUT-909

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

W.P.(C) NO. 17017 OF 2014

ODISHA POWER GENERATION CORPORATION LTD. .....Petitioner

.Vrs.

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

(A) ODISHA VAT ACT, 2004 – S.2(28)

Whether generation of electricity is a manufacturing activity ? Held, yes. (Para 19)

(B) ODISHA VAT ACT, 2004 – S.2(28)

Whether electricity is an article / a good as referred to in section 2(28) of the Act ? Held, yes. (Para 21)

(C) ODISHA ENTRY TAX RULES, 1999 – RULE 3(4)

Whether coal is a raw material for generation of electricity in thermal power plant ? Held, yes. (Para 30)

(D) ODISHA ENTRY TAX RULES, 1999 – RULE 3(4)

Whether the petitioner is entitled to avail concessional rate of entry tax on coal in terms of Rule 3(4) of the above Rules ? Held, yes. (Para 49)

(E) WORDS AND PHRASES – "Obiter dicta" – Meaning of – The expression "Obiter" means "by the way", "in passing", "incidentally".

Obiter dictum is the expression of opinion stated in the judgement by a judge which is unnecessary of a particular case – Obiter dicta is an observation which is either not necessary for the decision of the case or does not relate to the material facts in issue – Held, the assessing authority is not competent to declare any observation/finding of the High Court as obiter dicta. (Paras 34, 37)

Case Laws Referred to :-

1. (2012) 56 VST 50 : Bhushan Power and Steel Limited Vs. State of Orissa
2. 1990 77 STC 282 (SC) : Collector of Central Excise, New Delhi vs. Ballarapur Industries Ltd..
3. (1989) 42 ELT 552 (Ori) : Orient Paper & Industries Ltd. vs. Orissa State Electricity Board
4. (2004) 134 STC 24 (SC) : Union of India vs. Ahmedabad Electricity Co. Ltd. and others.
5. (1996) 4 SCC 596 at page 607 : S.Gopal Reddy Vs. State of A.P.
6. 1980 (Supp) SCC 174 at page 176 : Dy. CST Vs. Pio Food Packers
7. (1988) 2 SCC 348 : Collector of Central Excise, Bombay-II Vs. M/s. Kiran Spinning Mills.
8. (1988) Suppl. SCC 239 : Collector of Central Excise, Madras Vs. M/s. Kutty Flush Doors & Furniture Co. (P) Ltd.
9. AIR 1991 (SC) 2222 : Collector of Central Excise, Jaipur Vrs. Rajasthan State Chemical Works, Deedwana, Rajasthan.
10. (1969) 1 SCC 200 at page 204 : Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur.
11. (2007) 7 SCC 490 at page 495 : Commissioner of Central Excise Vs. Damnet Chemicals (P) Ltd.
12. (2007) 4 SCC 136 at page 139 : Commissioner, Sales Tax, U.P. Vs. Bharat Bone Mill.
13. AIR 1962 SC 1893 : East India Commercial Co. Ltd., Calcutta and Another vs. Collector of Customs, Calcutta.
14. (1973) 1 SCC 446 : Sri Baradakant Mishra vs. Bhimsen Dixit.
15. AIR 1992 SC 711 : Union of India and others vs. Kamlakshi Finance Corporation Ltd.

For Petitioner : Mr. N.Venkataraman (Sr. Adv.),
M/s. Satyajit Mohanty, D.P.Sahu,
S.Das & D.K.Mohanty

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

Date of Judgment : 30.03.2015

JUDGMENT

B.N. MAHAPATRA, J.

Petitioner-Odisha Power Generation Corporation Ltd. in the present writ petition challenges the order of assessment dated 03.05.2014 (Annexure-6 series) passed by the Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur (fort short, "Assessing Authority") under Section 9C of the Orissa Entry Tax Act, 1999 (for short, 'OET Act') for the period 01.04.2011 to 31.03.2013 levying additional entry tax at the rate of 0.5% amounting to Rs.2,40,81,536/- and penalty amounting to Rs.4,81,63,072/- on coal used by the petitioner-Company as raw material for generation of electricity on the ground that such levy is illegal, arbitrary and barred by limitation and outcome of non-application of mind, without jurisdiction and contrary to the provisions of OET Act.

2. Petitioner's case in a nut-shell is that it is a Government of Odisha Undertaking incorporated under the Companies Act, 1956 and a joint venture of Government of Odisha and AES of USA having main objects to establish, operate and maintain power generating stations and tielines, sub-stations and main transmission line connected therewith. In other words, the petitioner is engaged in business of generation of electricity and distribution thereof in the State of Odisha. Ib Thermal Power Station (ITPS) is one of the thermal power generation units of the petitioner-Company situated at Ib Valley area in the district of Jharsuguda, Odisha. The petitioner has also set up mini hydel projects for furtherance of its business to achieve its objects. It is registered under the Orissa Value Added Tax Act, 2004 (for short 'OVAT Act') and OET Act and in the said registration certificate it has been authorized to purchase coal as raw-material for generation of electricity. The petitioner having thermal power plant is engaged in manufacture and distribution of electricity. It uses coal as primary/only raw-material in its thermal power plant for manufacture of electricity. Petitioner purchases coal for use as raw-material from Mahanadi Coal Fields Ltd. in Lakhanpur area. In thermal power plant, chemical energy in coal gets converted to heat energy which in

turn gets converted to mechanical energy which ultimately gets converted to electrical energy.

Further case of the petitioner is that coal being raw-material in manufacture of electricity, it is entitled to the benefit of concessional levy of entry tax in terms of Rule 3 of OET Rules. The petitioner brings coal into local area for manufacture of electricity and has also furnished declaration in Form- E15 to its seller. During the period of assessment, the petitioner purchased coal for consumption in its power plant as raw-material at a cost of Rs.482,63,03,305.63 and paid entry tax thereon at the rate of 0.5% amounting to Rs.2,41,31,516.52. On the basis of audit visit report, the Assessing Authority passed the impugned assessment order denying the concessional rate of entry tax on coal without affording reasonable opportunity of hearing to the petitioner and without considering written note of submissions in its proper perspective. Hence, the present writ petition.

3. Mr.N.Venkataraman, learned Senior Advocate appearing for the petitioner submitted that coal is primary and important raw-material for generation of electricity as held by this Court in the case of ***Bhushan Power and Steel Limited Vs. State of Orissa***, (2012) 56 VST 50 (Orissa). Hence, coal is exigible to entry tax at concessional rate in terms of Rule 3(4) of OET Rules.

The Assessing Authority has grossly failed to appreciate the judgment rendered by this Court in *Bhushan Power and Steel Limited (supra)* including the other judgment in NALCO in [W.P.(C) No.1597 and 1686 of 2012] relied upon by the petitioner before the Assessing Authority. Decision of this Court in *Bhushan Power and Steel Limited (supra)* holding that coal is a raw-material for the purpose of generating electricity has not been followed by the Assessing Authority on the ground that such finding of this Court is a cursory remark, i.e., Obiter Dicta and the said judgment having been challenged before the Hon'ble Supreme Court, ratio decided in that case has no application to the present case. The above reasons given by the learned Assessing Authority for not following the decision of this Court is impermissible in law.

4. Coal has been mentioned as an item required to be purchased for generation of electricity in the registration certificate and the petitioner during relevant time was purchasing coal from MCL furnishing declaration in Form E-15 in terms of Rule 3(5) of OET Rules stating therein that coal purchased shall be used for production of finished product, i.e., electricity.

5. It was further submitted that 'manufacture' means bringing into existence a new substance. In other words, manufacture implies that when a change takes place a new and distinct article comes into existence known as a commercial product, which can be no longer regarded as the original commodity. Any process or processes creating something else having a distinct name, character and use would be manufacture. In the instant case, coal is used by the petitioner at its thermal power station at IB Valley area as a raw-material for generation of electricity by which process coal loses its characteristics and is transformed into electricity which is a finished product. Hence, the finding of opposite party No.2 in the impugned assessment order that generation of electricity cannot be equated with manufacturing activity is illegal and unsustainable.

6. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Collector of Central Excise, New Delhi vs. Ballarapur Industries Ltd., [1990] 77 STC 282 (SC),* it was submitted that coal is a raw material for production of electricity. Further relying upon the judgment of this Court in the case of *Orient Paper & Industries Ltd. vs. Orissa State Electricity Board, (1989) 42 ELT 552 (Ori),* Mr. Venkatraman submitted that electricity is a good and generation of electricity involves manufacturing activities.

7. Mr.R.P.Kar, learned Standing Counsel appearing on behalf of the Revenue while supporting the order of assessment submitted that the impugned order of assessment has been passed duly complying with the statutory provisions. It was submitted that 'electricity' is not an article/good which is required to be produced in terms of Rule 2(1)(c) of OET Rules. It was further argued that a joint reading of Section 26 of the OET Act and Rule 3 of the OET Rules makes it clear that only when goods purchased as raw material and used in manufacturing of goods for sale i.e. goods which go into composition of the finished product will be eligible for concessional rate of entry tax as provided in sub-rule (4) of Rule 3 of the OET Rules. Referring to the counter affidavit filed in another connected case, Mr. Kar submitted that in the present case, since generation of electricity is not a manufacturing activity and coal is not a raw material for generation of electricity, the petitioner is not entitled to avail the concessional rate of entry tax in terms of Rule 3(4) of OET Rules. In support of his contention, Mr. Kar relied upon the decision of the Hon'ble Supreme Court in the case of *Union of India vs. Ahmedabad Electricity Co. Ltd. and others, (2004) 134 STC 24 (SC).*

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

(i) Whether generation of electricity is a manufacturing activity?

(ii) Whether electricity is an article/a good as referred to in Section 2(28) of the OVAT Act which defines the expression "manufacture"?

(iii) Whether coal is a raw-material for generation of electricity in thermal power station?

(iv) If the answers to question (i), (ii) and (iii) are affirmative whether the petitioner is entitled to avail concessional rate of entry tax on coal in terms of Rule 3(4) of the OET Rules?

9. Question No.(i) is whether generation of electricity is a manufacturing activity.

The expression 'manufacture' is not defined in the OET Act. However, Rule 2(1)(c) of the OET Rules provides that "manufacture" with all its grammatical variations and cognate expressions, means a dealer or a person in the business of manufacture as defined in the Orissa Value Added Tax Act, 2004.

10. Section 2(q) of the OET Act provides as follows:

> "2(q) Words and expressions used in OET Act and not defined in the said Act, but defined in the OVAT Act shall have the same meaning respectively assigned to them in that Act."

11. Section 2(28) of the OVAT Act defines "manufacture" as under:

> "2(28) "Manufacture" means any activity that brings out a change in an article or articles as a result of some process, treatment, labour and results in transaction into a new and different article so understood in commercial parlance having a distinct name, character and use, but does not include such activity or manufacture as may be notified."

12. It may be relevant to mention here that law is well-settled that where an expression under the Act has been defined, the said expression will have the same meaning and it is not necessary to find out what is the general meaning of the expression.

13. The Hon'ble Supreme Court in the case of ***S.Gopal Reddy Vs. State of A.P.,*** (1996) 4 SCC 596 at page 607 held that where definition has been given in a statute itself, it is neither proper nor desirable to look to the dictionaries etc. to find out the meaning of expression. The definition given in the statute is the determinative factor.

14. The Hon'ble Supreme Court in the case of ***Dy. CST Vs. Pio Food Packers***, 1980 (Supp) SCC 174 at page 176 held that only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place.

15. The Hon'ble Supreme Court in ***Collector of Central Excise, Bombay-II Vs. M/s. Kiran Spinning Mills***, (1988) 2 SCC 348 at page 355 held as follows:

> "It is true that etymological word "manufacture" properly construed would doubtless cover the transformation but the question is whether that transformation brings about fundamental change, a new substance is brought into existence or a new different article having distinctive name, character or use results from a particular process or a particular activity."

16. In ***Collector of Central Excise, Madras Vs. M/s. Kutty Flush Doors & Furniture Co. (P) Ltd.,*** (1988) Suppl. SCC 239 at page 240, the Hon'ble Supreme Court held as follows:

> "3. It may be worthwhile to note that "manufacture" implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more was necessary and there must be transformation, a new and different article must emerge having a distinct name, character or use."

17. The Hon'ble Supreme Court in the case of ***Collector of Central Excise, Jaipur Vrs. Rajasthan State Chemical Works, Deedwana, Rajasthan,*** AIR 1991 (SC) 2222 held as follows:-

> "….Process in manufacture or in relation to manufacture implies not only the production but the various stages through which the raw

> material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to (*sic* that the) manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process manufacture or processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture."

18. This Court in the case of ***Orient Paper & Industries Ltd.*** *(supra)* while interpreting Section 2(b) of the Central Excise and Salt Act, 1944 has held that generation of electricity for the purpose of Central Excise and Salt Act is "manufacture or production of electricity", since the term "manufacture or production" is to be given a wide meaning.

19. In view of the definition of 'manufacture' as provided in Section 2(28) of OVAT Act read with Rule 2(1)(c) of the OET Rules and Section 2(q) of the OET Act and all the above judicial pronouncements of the Hon'ble Supreme Court and High Court, we are of the considered view that the activity of generating electricity in thermal power plant by using coal would qualify as a manufacturing activity.

20. Question No.(ii) is as to whether electricity is an article/a good as referred to in Section 2(28) of the OVAT Act which defines the expression "manufacture".

We need not retain ourselves for a longer period to adjudicate this question in view of the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur,*** (1969) 1 SCC 200 at page 204, wherein it has been held as under:

> "What has essentially to be seen is whether electric energy is "goods" within the meaning of the relevant provisions of the two Acts. The definition in terms is very wide according to which "goods" means all kinds of movable property. Then certain items are specifically excluded or included and electric energy or electricity is not one of them. The term "movable property" when considered with reference to "goods" as defined for the purposes of sales tax cannot be taken in

> a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property. It is needless to repeat that it is capable of abstraction, consumption and use which, if done dishonestly, would attract punishment under s.39 of the Indian Electricity Act, 1910. It can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other movable property. Even in Banjamin on Sale, 8th Edn., reference has been made at page 171 to County of Durham Electrical, etc., Co. v. Inland Revenue(1) in which electric energy was assumed to be "goods". If there can be sale and purchase of electric energy like any other movable object we see no difficulty in holding that electric energy was intended to be covered by the definition of "goods" in the two Acts. If that had not been the case there was no necessity of specifically exempting sale of electric energy from the payment of sales tax by making a provision for it in the Schedules to the two Acts. It cannot be denied that the Electricity Board carried on principally the business of selling, supplying or distributing electric energy. It would therefore clearly fall within the meaning of the expression "dealer" in the two Acts."

[Also see *State of A.P. vs. National Thermal Power Corporation Ltd. and Others, (2002) 127 STC 280 (SC)]*

21. In view of the above decisions of the Hon'ble Supreme Court, electricity is an article as referred to in Section 2(28) of the OVAT Act read with Rule 2(1)(c) of OET Rules which define 'manufacture'.

22. Question No.(iii) is whether coal is a raw-material for generation of electricity in thermal power plant.

The processes that are involved in manufacture/generation/ production of electricity as narrated in the written submission filed by the petitioner before the Assessing Authority and not disputed by the opposite party-Department, are as follows:-

(a) Coal is the primary material for power generation;

(b) In a Thermal Power Plant chemical energy available in Coal is converted into electricity;

(c) Coal is fed into a boiler along with water and air;

(d) Coal is fired to heat the water and resulting in generation of steam;

(e) Chemical energy in coal gets converted into heat energy and the same is carried by steam which acts as a medium to the Turbine;

(f) The high pressure steam impinges and expands across a number of blades in the turbine and thereby rotating the turbine;

(g) In the process heat energy carried through steam gets converted into mechanical energy;

(h) Mechanical energy gets converted to electrical energy based on Faradey's principle of electromagnetic induction.

(i) In other words, chemical energy in coal gets converted to heat energy which in turn gets converted to mechanical energy which ultimately gets converted to electrical energy.

23. The above process clearly demonstrates that coal is the primary raw-material for generation/production of electricity in thermal power plant and without coal, no electricity can be produced/generated/ manufactured.

24. In ***Ballarapur Industries Ltd.,*** *(supra),* the Hon'ble Supreme Court held as under:

> "5. The question, in the ultimate analysis, is whether the input of Sodium Sulphate in the manufacture of paper would cease to be a "Raw-Material" by reason alone of the fact that in the course of the chemical reactions this ingredient is consumed and burnt-up. The expression "Raw- Material" is not a defined term. The meaning to be given to it is the ordinary and well-accepted connotation in the common parlance of those who deal with the matter.
>
> The ingredients used in the chemical technology of manufacture of any end-product might comprise, amongst others, of those which may retain their dominant individual identity and character throughout the process and also in the end-product; those which as a result of interaction with other chemicals or ingredients, might themselves undergo chemical or qualitative changes and in such altered form find themselves in the end-product; those which, like catalytic agents, while influencing and accelerating the chemical reactions, however, may themselves remain uninfluenced and unaltered and remain independent of and outside the end-products and those, as here,

> which might be burnt-up or consumed in the chemical reactions. The question in the present case is whether the ingredients of the last mentioned class qualify themselves as and are eligible to be called "Raw Material" for the end-product. One of the valid tests, in our opinion, could be that the ingredient should be so essential for the chemical processes culminating in the emergence of the desired end-product, that having regard to its importance in and indispensability for the process, it could be said that its very consumption on burning-up is its quality and value as raw-material. In such a case, the relevant test is not its absence in the end product, but the dependance of the end product for its essential presence at the delivery and of the process. The ingredient goes into the making of the end-product in the sense that without its absence the presence of the end-product, as such, is rendered impossible. This quality should coalesce with the requirement that its utilisation is in the manufacturing process as distinct from the manufacturing apparatus."

25. When the processes that are involved in manufacturing/ generation/production of electricity in a thermal plant as narrated in the preceding paragraph is considered in the light of the above observation of the Hon'ble Supreme Court, it can safely be concluded that coal is a raw material for production/generation of electricity.

26. This Court in ***Bhushan Power and Steel Limited*** *(supra)* held that coal is a raw material for the purpose of generating electricity.

27. Apart from the above, perusal of the impugned assessment order reveals that before the Assessing Authority, the petitioner produced the expert opinion obtained from IIT, Kharagpur, wherein, it has been opined that coal is a raw material which results in the emergence of electricity. The relevant portion of the said report is reproduced herein below:-

> "Coal is the prime material for thermal power plants converting the embedded chemical energy through various stages and finally to electrical energy. The first conversion of energy takes place by burning Coal as raw material which produces steam as a result of boiling water in the boiler. Thereafter, the stage is the Thermo dynamic process that produces heat energy. In the final stage the steam produced as a result of heat energy delivered to the turbine rotates the generator, rotor to produce electrical energy based on Faradyne's Principles of Electro Magnetic Induction…."

Admittedly, the Department has not produced any acceptable evidence in rebuttal. Therefore, the expert opinion given by the IIT, Kharagpur has the binding force on the Department.

28. The Hon'ble Supreme Court in the case of ***Commissioner of Central Excise Vs. Damnet Chemicals (P) Ltd.,*** (2007) 7 SCC 490 at page 495 has held as under:-

> "It is well settled and needs no restatement at our hands that the test reports given by the Chemical Examiner are binding upon the Department in the absence of any other acceptable evidence produced by it in rebuttal. In the present case, the Department has neither produced any evidence to rebut the reports of the Chemical Examiner nor impeached the findings of the test reports."

29. The Hon'ble Supreme Court in the case of ***Commissioner, Sales Tax, U.P. Vs. Bharat Bone Mill***, (2007) 4 SCC 136, at page 139 held as under:-

> 11. Moreover, it is well-known that the question as to whether a commodity would be exigible to sales tax or not must be considered having regard to its identity in common law parlance. If, applying the said test, it is to be borne in mind that if one commodity is not ordinarily known as another commodity; normally, the provisions of taxing statute in respect of former commodity which comes within the purview of the taxing statute would be allowed to operate. In any event, such a question must be determined having regard to the expert opinion in the field. We have noticed hereinabove the difference between 'bone meal' and 'crushed bone'. Different utilities of the said items has also been noticed by the Allahabad High Court itself. The High Court or for that matter, the Tribunal did not have the advantage of opinion of the expert to the effect as to whether crushed bones can be used only for the purpose of fertilizer or whether crushed bones are sold to the farmers for use thereof only as fertilizer."

30. In view of the above, we are of the considered opinion that coal is a raw material for production of electricity in thermal plant.

The facts and the issues involved in *Ahmedabad Electricity Co. Ltd. and others (supra)* are completely different from the present case and therefore, it is of no assistance to the Department.

31. Now, let us examine whether the reasons given by the learned Assessing Authority for disallowing the petitioner's claim to avail concessional levy of entry tax in terms of Rule 3(4) of the OET Rules are legally valid.

The reasons assigned by the Assessing Authority to disallow the petitioner's above claim are as follows:

(a) coal generates steam and steam so generated rotates the turbine and in the process of rotation of turbine electricity is generated. Therefore, coal does not transform into electricity;

(b) Though coal contains chemical energy that does not convert to electric energy;

(c) In absence of any standard input and output ratio between coal and generation of electricity, it cannot be said that coal is a raw material for consumption of electricity;

(d) In the process of generation of hydro electricity, water remains with all its ingredients even after completion of process of generation of hydro electricity. Thus, neither water nor coal transforms to hydro electricity and thermal power. To strengthening his view, the Assessing Authority further observed that does the wind is a raw material for non-conventional energy like wind energy, similarly, what is the raw material for solar energy?

(e) Generation of thermal power being not manufacturing activity, the dealer-company cannot be considered to be a manufacturer and as such cannot avail the privilege of concessional rate of entry tax granted under Rule 3(4) of the OET Rules;

(f) Being burnt coal undergoes a change but every change is not a manufacture as held by the Hon'ble Supreme Court in the case of *Kutty Flush Doors and Furniture Co*.(supra), hence, although coal undergoes the change, yet it cannot be said that it transforms into a new article and hence, it does not satisfy the condition of transformation from one article or another as envisaged under Rule 3(4) of the OET Rules;

(g) The contention of the dealer that the coal is a raw material for the purpose of generating electricity as held by this Court in *Bhusan Power and Steel Limited* (supra) is not a settled ratio and it has no application

to the case at hand since in that case the question before the High Court was as to whether coal is a raw material for production of iron and steel and the case was not certainly determined or adjudicated as to whether the coal is a raw material for generation of electricity. Therefore, the observation of the High Court that coal is a raw material for generation of electricity is a cursory remark, i.e., obiter dicta and the said judgment having been challenged in the Hon'ble Supreme Court and the matter is subjudice, the same is not a settled ratio,

32. For the following reasons, we feel it extreme difficult to accept the above reasons given by the Assessing Authority to hold that coal is not a raw material for generation/production of electricity in thermal power station and that generation of electricity is not a manufacturing activity and therefore the petitioner is not entitled to avail concessional rate of entry tax as provided under Rule 3(4) of the OET Rules.

(a) It is not the case of the Assessing Authority that without coal thermal power which is finished product in a thermal power station can be produced and therefore, coal is not a primary/principal raw material to generate/produce thermal power. On the other hand, use of coal and production of electricity in a thermal power plant is an integral process and so inextricably connected that no thermal power can be produced without use of coal;

(b) Consumption and output ratio between coal and electricity is not necessary/relevant in deciding whether coal is a raw material for generation/production of thermal power.

(c) While adjudicating as to whether coal is a raw material for generation/production of thermal power, it is irrelevant to find out whether water, wind, solar power are raw material for generation of hydro electricity, wind energy and solar energy respectively. Such questions may be adjudicated in appropriate case (s).

(d) There is no dispute over the legal proposition that every change in a processing is not manufacture as held by the Hon'ble Supreme Court in *Kutty Flush Doors & Furniture Co. (supra).* As in the present case a new and different article, i.e., electricity energy emerges which is distinct in name, character and use from coal, the above case of the Hon'ble Supreme Court supports the petitioner.

(e) While dealing with question Nos. (i) and (iii) above, we have already held for the reasons stated therein that generation of electricity is a manufacturing activity and coal is a raw material for generation/production of electricity.

33. We are shocked to notice that the learned Assessing Authority held that the observation of this Court that "coal as a raw material for generation of electricity" is a **"cursory remark, i.e., obiter dicta"** and the said judgment having been challenged in the Hon'ble Supreme Court which is subjudice, the same is not a settled ratio and therefore, the petitioner-company cannot take advantage of the said decision. In other words, the said decision is not binding on him (on the Assessing Authority).

34. At this juncture, it would be appropriate to note as to what is "obiter dicta".The expression "obiter" means "by the way"; "in passing"; "incidentally".

Obiter dictum is the expression of opinion stated in the judgment by a judge which is unnecessary of a particular case. Obiter dicta is an observation which is either not necessary for the decision of the case or does not relate to the material facts in issue.

35. Now, let us see whether the observation/finding of this Court in the case of ***Bhusan Power & Steel Ltd.*** *(supra)* that "coal is a raw material for generation of electricity" is not necessary for the decision of the case or such observation does not relate to the material facts in issue.

In *Bhusan Power & Steel case* (supra) the petitioner was engaged in manufacturing of sponge iron, billet and H.R. Coil as well as generation of power. The petitioner's claim was that coal is required to manufacture the electricity, which is, in turn, essential to run the plant for manufacturing sponge iron, billets and HR coil. Therefore, when the electricity generation is a captive arrangement and the requirement is for carrying out manufacturing activity, the electricity generation also forms part of the manufacturing activity and the raw material used in that electricity generation qualifies for availing of concessional levy of entry tax in terms of Rule 3(4) of the OET Rules. On the basis of the above contention of the petitioner, this Court held that requirement of Rule 3(4) of the OET Rules is that scheduled goods purchased must be used as raw material in manufacturing the finished product. Thus, those scheduled goods are exclusively confined to "raw

material" only used in manufacture of the finished products. The petitioner-company manufactures sponge iron, billets and HR coil and undisputedly to manufacture such finished goods the coal is not the raw material. Coal is a raw material for the purpose of generating electricity, which is, in turn essential to run the plant and for that it cannot be said that the coal is a raw material for manufacturing sponge iron, billets and HR Coil.

36. In view of the above analytical discussion of this Court, by no stretch of imagination, it can be said that the findings/observations of this Court that 'coal is a raw material for generation of electricity' are unnecessary for the decision of that case or it does not relate to the material facts in issue. Therefore, the learned Assessing Authority is wholly unjustified to hold that the observation of this Court in ***Bhusan Power and Steel Ltd. (supra)*** that "coal is a raw material for generation of electricity" is a cursory remark, i.e., obiter dicta.

37. It may be relevant to note that the Assessing Authority is not competent to declare any observation/finding of the High Court as obiter dicta.

38. Now let us see whether the decision of the High Court is of binding nature and if so to whom. Undoubtedly, there is no express provision in the Constitution like Article 141, in respect of the High Court, Tribunals within the jurisdiction of the High Court are bound to follow its judgment, but as the High Court has the power of superintendence over them under Articles 226 and 227 of the Constitution, the law declared by the High Court in the State is binding on them.

39. The Hon'ble Supreme Court in the case of ***East India Commercial Co. Ltd., Calcutta and Another vs. Collector of Customs, Calcutta, AIR 1962 SC 1893,*** held as under:

> "We therefore, hold that the law declared by the highest court in the state is binding on authorities or Tribunals under its superintendence and they cannot ignore it."

40. The Hon'ble Supreme Court in the case of ***Sri Baradakant Mishra vs. Bhimsen Dixit,*** *(1973) 1 SCC 446,* held as follows:

> "15. The conduct of the appellant in not following the previous decision of the High Court is calculated to create confusion in the administration of law. It will undermine respect for law laid down by

> the High Court and impair the Constitutional authority of the High Court. His conduct is therefore comprehended by the principles underlying the law of Contempt. The analogy of the inferior court's disobedience to the specific order of a superior court also suggests that his conduct falls within the purview of the law of Contempt. Just as the disobedience to a specific order of the Court undermines the authority and dignity of the court in a particular case, similarly the deliberate and malafide conduct of not following the law laid down in the previous decision undermines the Constitutional authority and respect of the High Court. Indeed, while the former conduct has repercussions on an individual case and on a limited number of persons, the latter conduct has a much wider and more disastrous impact. It is calculated not only to undermine the Constitutional authority and respect of the High Court, generally, but is also likely to subvert the Rule of Law and engender harassing uncertainty and confusion in the administration of law."

41. The Hon'ble Supreme Court in the case of ***Union of India and others vs. Kamlakshi Finance Corporation Ltd.,*** *AIR 1992 SC 711,* in paragraph 6 has observed as follows:

> "The High Court has, in our view, rightly criticized the conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department-in itself an objectionable phrase and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessee and chaos in administration of tax laws."

42. The Hon'ble Supreme Court in the case of ***Sri Baradakant Mishra (supra)*** held that a Subordinate Court or Tribunal/Authority refusing to follow a High Court's decision where a petition for leave to appeal to Supreme Court against that High Court decision was pending would amount to deliberate disobedience and willful disregard of the High Court and is contempt of Court. Therefore, in the case at hand the plea of the Assessing Authority with regard to not following the decision of this Court on the ground of pendency of SLP before the Hon'ble Supreme Court amounts to deliberate disobedience and willful disregard of this Court.

43. In the case of ***K.N. Agarwal vs. CIT,*** *[1991] 189 ITR 769,* while emphasizing the need of following judgments of the High Courts by the Assessing Officer, the Allahabad High Court has observed as under:

> "Indeed, the orders of the Tribunal and the High Court are binding upon the Assessing Officer and since he acts in a quasi judicial capacity, the discipline of such functioning demands that he should follow the decision of the Tribunal or the High Court, as the case may be. He cannot ignore merely on the ground that the Tribunal's order is the subject matter of revision in the High Court or the High Court's decision is under appeal before the Supreme Court. Permitting him to take such a view would introduce judicial indiscipline, which is not called for even in such cases. It would lead to a chaotic situation."

44. The Andhra Pradesh High Court in the case of ***State of A.P. vs. CTO, (1988) 169 ITR 564,*** held as under:

> "…if any authority or the Tribunal refuses to follow any decision of the High Court on the above grounds, it would be clearly guilty of committing contempt of the High Court and is liable to be proceeded against."

45. Needless to say that if the Tribunal and authorities functioning within the territorial jurisdiction of the High Court would not follow the order of the High Court that will lead to chaos. Everybody would be then seeking interpreting the law according to their own whims and fancies. In such situation, lawyers may confuse not knowing how to advise their clients. The general public would be in dilemma as to what is the correct position of law. As a result, the judiciary would lose its credibility.

46. It may be noted that it is not the case of the Assessing Authority that the decision of this court in *Bhusan Power and Steel Ltd. (supra)* has been

stayed or varied by the Hon'ble Supreme Court. Therefore, the Assessing Authority cannot refuse to follow the judgment of the High Court on the ground that a challenge has been made to the judgment of this Court in the Hon'ble Supreme Court and the same is pending. Hence, the Assessing Authority is clearly guilty and committed contempt of this Court and is liable to be proceeded against.

The Registry of this Court is directed to separately initiate a contempt proceeding against Mr. A.C. Nayak, Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur by name, who has passed the assessment order dated 03.05.2014 under Section 9C of the OET Act for the period 01.04.2011 to 31.03.2013.

47. We are afraid to notice that even though the petitioner has filed a written submission in course of the assessment proceeding as evident from the impugned assessment order relying on various statutory provisions, the Supreme Court judgments, judgments of the High Court in support of its contention, the Assessing Authority without dealing with the contention of the petitioner with reference to the judgments relied upon by it passed the assessment order raising huge tax and penalty amounting to Rs.7,22,44,608/-. Thus, the impugned order shows complete non-application of mind which ultimately amounts to judicial indiscipline and impropriety. The Assessing Authority, who is Joint Commissioner of Sales Tax, Sambalpur Range, Sambalpur, being a fairly senior officer is always expected to take note of various decisions of the Hon'ble Supreme Court/High Court placed before him by the assessee before passing any order. It may not be appropriate to say that competent and efficient Assessing Authorities are to be posted because the fate of litigants is dependent upon their proper adjudication.

48. Question No.(iv) is whether the petitioner is entitled to avail concessional rate of entry tax on coal in terms of Rule 3(4) of the OET Rules.

49. In view of our answer to question Nos.(i), (ii) and (iii) in favour of the petitioner, we are of the considered opinion that the petitioner is entitled to avail concessional rate of entry tax on coal in terms of Rule 3(4) of the OET Rules.

50. Accordingly, the impugned order of assessment dated 03.05.2014 (Annexure-6 series) passed by the Assessing Authority is quashed.

51. In the result, the writ petition is allowed, but without any order as to costs. Writ petition allowed.

2015 (II) ILR - CUT- 928

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

STREV NO. 112 OF 2009

M/S. KALANAURIA TRADING CO, KHETRAJUR ……..Petitioner

.Vrs.

STATE OF ORISSA ……Opp. Party

ODISHA SALES TAX ACT, 1947 – S.12(8)

Clandestine business – Books of account not maintained relating to purchase and sale – Suppression of gross turn over by the dealer – Intelligence Wing of the Sales Tax Department found such discrepancies – Assessing authority enhanced the turnover by 26 times – In first appeal it was reduced to 16 times – However the learned Sales Tax Tribunal in second appeal enhanced the suppression of the turnover to 40 times – No reason assigned by the Tribunal while increasing the suppression by 40 times as against 26 times by the assessing authority – Held, the impugned order is set aside being arbitrary and illegal – The matter is remitted back to the learned Tribunal to dispose of the case on merit. (Paras 9)

Case Laws Relied on :-

1. 93 (1994) STC 362 : State of Orissa -V- Ranital Rice Mill

For Petitioner : M/s. Subash Ch. Lal, Sumit Lal & Sujit Lal
For Opp. Parties : Mr. S.P.Dalei (A.S.C. for Revenue)

Date of hearing : 21.07.2015
Date of judgment : 30.07.2015

JUDGMENT

DR. D.P.CHOUDHURY, J.

In the captioned revision the petitioner assails the order dated 23.12.2008 passed by the Orissa Sales Tax Tribunal in Second Appeal Nos. 817 and 736 of 1999-2000, whereby dismissed the appeal filed by the petitioner and allowed the appeal in part filed by the State.

FACTS

2. The factual matrix leading to the case of the petitioner is that the petitioner is a dealer in grocery articles at Sambalpur under Circle-Sambalpur. He deals with edible oil, ghee, sugar, rice, peas etc. on wholesale basis. It is alleged inter alia that the learned Assessing Authority got the establishment of the petitioner assessed for the year 1995-96. The I.S.T. (Intelligence Wing) of Sambalpur made visit to the establishment of the petitioner and found the stock of the materials goods with reference to the book of accounts of the dealer were not in order. Similarly another visit was made by the Intelligence Sales Tax Circle on 13.9.1995 and found 40 quintals of rice was carried from Gosala by the petitioner without any document. As the books of accounts, stock register and physical verification do not tally each other showing some items excess and deficit of some items, the learned Assessing Authority computed the gross turn over at Rs.3,91,92,861.35 paise. After making deduction under different heads the taxable turn over became Rs.1,93,64,867.11 paise. So the Assessing Authority after discussion found total amount of Rs.77,527.50 paise has to be paid by the petitioner as tax after deducting the tax already paid by the petitioner under Rule-36 of the O.S.T. Rules.

3. The petitioner challenged the order of the learned Assessing Authority before the First Appellate Authority.The learned First Appellate Authority observed that the calculation of the Assessing Authority about suppression of the amount for 26 times is excessive and contrary to the decision of the Court. When he found that the enhancement of turn over by 26 times of alleged suppression of Rs.47,805/- is excessive, he limited the enhancement of turnover to Rs.7,64,881/- of which Rs.6,64,881/- is added to the 4% tax rate of group, Rs.1,00,000/- is added to the 8% tax rate group of the taxable turn over. On the whole he allowed the appeal in part and assessed the tax demand by reducing the same by Rs.61,302/- only.

4. The petitioner preferred the Second Appeal before the learned Tribunal, whereas the Revenue also preferred a Second Appeal against the reduction of the turn over by the First Appellate Authority. Both the appeals were heard together and learned Tribunal passed a common order. After discussion at length learned Tribunal found suppression of turnover.It observed that the learned assessing Authority estimated suppression for the whole year at 26 times of the occasional suppression, whereas the First Appellate Authority reduced the demands to 16 times. It further stated that the suppression having been estimated on two occasions the suppression per occasion for Rs.23,902.50 paise, for which it should be 40 times of the

suppression following the decision reported in 93 (1994) STC 362, **State of Orissa v. Ranital Rice Mill**. So the learned Tribunal dismissed the appeal filed by the petitioner and allowed the appeal filed by the State in part. It remitted the case on remand to the learned Assessing Authority for re-computation of the tax dues within three months.

SUBMISIONS

5. Learned counsel for the petitioner submitted that the order of the Tribunal is perverse, illegal and absolute non-application of mind. According to him, without any basis the learned Tribunal has computed suppression 40 times when learned Assessing Authority computed the suppression 26 times and the First Appellate Authority computed the same to 16 times. The case of the petitioner should have been accepted as it is a grocery shop and during the visit, the concerned Officers have not checked up the grocery items properly about its variety and quantity. He further stated that this is as clear violation of natural justice by the authorities below, for which the order of the Tribunal should be struck down by allowing the revision.

6. Learned Standing Counsel for the Revenue submitted that the learned Assessing Authority has gone through the details of the report of Intelligence and also has verified the books of accounts, for which the order is legal and proper. He rather stated that the order of the learned First Appellate Authority even if gone detailed, but it has no basis to relax the number of times of suppression as determined by the Assessing Authority. He further submitted that the order of the learned Tribunal is justified for enhancing the suppression by 40 times, since many items of the grocery shop have not been taken into consideration, where the tax must have been suppressed by the petitioner. Be that as it may, learned Standing Counsel for the Revenue supports the order of the Tribunal and submitted to dismiss the revision.

7. We have heard the respective counsel and considered the documents filed before us. Perused the impugned order and all orders passed by the authorities below. No doubt the petitioner is a dealer in grocery items. Learned Assessing Authority basing on the report of the Intelligence of Sales Tax on two occasions has found the suppression of gross turnover by the petitioner. With reasoning it has computed the gross turnover 26 times. Similarly, the First Appellate Authority has considered the order and reduced it to 16 times. Learned Tribunal while enhancing the suppression of the turnover to 40 times has observed in the following manner:-

> "…. The dates of inspection of two different inspecting agencies were 25.4.95 and 2.8.95 and on both the occasions suppressions were unearthed. From this it is implied that the suppressions have a pattern. The Ld. STO estimated the suppression for the whole year at 26 times of the occasional suppression whereas the Ld. ACST reduced the times to 16. The suppressions having been estimated on 2 (two) occasions the suppression per occasion was for Rs.23,902.50. Applying the ratio of the decision of the Hon'ble High Court of Orissa in case of Ranital Rice Mill Vrs. State of Orissa 93 STC 362 (Orissa) 40 times of Rs.23,902.50 i.e. 9,56,100.00 is determined as the suppression for the whole year and the same meets the ends of justice….."

8. It appears from the above order of the Tribunal that following the case of Ranital Rice Mill (supra) it has increased the suppression by 40 times. There is no any reason assigned in the order except applying the ratio of such decision.In the case of State of Orissa v. Ranital Rice Mill, 93 STC 362 (Orissa High Court) Their Lordships have been pleased to observe at page 364 as follows:-

> "……Though the Tribunal has not indicated the nexus in so many words yet it cannot be said that the Tribunal did not consider relevant aspects while fixing the quantum. It took note of the quantum of suppression involved and came to hold that enhancement of Rs.6 lakhs would be adequate. The conclusion has been arrived at after making elaborate analysis of the fact situation. What would be the quantum of enhancement does not in all cases involve a question of law. Where there is absolutely no material to support the conclusion, a question of law arises. But where the Tribunal after dealing with relevant aspects fixes up the enhancement at a particular figure, it is a conclusion on facts, giving rise to no question of law……"

9. With due respect to the said decision, we find that the view was taken by Their Lordships finding the conclusion arrived at after the Tribunal considered the relevant aspect while fixing the quantum. In that case this Court found the enhancement of the figure by the Tribunal on the conclusion of facts for which refrained from reference on question of law. In the instant case there is no discussion of any fact showing nexus of enhancement of 40 times to the facts of the case. Had there been the discussion to prove the enhancement of the turnover 40 times correcting the finding of the Assessing

Authority, the conclusion of the Tribunal by following the decision of Ranital (supra) could have been appropriate. So the conclusion of the learned Tribunal following the authority is based on no evidence. On the other hand the learned Tribunal has not followed the aforesaid authority properly, but under the veil of such decision has decided the case arbitrarily against the petitioner. So the conclusion arrived at by the learned Tribunal about suppression of the turnover and multiplying it 40 times is based on no factual aspects. Hence the order of the Tribunal is vulnerable, illegal and perverse. We, therefore, set aside the order of the Tribunal and remit back the matter to the learned Tribunal with a hope and trust that the learned Tribunal will look into the facts and law of the case and dispose of the case on merit after affording reasonable opportunity to the parties of being heard within a period of two months from today. Any observation made by us in this revision should not influence the Tribunal in reaching the conclusion.

10. The revision petition is disposed of accordingly.

Revision disposed of.

2015 (II) ILR - CUT- 932

S. PANDA, J.

W.P. (C) NO. 2589 & 9427 OF 2015

DHAMNAGAR GRAMA PANCHAYAT ……...Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART. 243- E
r/w Sec. 148(4) of the Odisha G.P. Act.1964

Notification U/s. 4 (a) of the Odisha Municipal Act, 1950 to include the area of Dhamnagar Grama Panchayat for Constitution of Dhamnagar NAC – In the other hand Collector, Bhadrak Stopped providing different benefits like IAY,BPGY etc. to the said Grama Panchayat – Action challenged – Similar notification issued in the year

1998 was stayed by this court and the writ petition was dismissed for default – Elections to the Grama Panchayat was held in the year 2007 and 2012 – The impugned notification issued in the year 2014 without de-notifying the Grama Panchayat – Duration of Panchayat has been constitutionally limited to five years under Article 243-E of the Constitution of India – The state Government has not appointed a person as administrator from 1999 till date – Held, the impugned notification being contrary to Article 243-E of the constitution of India is quashed – Direction issued to the opposite Parties to provide required benefits to Dhamnager Grama Panchayat . (Paras 7to11)

For Petitioner : M/s. P.K.Rath, R.N.Parija, A.K.Rout, S.K.Pattnaik, P.K.Sahoo, A.Behera, S.K.Behera and A.K.Behera

For Opposite Parties : Addl. Government Advocate

Date of Judgment : 25.09.2015

JUDGMENT

S.PANDA, J.

W.P.(C) No.2589 of 2015 has been filed by the petitioner challenging the notifications bearing No.26955/HUD/Elec-19/2014 and No.27005/HUD/Ele-19/2014 dated 22.12.2014 under Annexures-3 and 4 respectively issued by the State Government in Housing and Urban Development Department publishing notification under Section 4 (a) of Odisha Municipal Act, 1950 including Dhamnagar Grama Panchayat for constitution of Dhamnagar Notified Area Council before completion of full term of five years of the existing Grama Panchayats violating the mandate of Article 243-E of the Constitution of India.

Similarly W.P.(C) No.9427 of 2015 has been filed by the petitioner challenging the action of the Collector, Bhadrak in not sanctioning the benefits to which the petitioner is entitled under different schemes like IAY, BPGY, MGNREGA, GGY, C.C Road, TFC etc.

2. As in both the Writ Petitions the parties are same and the questions involved are interlinked to each other, both the matters are taken up for hearing together and are disposed of by this common judgment.

3. The brief facts of the case are that the petitioner was elected as Sarpanch of Dhamnagar Grama Panchayat in the year 2012 and continuing as

such. The Government of Odisha in the Department of Housing and Urban Development Department vide notification dated 22.12.1998 notified certain area to be transitional area for constitution of Dhamnagar Notified Area Council. The said notification was never given effect to. The area under Dhamnagar Panchayat notified as Grama Panchayat and continuing as such, even after the aforesaid notification in 1998. Elections were conducted in respect of Dhamnagar Grama Panchayat in 2007 and 2012 respectively. One Tapan Rout, the then Sarpanch of the Grama Panchayat had approached this Court challenging the said notification dated 22.12.1998 in OJC No.124 of 1999. This Court by order dated 18.1.1999 was pleased to stay the said notification. The said Writ Application was dismissed for default on 06.11.2007. However, the present petitioner was not aware about the said Writ Application. The Government while matter stood thus has issued the impugned notification for taking over Dhamnagar Grama Panchayat and deployment of technical person from DRDA and Block for newly constituted Urban Local Bodies. The newly constituted Grama Panchayat after election in the year 2012 is continuing as such and it was not dissolved as per Article 243-E of the Constitution of India before completion of its term. The elected Sarpanch and the Ward Members of the Grama Panchayat are holding the office and they are carrying out the developmental work of the Panchayat as usual. The action of the State Government being unconstitutional is liable to be quashed. Hence the present Writ Petitions.

4. A counter affidavit has been filed by opposite party no.2 contending inter alia that the proposal regarding constitution of Dhamnagar Notified Area Council in the district of Bhadrak was approved by the Government in Panchayat Raj Department. Accordingly, in exercise of the power conferred under Article 243-Q (2) of the Constitution of India read with Section 4 of Odisha Municipal Act, 1950 the notification dated 31.8.1998 was issued by the Housing and Urban Development Department inviting objections / suggestions from the people of the areas specified as transitional area comprising revenue villages as per the draft notification. Subsequently, considering the objection received, the final notification Nos.42484/HUD dated 22.12.1998 and 42488/HUD respectively specifying the area as transitional area as well as the notification on constitution of Dhamnagar Notified Area Council for the said transitional area were issued. In view of Section 148 (4) of Odisha Grama Panchayat Act, 1964 (hereinafter referred to as 'the Act') if the whole of the area within a Grama is included in a Municipality or a Notified Area, the Grama Panchayat shall cease and the

Grama Panchayat constituted thereof shall stand abolished. It was also stated that one Tapan Kumar Rout and another and Madhusudan Sahoo and others have filed Writ Applications bearing OJC Nos.124 of 1999 and 290 of 1999 respectively challenging the aforesaid notification regarding transitional area and appointment of Sub-Collector, Bhadrak as Administrator of Dhamnagar Notified Area Council. In the said Writ Application on 18.1.1999 an interim order was passed not to take further steps in pursuance of the notification regarding transitional area etc. However, the said Writ Applications were dismissed on 06.11.2007 and 15.3.1999 respectively. After receipt of the dismissal order, the Government has taken action on the earlier notification issued for constitution of Dhamnagar Notified Area Council and appointment of Addl. District Magistrate, Bhadrak as Administrator afresh by notification No.23620 dated 22.11.2014. In pursuance of the said notification, the State Election Commission, Odisha in its letter dated 07.1.2015 intimated the Housing and Urban Development Department to start the process to hold election to constitute new Council for Dhamnagar Notified Area within six months as provided under Section 12 (1) (a) of the Odisha Municipal Act, 1950. The Government vide its letter dated 21.1.2015 intimated the District Magistrate, Bhadrak to start the process of delimitation of wards and reservation of seats of Dhamnagar Notified Area Council and complete all process by 30.3.2015. Accordingly, the notification for delimitation of wards and reservation of seats of Dhamnagar Notified Area Council was published on 21.2.2015 by the District Magistrate, Bhadrak. In view of the above, since the Grama Panchayat has been abolished as per Section 148 (4) of the Act the contention of the petitioner is not tenable.

5. Learned Addl. Government Advocate fairly submitted that the dismissal of O.J.C No.124 of 1999 in the year 2007 was not within the knowledge of the State Government. In the year 2014 the Government after receiving such information regarding dismissal of Writ Application issued the impugned notifications. In support of his contention he has relied on the decision in the case of **P.V.V Prasad and others Vs. Government of Andhra Pradesh and others** reported in **2006 (2) ALD 797** wherein the proposal of the Government for inclusion of 32 Grama Panchayats has been opposed by 23 Gram Panchayats, which have unanimously resolved opposing merger of their areas in VMC for formation of GVMC and whereas 9 Grama Panchayats, dominated by the ruling party, have favoured the move of the Government. Article 243-E assured the period of five years unless so sooner dissolved under any law for the time being in force. The only power to

dissolve the Grama Panchayat is contained in Section 250 of the A.P.Panchayat Raj Act, 1994 and the power conferred on the Government to dissolve such Panchayat is only for misconduct i.e. not competent to perform its functions or has failed to exercise its powers and perform its functions or has exceeded or abused any of the powers conferred upon it by or under this Act, or any other law for the time being in force.

xxx xxx xxx

There is no provision for the dissolution of the Panchayat for the purpose of inclusion in either Municipality or a Municipal Corporation. The provisions relied upon and used by the Government are traceable and confined to the expansion or contraction and enlargement of the territorial limits only. The attempt of the Government abolishing 32 Grama Panchayats in the name of merging their areas with a larger body called Greater Visakhapatnam Municipal Coroporation, without there being a proper dissolution, is totally unsustainable, unconstitutional, inoperative and is void ab initio was the contention of the petitioners. Taking into consideration that Grama Panchayats have been de-notified, it was held that the petitioners cannot take shelter under Article 243-E of the Constitution of India and cannot take shelter under Section 250 of A.P.Panchayat Raj Act, 1994 since the said provision is no longer available in pursuance of the notification issued by the Government. (Emphasis supplied)

6. Learned counsel appearing for the petitioner submitted that the election of Dhamnagar Grama Pancyayat was conducted in the year 2012 and the first meeting of the elected members of the Grama Panchayat was held on 10.3.2012. He further submitted that since the elected members of the Grama Panchayat are continuing as such and the Grama Panchayat has not yet been dissolved by the State Government, the issuance of the impugned notifications without complying the provisions of Article 243-E of the Constitution of India is illegal and not sustainable in the eye of law. In support of his contention has relied on the decision in the case of **B.K.Chandrashekar Vs. State of Karnataka** reported in **AIR (Kar) 461** wherein it was held that Article 243-E and Entry of list II of Seventh Schedule conflict between mandatory provisions of the Constitution and right of State Legislature to enact laws within the legislative competence – Constitution being the supreme laws enacted by the State legislature should be within the provisions of the Constitution of India. It was also held that the State Election Commission cannot hold elections to the existing Grama Panchayats, before expiry of their term, which starts from March, 1999

onwards 'on the issuance of the Press Note by the Election Commission the present Writ Petitions have been filed seeking mandamus to the Election Commission to hold the elections either ignoring the ordinance issued or declaring the same to be unconstitutional running counter to the express provisions contained in the Constitution of India'. Under Article 243-E duration of Panchayat has been constitutionally limited to five years. Dissolution is permissible but not extension. Elections to new Panchayats have to be completed before the expiry of the duration of the outgoing Panchayat and in the case of dissolution before the expiry of six months from the date of its dissolution. Article 243-E has to be held to be mandatory and not directory.

7. For better appreciation the statutory provisions are quoted hereunder:- Section 243-E of the Constitution of India mandates that:

"(1) Every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Panchayat at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Panchayat shall be completed.

(a) before the expiry of its duration specified in clause (1).

(b) before the expiration of a period of six months from the date of its dissolution.

Provided that where the remainder of the period for which the dissolved Panchayat would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Panchayat for such period.

(4) A Panchayat constituted upon the dissolution of a Panchayat before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Panchayat would have continued under Clause (1) had it not been so dissolved."

7.1 Section 148 (4) of Orissa Grama Panchayats Act, 1964 stipulates that:

" If the whole of the area within a Grama is included in a Municipality or a Notified Area, the Grama Sasan shall cease and the Grama Panchayat constituted there for stand abolished."

In the case at hand after the notification made in the year 1998 declaring the area to be 'transitional area' in view of Section 148 (4) of the Act, the Grama Panchayat constituted should have been abolished without conducting further election of the Grama Panchayat. However, after dismissal of OJC No.124 of 1999 in the year 2007, the election of Dhamnagar Grama Panchayat was conducted twice and the last election was held in the year 2012. The first meeting of the elected members of Dhamnagar Grama Panchayat was held on 10.3.2012. In view of Article 243-E of the Constitution of India the Grama Panchayat shall continue to function till its term expires or it dissolved. However, in the present case no such step has been taken by the State Government. Therefore, the notification of the year 1998 cannot be said to be stand abolished as provided under Section 148 (4) of the Act.

7.2 Section 4 (2) of the Orissa Municipal Act, 1950 specifically stipulates regarding 'transitional area' and on a conjoint reading of the said Section along with Section 423 (1) of the said Act it appears that when an area is specified as 'transitional' area under Section 4 (2) until a Municipality is constituted for that area in accordance with the provisions of the Act, a person appointed by the State Government as Administrator shall exercise the powers, discharge the duties and perform the functions of Municipality for that area including that of its Chairperson.

8. However, in the present case the election of Dhamnagar Grama Panchayat was held in the year 2012. While the elected Sarpanch and Ward Members are continuing, the impugned notifications were issued in the year 2014 without de-notifying the Grama Panchayat as per the statutory provision.Therefore, the contention of the learned Addl. Government Advocate that the Grama Panchayat was dissolved in the year 1998 and hence the impugned the notifications were made, is not tenable as the notification issued in the year 1998 was stayed by this Court and the Writ Application was dismissed for default without going into the merits of the case. The election of the Grama Panchayat was held in the year 2007 and 2012.

9. The State Government has not appointed a person as administrator from 1999 till date. In 2014 by issuing the impugned notifications step was only taken, which is not in consonance with the statutory provisions of Orissa Municipal Act, 1950 and the Rules made there under.Therefore, the consequential action of the opposite parties in 2014 is illegal, unconstitutional and contrary to Article 243-E of the Constitution of India.

10. In view of the discussions made hereinabove, this Court in exercise of the jurisdiction under Article 227 of the Constitution of India quashes the impugned notification bearing Nos.26955/HUD/Elec-19/2014 as well as No.27005/HUD/Ele-19/2014 dated 22.12.2014 issued by the State Government in Housing and Urban Development Department as the same are contrary to Article 243-E of the Constitution of India.

11. The opposite parties are directed to provide the benefits to Dhamnagar Grama Panchayat, to which it is entitled under different schemes of the Government as expeditiously as possible, preferably within a period of fifteen days from the date of production of certified copy of this judgment. Both the Writ Petitions are accordingly disposed of.

Writ petition disposed of.

2015 (II) ILR - CUT- 939

B.K.NAYAK, J.

O.J.C. NO. 2592 OF 2002

STEEL AUTHORITY OF INDIA LTD. .....Petitioner

.Vrs.

PRESIDING OFFICER, INDUSTRIAL TRIBUNAL, ROURKELA & ORS. .....Opp. Parties

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

Removal of workman form service – Proceeding U/s. 33 (2) (b) of the Act by the management for approval of the punishment – Industrial Tribunal refused to approve as the domestic enquiry not conducted

fairly – Management made further prayer to adduce additional evidence which was also refused as no specific prayer made to that effect – Hence the writ petition – Management made a specific request in para 13 of the application U/s 33 (2) (b) to lead additional evidence which has lost sight of the Tribunal – A prayer or request need not be only in the prayer portion of the petition but it can be in any part of the petition – Held, impugned orders are set aside – Direction issued to the Tribunal to allow the management to lead additional evidence.

(Paras 8 to 11)

For Petitioner : M/s. D.P.Nanda, P.K.Mohapatra & M.K.Pati
For Opp. Parties ; M/s. K.Ray & A.K.Baral

Date of hearing : 25.03.2014
Date of judgment: 25.03.2014

JUDGMENT

B .K. NAYAK, J.

The petitioner-management has filed this writ petition challenging the order under Annexure-1 dated 26.03.2001 passed by the Presiding Officer, Industrial Tribunal, Rourkela in I.D. Misc. Case No.183 of 1997 holding that the domestic enquiry against the opposite party-workman was not conducted fairly and properly and thereby refusing to approve the action of the management in removing the workman, and also the order dated 06.11.2001 (Annexure-2) passed by the said Tribunal refusing the prayer of the management to adduce additional evidence in support of the charge of misconduct of the workman.

2. The petitioner-management passed order of removal of the opposite party-workman from service for misconduct after holding a domestic enquiry and filed application before the Industrial Tribunal, Rourkela under Section 33 (2) (b) of the Industrial Disputes Act for approval of the order of removal of the workman, since the opposite party-workman was concerned in a pending I.D. Case before the said Tribunal. The said application was registered as I.D. Misc. Case No.183 of 1997. In his show cause the workman took the plea that the domestic enquiry against him was not conducted fairly and properly. By order dated 26.03.2001 (Annexure-1) the Presiding Officer, Industrial Tribunal, Rourkela held that the domestic enquiry against the workman was not conducted fairly and properly and, therefore, he disapproved the action of the management in removing the workman.

Thereafter, the management filed a petition to restore I.D. Misc. Case No.183 of 1997 and to allow the management to lead evidence before the Tribunal in proof of the misconduct of the workman. The said petition has been rejected vide order dated 06.11.2001 (Annexure-2) on the ground that the management has not made any specific request seeking opportunity of leading additional evidence to substantiate the charges against the workman.

3. It is the submission of the learned counsel for the petitioner that in the application under Section 33 (2) (b) of the Industrial Disputes Act itself, the management had made a request to lead evidence to prove the charge against the workman in the event the Tribunal came to the conclusion that the domestic enquiry against the workman was not fair and proper. But in spite of such pleading and request the Tribunal passed the order under Annexure-1 closing the case after holding that the domestic enquiry was not fair and proper, without giving opportunity to the management to lead additional evidence with regard to the merits of the charge. It is also submitted that the Tribunal has also gone wrong in stating in the order under Annexure-2 that no request for adducing additional evidence in proof of the charge has been made earlier.

4. The learned counsel appearing for opposite party-workman, on the other hand, contends that in the application under Section 33 (2)(b) of the Industrial Disputes Act, the management has not made any request for allowing it opportunity to lead additional evidence on the merits of the charge and further that no application subsequent to filing of show cause by the workman was filed by the management seeking permission to lead additional evidence in proof of the charge as held by the apex Court in the case of ***Sambhu Nath Goyal v. Bank of Baroda and others : AIR 1984 SC 289,*** which decision has been affirmed later by a Constitutional Bench by the Hon'ble apex Court in the case of ***Karnataka State Road Transport Corpn. v. Smt. Lakshmidevamma and another : AIR 2001 SC 2090.***

Referring to paragraph-16 of the judgment in the case of ***Sambhu Nath Goyal*** (supra), the learned counsel for the opposite party-workman submits that in a proceeding under Section 33 (2) (b) of the Industrial Disputes Act request/application by the management for adducing additional evidence in support of the merits of the charge should be made after the workman files his show cause/written statement challenging the propriety and legality of the domestic enquiry in pursuance of which the removal order is passed.

5. In paragraph-16 of the judgment in the case of ***Sambhu Nath Goyal*** (supra), it has been held as follows :

> " **16.** We think that the application of the management to seek the permission of the Labour Court or Industrial Tribunal for availing the right to adduce further evidence to substantiate the charge or charges framed against the workmen referred to in the above passage is the application which may be filed by the management during the pendency of its application made before the Labour Court or Industrial Tribunal seeking its permission under Section 33 of the Industrial Disputes Act,1947 to take a certain action or grant approval of the action taken by it. The management is made aware of the workman's contention regarding the defect in the domestic enquiry by the written statement of defence filed by him in the application filed by the management under Section 33 of the Act. Then, if the management chooses to exercise its right it must make up its mind at the earliest stage and file the application for that purpose without any unreasonable delay. But when the question arises in a reference under Section 10 of the Act after the workman had been punished pursuant to a finding of guilt recorded against him in the domestic enquiry there is no question of the management filing any application for permission to lead further evidence in support of the charge or charges framed against the workman, for the defect in the domestic enquiry is pointed out by the workman in his written claim statement filed in the Labour Court or Industrial Tribunal after the reference had been received and the management has the opportunity to look into that statement before it files its written statement of defence in the enquiry before the Labour Court or Industrial Tribunal and could make the request for the opportunity in the written statement itself. If it does not choose to do so at that stage it cannot be allowed to do it at any later stage of the proceedings by filing any application for the purpose which may result in delay which may lead to wrecking the morale of the workman and compel him to surrender which he may not otherwise do."

6. However, for holding as aforesaid the Hon'ble Court took note of the observation of the apex Court in the case of ***Shankar Chakravarti v. Britannia Biscuit Co. Ltd. : AIR 1979 SC 1652*** and quoted a passage therefrom in paragraph-15 of the judgment which is to the following effect :

"Earlier clear-cut pronouncements of the Court in R.K. Jain's case (AIR 1972 SC 136) and Delhi Cloth & General Mills Co's case (AIR 1972 SC 1031) that this right to adduce additional evidence is a right of the management or the employer and it is to be availed of by a request at appropriate stage and there is no duty in law cast on the Industrial Tribunal or the Labour Court to give such an opportunity notwithstanding the fact that none was ever asked for are not even departed from. When we examine the matter on principle we would point out that a quasi-judicial Tribunal is under no such obligation to acquaint parties appearing before it about their rights more so in an adversary system which these quasi-judicial Tribunals have adopted. Therefore, it is crystal clear that the rights which the employer has in law to adduce additional evidence in a proceeding before the Labour Court or Industrial Tribunal either under Section 10 or Section 33 of the Act questioning the legality of the order terminating service must be availed of by the employer by making a proper request at the time when it files its statement of claim or written statement or makes an application seeking either permission to take a certain action or seeking approval of the action taken by it. If such a request is made in the statement of claim application or written statement, the Labour Court or the Industrial Tribunal must give such an opportunity. If the request is made before the proceedings are concluded the Labour Court or the Industrial Tribunal should ordinarily grant the opportunity to adduce evidence. But if no such request is made at any stage of the proceedings, there is no duty in law cast on the Labour Court or the Industrial Tribunal to give such an opportunity and if there is no such obligatory duty in law failure to give any such opportunity cannot and would not vitiate the proceedings."

7. The Constitution Bench of the Hon'ble apex Court in the case of ***Karnataka State Road Transport Corpn.***(supra) has held as follows :

"**3.** In Shambu Nath Goyal v. Bank of Baroda (1984) 1 SCR 85 : (AIR 1984 SC 289 :1983 Lab IC 1697) this Court held (Para-15):

"The rights which the employer has in law to adduce additional evidence in a proceeding before the Labour Court or Industrial Tribunal either under Section 10 or Section 33 of the Industrial Disputes Act questioning the legality of the order terminating the service must be availed of by the employer by making a proper

request at the time when it files its statement of claim or written statement or makes an application seeking either permission to take certain action or seeking approval of the action taken by it."

The above observation is only a part of the quotation made in ***Sambhu Nath Goyal*** (supra) from the case of ***Shankar Chakravarti*** (supra) as noted in the preceding paragraph (portion underlined).

8. In the instant case in paragraph-13 of the original application under Section 33 (2)(b) of the Industrial Disputes Act filed by the petitioner a request has been made by the management to allow it to lead evidence to prove the charge on merits in the event the Tribunal came to hold that the domestic enquiry conducted against the workman was not fair and proper. The pleadings in paragraph-13 of the petition is not merely pleading reserving right of the management to lead additional evidence on the merits of the charge, but also a request to allow it to lead evidence on merit of the charge, if the Tribunal came to the conclusion that the domestic enquiry against the workman was not fair and proper. A prayer or request need not only be in the prayer portion of the petition, it can be in any part of the petition.

9. The only principle laid down by the Hon'ble apex Court in the case of ***Sambhu Nath Goyal*** (supra) is that a specific application or request has to be made by the management to lead evidence on the merits of the charge. It does not lay down that where a prayer has already been made in the main petition by the management to this effect, a further application should also be made by the management after the workman files his written statement or show cause. There is also no logic as to why repeated prayers or requests are to be made by the management to allow it opportunity to lead evidence on the merits of the charge. In case request has already been made in the original application under Section 33 (2) (b) of the Act, there is no necessity of making a further prayer to the same effect at a later stage. The only requirement as per the principle laid down by the Hon'ble apex Court in the case of ***Sambhu Nath Goyal*** (supra) is that a specific request during the course of the proceeding should be made by the management.

10. In view of the request made in paragraph-13 of the application of the petitioner-management filed under Section 33 (2)(b) of the Act, which has been clearly lost sight of by the Industrial Tribunal, the orders under Annexures-1 and 2 are unsustainable. The Tribunal should have given

opportunity to the petitioner-management to lead evidence on the merits of the charge against the workman.

11. Accordingly, the orders under Annexures-1 and 2 are set aside and the Presiding Officer, Industrial Tribunal, Rourkela is directed to give opportunity to the petitioner-management to lead additional evidence on the merits of the charge against the workman and proceed further with the Industrial Misc. Case No. 183 of 1997 from that stage and dispose of the said proceeding expeditiously, preferably, within a period of four months from the date of first appearance of both the parties before the Tribunal. To cut short the matter, both the parties are directed to appear before the Presiding Officer, Industrial Tribunal, Rourkela on 15th April,2014. The writ petition is accordingly disposed of. No costs.

Writ petition disposed of.

2015 (II) ILR - CUT- 945

B. K. NAYAK, J.

W.P.(C) NO. 8343 OF 2014

ANJALI PANDA .....Petitioner

.Vrs.

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

O. C .H & P. F. L. ACT, 1972 – S. 34

Tahasildar while allowing conversion of agricultural land to homestead imposed a condition that the converted land shall not be sold by creating fragmentation as required U/s. 34 of the Act – Order imposing condition challenged – Tahasildar having allowed conversion Kisam of the land is no more remains agricultural to attract the provision U/s. 34 of the Act – Held, impugned order in respect of imposing condition prohibiting sale of the land in fragments is quashed. (Paras 3, 4)

For Petitioner : Ms. Sushanta Ku. Mishra
For Opp. Parties : Addl Govt.Adv.

Date of order : 31. 07. 2014

ORDER

B. K. NAYAK, J.

Heard learned counsel for the parties.

2. Order dated 25.10.2013 passed by the Tahasildar, Tihidi in OLR Case No.168 of 2012 imposing the restriction contained in Section 34 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act,1972 (in short 'O.C.H. & P.F.L. Act') after allowing the conversion of the land, has been assailed in this writ petition.

3. On the application of the petitioner under Section 8-A of the O.L.R. Act for conversion of Plot No.1155, measuring an area Ac.0.79 under Chaka No.484 in Khata No.628/189 in Mouza-Mangarajpur under Tihidi Tahasil from agricultural to homestead opposite party no.3-Tahasildar registered OLR No.168 of 2012. After receipt of report of the local Revenue Inspector and after service of notice as per law, the Tahasildar allowed the application for converting the disputed land from agricultural to homestead kisam and assessed Rs.80,383.00 towards premium and other dues. The said dues having been paid, the order was passed finally on 12.11.2012 allowing the conversion with a condition that the converted land shall not be sold by creating fragmentation. The petitioner, thereafter filed an application for waiving the condition as aforesaid and by the impugned order dated 25.10.2013, the Tahasildar again stated that the condition of prohibition of sale by way of fragmentation is in accordance with the provision of Section 34 of the O.C.H. & P.F.L. Act,1972.

Section-34 of the O.C.H. & P.F.L. Act reads as under :

"**34. Prevention of fragmentation**- (1) No agricultural land in a locality shall be transferred or partitioned so as to create a fragment.

(2) No fragment shall be transferred except to a land-owner of a contiguous Chaka :

Provided that a fragment may be mortgaged or transferred in favour of the State Government, a Co-operative Society, a scheduled bank

within the meaning of the Reserve Bank of India Act,1934 (2 of 1934) or such other financial institution as may be notified by the State Government in that behalf as security for the loan advanced by such Government, Society, Bank or institution, as the case may be.

(3) When a person, intending to transfer a fragment, is unable to do so owing to restrictions imposed under Sub-section (2), he may apply in the prescribed manner to the Tahasildar of the locality for this purpose whereupon the Tahasildar shall, as far as practicable within forty-five days from the receipt of the application determine the market value of the fragment and sell it through an auction among the landowners of contiguous Chakas at a value not less than the market value so determined.

[3-a) Any person aggrieved by an order of the Tahasildar under Sub-section (3) may, within sixty days from the date of such order, prefer an appeal in the prescribed manner before the concerned Sub-divisional Officer, whose decision thereon shall be final]

(4) When the fragment is not sold in course of the auction it may be transferred to the State Government and the State Government shall, on payment of the market value determined under Sub-section (3), purchase the same and thereupon the fragment shall vest in the State Government free from all encumbrances.

(5) Nothing in sub-sections (1) and (2) shall apply to-

(a) any land which is covered under the approved Master Plan published under the Odisha Town Planning and Improvement Trust Act,1956 or as the case may be, approved development plan published under the Odisha Development Authorities act,1982; or

(b) a transfer of any land for such public purposes, as may be specified, from time to time, by notification in this behalf, by the State Government."

It is evident that the prohibition under Section 34 of the O.C.H. & P.F.L. Act as aforesaid applies only to agricultural land. The Tahasildar having allowed the conversion of the agricultural land to homestead kisam, the land no more retains its agricultural character and, therefore, Section 34 of the O.C.H. & P.F.L. Act will have no application. The impugned condition as such is unwarranted and illegal.

4. Accordingly, this writ petition is allowed and the impugned order dated 25.10.2013 and the condition prohibiting the sale of the land in fragments contained in order dated 12.11.2012 are quashed. Consequently, the condition with regard to prohibition of sale in fragments incorporated in the record of rights which has been issued in favour of the petitioner after conversion also stands quashed. The writ petition is accordingly disposed of.

Writ petition disposed of.

2015 (II) ILR - CUT- 948

C. R. DASH, J.

W.P.(C) NO. 15805 OF 2014

BRUNDABATI PRADHAN .....Petitioner

.Vrs.

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

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

Meeting of "No Confidence Motion" – Meeting scheduled to be held on 28.08.2014 – Notice issued to the petitioner on 12.08.2014 – Dispatch of notice by post office on 16.08.2014 – Action challenged on the ground that there was no 15 clear days gap as required under the above provision – Held, since there is 15 clear days gap between the date of issuance of notice and the date of the meeting, delay in dispatch of notice by Post Office shall not invalidate the meeting of "No Confidence Motion" unless prejudice shown to have occasioned to the petitioner. (Paras 10,11,12)

Case Laws Referred to :-

1. 99 (2005) CLT 180 : Smt. Heeramani Munda vs. The Collector, Keonjhar & others.
2. 2005 (II) OLR – 659 : Nilambar Majhi vs. Secretary to Govt. of Orissa, Panchayati Raj Deptt. & Others.
3 65 (1988) C.L.T. 122/A.I.R. 1988 Orissa 116 : Sarat Padhi vs. State of Orissa and others

For Petitioners : M/s. Biraja Prasad Satapathy, B.K.Nayak, A.K.Sahoo, S.Pradhan & S.Sahoo

For Opp. Parties : Additional Govt. Advocate. M/s. D.K.Barik, M.K.Pradhan M/s. Budhadev Routray

Date of Judgment : 23.09.2015

JUDGMENT

C.R. DASH, J.

The petitioner, who is the elected Sarpanch of Tinkbir Grama Panchayat in the district of Deogarh, has challenged, in this writ application, the notice dated 12.08.2014 issued by the Sub-Collector, Deogarh- opposite party No.3 calling upon the petitioner to attend the meeting of "No Confidence Motion" to be held on 28.08.2014.

2. The present petitioner was elected as Sarpanch in the Grama Panchayat Election held in February, 2012. While she was acting as such, requisite number of Ward Members adopted a resolution on 08.08.2014 to table a "No Confidence Motion" against the petitioner. On the same day, requisition was sent to the Sub-Collector, Deogarh- Opposite Party No.3 along with the proposed resolution by the said Ward Members for necessary action at his end. On receipt of such requisition, the Sub-Collector, after due processing, fixed the date, hour and place of the specially convened meeting and issued notice on 12.08.2014 calling upon the petitioner to attend the meeting of "No Confidence Motion" to be held on 28.08.2014.

3. It is alleged by the petitioner that the aforesaid notice dated 12.08.2014 vide Annexure- 1 was issued by the concerned Post Office on 16.08.2014 and it was received by the petitioner on 20.08.2014. It is, therefore, urged that there being no clear 15 days notice as contemplated under Section 24 (2) (c) of the Orissa Grama Panchayat Act (for short, "the Act"), notice vide Annexure- 1 is to be quashed, the meeting being a nullity.

4. The opposite party No.3 has filed counter affidavit. It is specifically averred in paragraph- 7 of the counter affidavit that vide Memo No.3027, dated 12.08.2014 copy of the notice along with the requisition and proposed resolution have been published on the Notice Board of Panchayat Samiti. Further, from the Issue Register, Annexure- B/3 series, it would be found that the notice along with the requisition and the proposed resolution have

been sent to the petitioner on 12.08.2014. Annexure- B/3 series shows that vide Memo No.3026 (14), notice regarding "No Confidence Motion" has been sent to the Sarpanch of Tinkbir Grama Panchayat. The opposite party No.5 vide Annexure- A/3 has also filed extract of the said Issue Register maintained in the Office of the Sub-Collector, Deogarh. The opposite party No.5, by filing counter affidavit, has also taken the same stand as opposite party No.3 regarding issuance of notice from the office of the Sub-Collector on 12.08.2014.

5. From the narration of facts (supra), it is clear that the "No Confidence Motion" was fixed to be held on 28.08.2014 and the notice vide Annexure- 1 is dated 12.08.2014, which might have been dispatched by the Post Office to the petitioner on 16.08.2014. This Court, in the case of **Smt. Heeramani Munda vs. The Collector, Keonjhar & others**, ***99 (2005) CLT 180*** and in the case of **Nilambar Majhi vs. Secretary to Govt. of Orissa, Panchayati Raj Deptt. & Others**, ***2005 (II) OLR – 659,*** have held that there should be 15 clear days notice as contemplated under Section 24 (2) (c) of the Orissa Grama Panchayat Act excluding the date of issuance of notice and the date of meeting fixed for "No Confidence Motion".

6. In view of such provision and in view of the contentions raised by learned counsel for the petitioner, it is to be decided whether the date of dispatch by the Post Office or date of issue by the Sub-Collector is to be understood as date of issue as contemplated in Section- 24 (2) (c) of the Orissa Grama Panchayat Act.

7. This Court, in the case of **Sarat Padhi vs. State of Orissa and others**, ***65 (1988) C.L.T. 122/A.I.R. 1988 Orissa 116*** has held that "in the eye of law however 'giving' is complete in many matters where it has been offered to a 'person'. It has further been clarified that "tendering of a notice in law therefore is giving a notice even though the person to whom it is tendered refused to accept it." In the said decision of Sarat Padhi, it was further held thus :-

> *"…… Therefore, all that is required is that the Sub-Divisional Officer on receipt of a requisition, after fixing the date, hour and place of the meeting, has to give notice of the same to all the members holding the office and that part is as a matter of course. But, whether the notice reaches the addressee is not of any consequence, unless of course, any prejudice on the failure of the*

service of the notice is writ large or established by bringing relevant facts on the record. ……..”

Referring to the case of Sarbeswar Satapathy, an unreported decision and other Supreme Court judgments on the meaning of “15 clear days”, this Court in Sarat Padhi’s case (supra) held that “15 days must intervene between the date of the notice and the date of meeting and, therefore, the terminal dates be excluded so as to provide 15 clear days in between.”

8. From the aforesaid case law, it is clear that the date of issue of notice and the date of meeting are to be excluded and there should be gap of clear 15 days in between the date of issue of notice and the date of the proposed meeting.

9. In the present case, there is positive averment by the opposite parties 3 & 5 to the effect that, requisition of requisite number of members of Tinkbir Grama Panchayat was received by the Sub-Collector on 08.08.2014 and after due processing and verification of signatures of the members, who had signed the requisition, the Sub-Collector- opposite party No.3 fixed the date, hour and place of such meeting and issued notice to all the members on 12.08.2014. The notice might have been dispatched by the Post Office on 16.08.2014. But I do not find any reason to disbelieve the positive averment of the opposite parties 3 & 5 so far as issue of notice on 12.08.2014 is concerned, especially in view of the entry in the Issue Register vide Annexure- A/3 to the counter affidavit filed by the opposite party No.5 and vide Annexure- B/3 to the counter affidavit filed by the opposite party No.3 and also for the reason that on the self-same date, the notice has also been pasted on the Notice Board of Grama Panchayat for general information of the members. It is common knowledge that in Government offices, after a letter is issued, the same is to be dispatched through ministerial process. There might have been some delay in such process and the notice might have been dispatched by the Post Office on 16.08.2014.

10. This Court, in the case of Sarat Padhi (supra) has taken into consideration the entire scheme of the notice contemplated under Section 24 (2) (c) of the Act and has held thus :-

“The Scheme of the notice contemplated under Section 24 (2) (c) may be divided into three parts:- ***(i) requirement of giving the notice, (ii) fixing the margin of time between the date of the notice and the date of the meeting and (iii) service of notice on the members****. I am*

of the view, which is also conceded by the learned Advocate General that the first two parts, namely, the date of issue of the notice and the margin of clear 15 days between the date of the notice and the date of meeting are mandatory. In other words, if there is any breach of these two conditions, then the meeting will be invalid without any question of prejudice. But the third condition, i.e., the mode of service or the failure by any member to receive the notice at all or allowing him less than 15 clear days before the date of the meeting, will not render the meeting invalid. This requirement is only directory. This is also based on a sound public policy as in that event any delinquent Sarpanch, or Naib-Sarpanch can frustrate the consideration of the resolution of no-confidence against him by tactfully delaying or avoiding the service of the notice on him and thus frustrate the holding of the meeting. The legislation has also accordingly taken care to provide in unequivocal terms a provision to obviate such contingencies by incorporating clause (e) to sub-section (2) of Section- 24".

11. From the aforesaid observation of the Court in the aforesaid Full Bench decision, it is clear that date of notice is to be understood as date of issue of notice by the Sub-Collector. If, it is understood to be the date of issue of notice by the Post Office, then it would be like rewriting the law and such an interpretation would give chance to crafty delinquent Sarpanches and Naib-Sarpanches to obviate resolution and the proposed meeting by delaying the ministerial process in the office of the Sub-Collector, over which none has any control.

12. Taking into consideration the aforesaid discussion, I am of the firm view that the date of issue of notice is to be understood as date of issue from the office of the Sub-Collector. If there is some delay in dispatch from the office of the Sub-Collector, the same shall not invalidate the meeting of no-confidence unless prejudice is writ large or shown to have occasioned so far as the petitioner is concerned. In the present case, however, there is no pleading to the effect that any prejudice has been caused to the petitioner by delayed receipt of the notice. There is clear 15 days in between the date of the meeting and the date of issue of the notice. The petitioner has also participated in the meeting for recording confidence. In view of such fact, the contention raised by learned counsel for the petitioner must fail.

13. Secondly, it is contended by learned counsel for the petitioner that, the notice vide Annexure- 1 is not accompanied with the proposed resolution and the requisition of the requisite number of members given to the Sub-Collector. There is, however, no pleading to this effect in this writ application.

14. In view of such fact, the notice vide Annexure- 1 cannot be invalidated on such a ground, which has not at all been pleaded.

15. In the result, the writ application is dismissed. The result of "No Confidence Motion" kept in the sealed cover, be published forthwith and consequent action be taken in accordance with law.

Writ petition dismissed.

2015 (II) ILR - CUT- 953

DR. A.K.RATH, J.

W.P.(C) NO. 193 OF 2008

SARAT CHANDRA BARIK & ANR. .....Petitioners

.Vrs.

MANORANJAN BARIK & ORS. .....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – 0-1, R-10 (2)

Transposition of Defendant No 7 as Plaintiff – Defendant no 7 has no adverse interest with the plaintiff, rather he being the son of the plaintiff has some interest in common with him – Section 21 of the Limitation Act, 1963 has no application in case of transposition of parties – Held, learned trial court has rightly allowed application of defendant no 7 under order 1, Rule 10 (2) CPC.

(Paras 7,8,9)

For Petitioners : Mr. Soumya Mishra for Mr. S.P.Mishra, Sr. Adv.
For Opp. Parties : Mr. D.Deo.

Date of Hearing : 07.9.2015
Date of Judgment : 11.9.2015

JUDGMENT

DR.A.K.RATH, J.

Assailing the order dated 6.9.2007 passed by the learned Civil Judge (Sr. Division), Baripada in Civil Suit No.208 of 2005, defendant nos.1 and 2 have filed the instant petition under Article 227 of the Constitution of India. By the said order, the learned trial court allowed the application of the defendant no.7 filed under Order 1 Rule 10(2) C.P.C. to transpose him as plaintiff.

2. Bereft of unnecessary details, the short fact of this case is that one Smt.Basanti Barik instituted a suit for declaration of right, title and interest, for a declaration that the sale deed dated 17.9.1993 executed by the defendant nos. 3 to 6 in favour of defendant no.1 and the sale deed dated 11.6.2004 executed by the defendant no.1 in favour of defendant no.2 as null and void in the court of the learned Civil Judge (Sr.Division), Baripada, which is registered as C.S.No.208 of 2005. In the said suit, sons of the plaintiff have been arrayed as defendants 3 to 7. Pursuant to issuance of notice, defendants 1 and 2 entered appearance and filed a comprehensive written statement denying the assertions made in the plaint. While the matter stood thus, the sole plaintiff died on 9.1.2006. Defendant no.7, son of the plaintiff, filed an application under Order 1, Rule 10 (2) of C.P.C. for transposition as plaintiff. Defendants 1 and 2 filed objection to the same. By order dated 6.9.2007, vide Annexure-3, the learned trial court allowed the application and transposed the defendant no.7 as plaintiff.

3. Heard Mr.Soumya Mishra on behalf of Mr.S.P.Mishra, learned Senior Advocate for the petitioners and Mr.D.Deo, learned counsel for the opposite party no.1.

4. Mr.Mishra, learned counsel for the petitioners submitted that defendant no.7 has neither filed any written statement in support of the claim of the plaintiff, nor challenged the sale transactions within the prescribed period of limitation and as such his right to property has been extinguished. He further submitted that consequent upon the death of the plaintiff, the right accrued in favour of defendant nos.1 and 2 cannot be taken away by transposing the defendant no.7 in place of plaintiff. He further submitted that transposition of defendant no.7 as plaintiff was far beyond the period of limitation for seeking the relief as claimed by the original plaintiff.

5. Per contra, Mr.Deo, learned counsel for the opposite party no.1 supported the order dated 6.9.2007 passed by the learned Civil Judge (Sr.Division), Baripada.

6. The provisions of Order 1 Rule 10 (2) C.P.C. pertaining to adding or striking off the parties would include transposing of parties as well. In exercise of the power under Order 1 Rule 10 (2) C.P.C., the Court may transpose defendant as plaintiff. It is not necessary that defendant must have filed a written statement before he can be allowed to be transposed as a plaintiff.

7. In Piyush Hasmukhlal Desai v. International Society for Krishna Consciousness (ISKCON), AIR 2015 ORISSA 43, a Division Bench of this Court, where Dr.A.K.Rath was a party, held that transposition of defendant as plaintiff can be made only when the defendant has some interest in common with that of the plaintiff. A pro forma defendant can be transposed as plaintiff only when interest and identity are the same between the plaintiff and one or more of the defendants. A person, whose interest is adverse to the plaintiff, cannot be permitted to be transposed as plaintiff. Be it noted that SLP No.16533 of 2015 filed by the appellant before the apex Court against the aforesaid judgment was dismissed on 16.07.2015.

8. The submission of Mr.Mishra, learned counsel for the petitioners that transposition of defendant no.7 as plaintiff was far beyond the period of limitation is difficult to fathom. In Mukesh Kumar and others Vrs. Col. Harbans Waraiah and others, AIR 2000 S.C. 172, the apex Court held that section 21 of the limitation has no application to cases of transposition of parties. Since the transposition also involves addition of a plaintiff or a defendant as the case may be, into the suit as originally filed, sub-sec.(2) of Sec.21 of the Limitation Act applies only to those cases where the claim of the person transposed as plaintiff can be sustained or the plaintiff as originally filed or where person remaining as a plaintiff after the said transposition can sustain his claim against the transposed defendant on the basis of the plaint as originally filed. Paragraph 9 of the report is quoted hereunder:

> **"9.** Section 21 of the Limitation Act provides that wherever on institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he is so made a party. However, if Court is satisfied that omission to include a new plaintiff or defendant was due to a

mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. Sub- sec. (2) thereof makes it very clear that these provisions would not apply to a case where a party is added or substituted owing to assignment or devaluation of any interest during the pendency of the suit or where plaintiff is made a defendant or a defendant is made a plaintiff. Section 21 has no application to cases of transposition of parties. Since transposition also involves addition of a plaintiff or a defendant as the case may be, into the suit as originally filed, sub-sec. (2) of S.21 of the Limitation Act applies only to those cases where the claim of the person transposed as plaintiff can be sustained on the plaintiff as originally filed or where person remaining as a plaintiff after the said transposition can sustain his claim against the transposed defendant on the basis of the plaint as originally filed. For sub-sec. (2) to apply all that is necessary is that suit as filed originally should remain the same after the transposition of the plaintiff and there should be no addition to its subject matter. Where a suit as originally filed is properly framed with the proper parties on record the mere change of a party from array of defendants to that of plaintiffs under Order 1 Rule 10 of the Civil Procedure Code will not make him a new plaintiff and will not bring the case within this Section and in such a case sub-section (2) will not apply."

9. Defendant no.7 has no adverse interest with the plaintiff, her mother. The interest and identity are the same between the plaintiff and defendant no.7. Thus, the learned trial court has rightly allowed the application of defendant no.7 under Order 1 Rule 10 (2) C.P.C.

10. In the ultimate analysis, the petition, sans any merit, deserves dismissal. Accordingly, the petition is dismissed. No costs.

Writ petition dismissed.

2015 (II) ILR - CUT-957

DR. A. K. RATH, J.

W.P.(C) NO. 8777 OF 2008

PRANATI BISWAL ……..Petitioner

.Vrs.

M.D, M/S. PURI BEACH RESORT (P) LTD. ……Opp. Party

COURT FEES ACT, 1870 – S.35

Whether the petitioner who is the proprietor of M/s. Cosmos A.R. Industries is exempted from payment of court fees in the suit filed by her ? Held, yes.

A proprietary concern is nothing but an individual trading under a trade name – In civil law where an individual carries on business in a name or style other than his own name, he can not sue in the trading name but must sue in his own name, though others can sue him in the trading name – State of Odisha has also issued notification Dt. 07.06.1994 exempting seven categories of persons including women from payment of all fees mentioned in schedules I & II of the Court Fees Act for filing cases/proceedings in any court in Odisha – Held, petitioner is exempted from payment of Court fees in the suit.

(Paras 5, 6, 7)

For Petitioner : Mr. A.C.Mohapatra
For Opp. Parties : Mr. A.Routray

Date of hearing : 26.08.2015
Date of judgment : 28.08.2015

JUSGMENT

DR. A.K.RATH, J

By this petition under Article 227 of the Constitution of India, the petitioner has prayed, inter alia, to quash the order dated 24.3.2008 passed by the learned Civil Judge (Senior Division), 1st Court, Cuttack in C.S. Suit (III) No.135 of 2006, vide Annexure-1, whereby and whereunder the petition filed by her for exemption of court fees was rejected.

2. The petitioner is the proprietor of M/s. Cosmos A.R. Industries. She filed a suit for passing a money decree against the defendant in the court of

learned Civil Judge (Senior Division), 1st Court, Cuttack, which is registered as C.S. Suit (III) No.135 of 2006. Along with the suit she filed an application to exempt her from payment of court fees. But then the said petition was rejected by the trial court on the ground that the suit has been filed by the proprietor of M/s. Cosmos A.R. Industries. The entire transaction of the proprietary concern has been made by the proprietor. It was further held that although the proprietor is a woman, the entire benefit goes to the proprietary concern.

3. The seminal point that hinges for consideration before this Court is as to whether the petitioner, who is the proprietor of M/s. Cosmos A.R. Industries, is exempted from payment of court fees in the suit filed by her?

4. In exercise of the powers conferred by Section 35 of the Court-fees Act, 1870, the State of Orissa issued a notification on 7.6.1994 exempting seven categories of persons including women from payment of all fees mentioned in Schedules I and II of the Court-fees Act for filing or instituting cases of proceedings in any court in Orissa.

5. In M/s. Shankar Finance & Investments v. State of Andhra Pradesh & others, AIR 2009 SC 422, the apex Court held that as contrasted from a company incorporated under the Companies Act, 1956 which is a legal entity distinct from its shareholders, a proprietary concern is not a legal entity distinct from its proprietor. A proprietary concern is nothing but an individual trading under a trade name. In civil law where an individual carries on business in a name or style other than his own name, he cannot sue in the trading name but must sue in his own name, though others can sue him in the trading name.

6. In view of the authoritative pronouncement of the apex Court in the case cited supra, the conclusion is irresistible that the petitioner being a woman is exempted from payment of court fees as per schedule mentioned in the notification dated 7th June, 1994 issued by the Government of Orissa, vide Annexure-2.

7. Accordingly, the order dated 24.3.2008 passed by the learned Civil Judge (Senior Division), 1st Court, Cuttack in C.S. Suit (III) No.135 of 2006, vide Annexure-1, is quashed. This Court holds that the petitioner is exempted from payment of court fees in the suit. The learned trial court is directed to proceed with the matter. The petition is allowed.

Writ petition allowed.

2015 (II) ILR - CUT-959

DR. A.K.RATH, J.

W.P.(C) NO. 15604 OF 2013

DILIP KUMAR BARAD ……..Petitioner

.Vrs.

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

SERVICE LAW – Petitioner working as Gram Rozgar Sevak – Disengagement notice issued to him by O.P. No.3 – However order of disengagement passed by O.P. No. 2 – Action challenged – If one man hears and another man decides, personal hearing becomes an empty formality – Held, impugned order of disengagement is quashed – Matter is remitted back to O.P. No. 2 who shall issue fresh notice to the petitioner allowing him to show cause and on consideration of the same O.P.No. 2 shall pass orders in accordance with law.

(Paras 8,9)

For Petitioner : Mr. S.B.Jena
For Opp. Parties : Mr. P.C.Panda (Addl.Govt.Adv.)

Date of Hearing : 10.9.2015
Date of Judgment : 10.9.2015

JUDGMENT

DR. A.K.RATH, J.

By this writ petition under Article 226 of the Constitution of India, challenge is made to the order dated 29.6.2013 passed by the Collector-cum-Chief Executive Officer, Zilla Parishad, Sambalpur-opposite party no.2, vide Annexure-5, disengaging the petitioner from the post of Gram Rozgar Sevak, Sankarma Gram Panchayat of Dhankauda Block.

2. Sans details, the case of the petitioner is that pursuant to the advertisement for the post of Gram Rozgar Sevak, the petitioner made an application. He was selected. On 11.1.2008, the opposite party no.2 sent a letter to the Sarpanch, Sankarma Gram Panchyat of Dhankuda Block, vide Annexure-1, enclosing therein the panel of the candidates in order of their merit approved by the District Level Selection Committee for engagement as Multi Purpose Assistant (Gram Rojgar Sevak) in the Gram Panchayat on contractual basis on certain terms and conditions. The name of the petitioner found place at serial no.1 of the list. On 15.1.2008, vide Annexure-2, the

Sarpanch, Sankarma Gram Panchayat sent a letter to the petitioner appointing him to the post of Gram Rozgar Sevak. While the matter stood thus, on 18.6.2013, the Project Director, DRDA, Sambalpur-opposite party no.3 issued notice to the petitioner asking him show cause. Pursuant to the same, he filed a show cause, vide Annexure-4, denying the allegations. By order dated 29.6.2013, the opposite party no.2 disengaged him from the post.

3. Pursuant to issuance of notice, a counter affidavit has been filed by the opposite party no.2. It is stated that MGNREGS, being a rural poverty alleviation programme, aims at mobilizing the manual job seekers, who are generally unaware of the provisions of the scheme. It is the prime duty of a Gram Rozgar Sevak (GRS) to mobilize the job seekers and collect demand from them explaining the scope of the earning potential and creation of community asset. The authority has fixed a specific target to achieve and successful implementation of MGNREGA scheme. The staffs working under MGNREGS including Gram Rozgar Sevaka (GRS) are paid from the 6% contingency of the scheme and the achievement of the GRS in the Gram Panchayat is far below from the target. The man-days generated up to 20.6.2013 against target are 0% only, which is not at all satisfactory and the position of the GP is in 145th in the district out of 148 Gram Panchayats. The petitioner failed to collect job applications from the prospective job seekers, maintenance of Muster Roll and to execute the MGNREGS scheme. It is further stated that the petitioner was not doing anything for the scheme for which he was engaged. His achievement in the Gram Panchayat is nil. The show cause was issued directing the petitioner to submit his reply as to why he shall not be disengaged from engagement for the above lapses and unsatisfactory performance. It is further stated that as many as four numbers of notices to show cause have been issued to him. The petitioner has not replied. The show cause attached in the writ petition is vague and false. The reply to show cause was not received. It is further stated that as per the power vested by the Government, Collector-cum-CEO of Zilla Parishad is the competent authority to take disciplinary action including removal of GRS for unsatisfactory performance, indiscipline or otherwise after observing due formalities. In this case, the applicant was given ample opportunity of being heard. The act of the Collector in disengaging the petitioner is based on sufficient reasons and, therefore, cannot be termed as illegal, arbitrary and violation of the principles of natural justice.

4. Heard Mr.S.B.Jena, learned counsel for the petitioner and Mr.P.C.Panda, learned counsel for the opposite parties.

5. Notice was issued by the opposite party no.3 on 18.6.2013, vide Annexure-3, asking the petitioner to show cause for dereliction of the duties. The charges levelled against the petitioner are as follows:-

"xxx xxx xxx

8. You have not cooperating the Job Card holders for opening of Savings Bank Account.

9. You have not prepared the list of unskilled labourers who have engaged below 100 days.

10. You have not report the detail position of Job seekers to BDO-cum-P.O.

11. You have not collected the applications from job seekers on the day of Rozgar Divas.

12. You have not attended the weekly meeting in the Block regularly.

13. You have not maintained properly the Job Card register and employment register.

14. You have not provided the records during Social Audit of MGNREGA."

6. The order of disengagement dated 29.6.2013 passed by the opposite party no.2, vide Annexure-5, reveals that performance of the petitioner was not at all satisfactory as reported by the Sarapanch, Sankarma Gram Panchayat and the B.D.O., Dhanakuda Block. He remained absent from the Gram Panchayat Office willfully and unauthorizedly and failed to fulfill the terms and conditions of the agreement. He was not regular in his duties and respectful to higher authority and violated the agreement. The impugned order does not reveal that the charges levelled against the petitioner were proved. The opposite party no.2 has not considered the case in its proper perspective.

7. The matter may be considered from another angle. Notice to show cause was issued by the opposite party no.3. The petitioner filed his show cause before the opposite party no.3. It is strange that the order of disengagement was passed by the opposite party no.2. Nothing fetters the opposite party no.2 to issue notice to show cause to the petitioner. Thus, issuance of show cause and consideration of reply becomes an empty formality.

8. In ***Gullapalli Nageswara Rao and others Vrs. Andhra Pradesh State Road Transport Corporation and another***, AIR 1959 SC 308, the apex Court held that personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. (emphasis laid)

9. In view of the same, the order dated 29.6.2013 passed by the Collector-cum-Chief Executive Officer, Zilla Parishad, Sambalpur-opposite party no.2, vide Annexure-5, is hereby quashed. The matter is remitted back to the opposite party no.2. The opposite party no.2 shall issue a fresh notice to show cause to the petitioner granting him opportunity to file reply. After considering the same, the opposite party no.2 shall pass order in accordance with law. The petition is disposed of.

Writ petition disposed of.

2015 (II) ILR - CUT-962

DR. B.R.SARANGI, J

O.J.C. No. 2040 OF 2001

UDIT KUMAR PANIGRAHI ……..Petitioner

.Vrs.

SAMBALPUR UNIVERSITY AND ANR. ……....Opp.Parties

DISCIPLINARY PROCEEDING – Imposition of major penalty – Non-Supply of inquiry report and copies of statements of witnesses recorded during preliminary inquiry – Though charges framed individually, the inquiry was conducted jointly, even in the absence of any order by the disciplinary authority – prejudice caused to the petitioner – Impugned orders having suffered from vice of bias of the authorities are quashed – Petitioner is entitled to be reinstated in Service with all consequential financial and Service benefits.

(Paras 7,8,9)

Case laws Relled on :-

1. AIR 1986SC 2118 : Kashinath Dikshita.-V- Union of India and Ors.
2. AIR1994 SC.1074 : Managing Director , ECIL, Hyderabad -V- B.Karunaka, etc.
3. AIR 2010 SC3131 : State of U.P and Ors.-V- Saroj Kumar Sinha.
4. AIR2013 SC 1513 : Nirmal J. Jhala -V- State of Gujarat and Anr.
5. AIR 2001 SC 24 : Kumaon Mandal Vikas Nigam Ltd Girija Shankar pant and Ors.
6. AIR 2001 SC 343 : State of Punjab -V- V.K.Khanna and Ors.
7. AIR 1996 SC 1669 : State Bank of Patiala and Ors -V- S.K.Sharma.
8. AIR 1997 SC 1358 :Vijay Kumar Nigam (dead) etc. -V- State of M.P. and Ors.

For Petitioners : M/s. A.K.Mishra, B.B.Acharya, J.Sengupta, D.K.Panda,P.R.Jibandash,C..Mohanty & G.Sinha

For Opp.party M/s. B.K.Behuria, P.K.Mohapatra

Date of hearing : 20.10.2014
Date of judgment : 30.10.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who was working as Technician of Sambalpur University, has filed this application to quash the order dated 31.8.2000 (Annexure-11) passed by the disciplinary authority imposing on him punishment of dismissal from service and confirmation thereof by the appellate authority vide order dated 19.12.2000, Annexure-14.

2. The facts of the case in hand are that the petitioner entered into service as a Technician of Sambalpur University on 2.4.1984. Pursuant to a news item published in Oriya dailies dated 10.6.1998 and 11.6.1998 relating to an ugly incident that took place on 19.5.1998 at University Guest House, the Registrar of the University directed the Officer-in-Charge of the Guest House to conduct an inquiry and submit his report. As a consequence thereof, the Officer-in-charge of the Guest House called for a report from the Manager of the Guest House and submitted the same to the Registrar of the University. Thereafter, the Revenue Divisional Commissioner (Northern Division), Sambalpur and the Vice- Chancellor of the University directed a detailed inquiry relating to the incident byone Mr.P.Patra, A.D.M-cum-

Administrative Officer, VSS Medical College, Burla. During inquiry, statements of 13 persons were recorded on solemn affirmation and 32 documents were exhibited. Pursuant to the inquiry report, proceedings were initiated against the petitioner as also three others, namely, Dr.Satya Narayan Pradhan, Sr. Lecturer, Department of Earth Science, Chittaranjan Tripathy, Manager of the Guest House and S.C.Paramguru, Khansama of University Guest House, Sambalpur and the following charges were framed against the petitioner vide Annexure-1 dated 23.7.1998.

"(a) Moral turpitude;

(b) Conduct improper on the part of an employee of the University;

(c) Misuse of premises of the University;

(d) Occupying University Guest House without authority;

(e) Collusion with your staff for financial impropriety;

(f) Misbehaviour with employees of the University;

(g) Conducting business with the University by benami transaction, and thus gaining financial advantage."

The petitioner was called upon to explain as to why he should not be suitably punished under Chapter XIV, Part VI of the Orissa University Statutes, 1990 read with Orissa Civil Services (Classification, Control & Appeal) Rules, 1962, in short, "1962 Rules" within 30 days, failing action as deemed proper would be taken against him presuming that he had nothing to explain. A memorandum of charges along with statement of allegations was served on the petitioner to which he submitted his explanation, vide Annexure-5 dated 7.9.1998. In his explanation, the petitioner had taken categorical stand that he was not supplied copies of the statements of 13 persons examined as witnesses or the documents referred to in the so-called inquiry report of Sri Patra, A.D.M-cum-Administrative Officer, VSS Medical College, Burla and, therefore, due to non-compliance with the principles of natural justice, the proceeding itself was vitiated. Even though the petitioner made a demand for supply of copies of documents including statements of 13 persons examined by Sri P.Patra, the same went unheeded. In the inquiry four persons were examined as witnesses, namely, Tribikram Mishra, Officer-in-charge of the Guest House as P.W.1, Sunanda Mohanty, Lecturer of B.Ed. College, Sambalpur, as P.W.2, Chakradhar Biswal, Lecturer of B.Ed. College, Sambalpur as P.W.3, and one Purusottam Patra as

P.W.4, who were no way connected with the alleged incident. However, P.W.1, Tribikram Mishra being the Officer in-charge of the Guest House examined as a witness, who was neither present in the Guest House at the relevant point of time nor was he any way connected with the occurrence alleged. On the basis of such perfunctory inquiry, the disciplinary authority finding the petitioner guilty of the charges imposed major penalty of dismissal from service on the petitioner vide order dated 31.8.2000 in Annexure-11. The appellate authority confirmed such order passed by the disciplinary authority vide Annexure-14. Hence, the present writ application.

3. Mr.A.K.Mishra, learned Senior Counsel for the petitioner strenuously urged that the entire inquiry proceeding was vitiated due to non-compliance with the principles of natural justice, more particularly non-supply of the documents asked for by the petitioner as well as non-examination of material witnesses and above all non-supply of the inquiry report. He further submitted that the harshest punishment i.e., dismissal from service, imposed by the disciplinary authority, confirmed by the appellate authority being contrary to the provisions contained in Rule 15 of the 1962 Rules, the same is liable to be quashed.

To substantiate the allegation as to non-supply of documents, Mr.Mishra has relied upon the judgments of the apex Court in **Kashinath Dikshita v. Union of India and others,** AIR 1986 SC 2118, **Managing Director, ECIL, Hyderabad v. B. Karunakar , etc. etc.,** AIR 1994 SC 1074, **State of U.P. and others v. Saroj Kumar Sinha,** AIR 2010 SC 3131, **Nirmala J. Jhala v. State of Gujarat and another**, AIR 2013 SC 1513, **Kumaon Mandal Vikas Nigam Ltd. v. Girija Shankar Pant and others**, AIR 2001 SC 24, and **State of Punjab v. V.K.Khanna and others,** AIR 2001 SC 343.

4. Mr.B.K.Behuria, learned Sr.Counsel for the University refuting the allegations made by the learned Senior Counsel for the petitioner, argued that there was compliance with principles of natural justice by supplying the documents, examining the material witnesses and as such no prejudice was caused to the delinquent and therefore, this Court may not interfere with the impugned orders and this being a case of moral turpitude, the Court may be very cautious to pass orders on the basis of the materials available on record. To substantiate his case, he has relied upon the judgments of the apex Court in **State Bank of Patiala and others v. S.K.Sharma**, AIR 1996 SC 1669, **State of U.P. and others v. Ramesh Ch.Mangalik**, AIR 2002 SC 1241,

Vijay Kumar Nigam (dead) etc. v. State of M.P. and others, AIR 1997 SC 1358, **S.K.Singh v. Central Bank of India and others,** (1996) 6 SCC 415, **State of U.P. v. Harendra Arora**, AIR 2001 SC 2319, **Sarva U.P.Gramin Bank v. Manoj Kumar Sinha**, (2010) 3 SCC 556, **Orissa Mining Corporation and another v. Ananda Ch. Prusty,** (1996) 11 SCC 600 and **Hira Nath Mishra and others v. The Principal, Rajendra Medical College, Ranchi and others**, AIR 1973 SC 1260.

5. After hearing the learned counsel for the parties and going through the records, this Court proposes to deal with the case on the basis of the allegations made, materials available on record and the law governing the field.

6. (i) **Inquiry proceeding is vitiated**

(a) The petitioner on receipt of the charges, immediately made a representation to the Registrar of the University on 29.7.1998 (Annexure-2) requesting him to supply him the copies of the statements recorded during the course of preliminary enquiry as provided under Rule 15(3) of the 1962 Rules so as to enable him to submit an effective reply to the charges. But the same was denied to the petitioner by opposite party no.2, which was communicated vide letter dated 01.08.1998 (Annexure-4) on the ground that as the statement of allegations have been prepared basing on all those recorded statements, so there is no need to supply the recorded statements of the persons. On receipt of the above letter, the petitioner vide his representation dated 10.08.1998 (Annexure-3) had pointed out that since the written statement of defence to be submitted by the delinquent is a very vital document for reference at all the stages of inquiry, so a provision has been made in Rules, 1962 to provide/ supply all the documents, basing on which the charges are framed and to allow him to peruse/ take extracts of the documents, which in the opinion of the delinquent are necessary for his defence. In view of the specific provision, he is entitled to get the copies of the statements recorded during the preliminary enquiry, basing on which admittedly the statement of allegations have been prepared and as such, the petitioner again requested to supply him the statements of the witnesses recorded during the preliminary enquiry. In spite of the above, the petitioner was neither supplied with the statements recorded during the preliminary enquiry nor was he supplied with the preliminary inquiry report, basing on which the charges were framed. Due to this, the petitioner finding no other alternative, had to submit his preliminary explanation on 7.9.1998 without

the required documents on the charges framed with a further request to him personal hearing.

(b) In the reply submitted by the petitioner, it was categorically pointed out that though the statement of allegations is supposed to be details of the charges, but the statement of allegations appended to the charge-sheet would go to show that the same are nothing more than a report of the so-called inquiry. Moreover, it was pointed out by the petitioner that the charge-sheet is not supported by the list of witnesses and documents and copies thereof. So far as the statements of witnesses extracted in the "statement of allegations", the petitioner pointed out that the same are inconsistent with each other. To substantiate the same, the petitioner had pointed out that while some of the witnesses say that the lady was brought by a Car, some other say that the lady was brought by a scooter. Similarly, from the report of the Manager dated 10.6.2008, it is clear that the names of Sri Mahanandia and Dr.Pradhan was mentioned, but in the subsequent reports, his name along with his brother's name was dragged into.

(c) The petitioner was issued with a notice by the Inquiring Officer to appear before him. After receiving the above notice, the petitioner made a representation to the Inquiring Officer on 25.2.1999 (Annexure-6) to supply him the statements of 13 witnesses examined by Sri P.Patra, ADM & Administrative Officer, VSS Medical College, Burla as mentioned in Annexure-A in the statement of allegations. Moreover, as the documents listed at Sl.Nos.11,12,20, 26, 27(3) of Annexure-B were not supplied to him, request was made to supply those documents along with the written statement of defence submitted by other delinquents sufficiently ahead of the next date of inquiry. In the above premises, the inquiry proceeded and evidences were recorded by the Inquiring Officer. On conclusion of hearing of the enquiry proceedings, both the Marshalling Officer as well as the delinquents was directed to submit their written arguments. It is also a fact that though the charges were framed individually, the inquiry was conducted jointly even in absence of any order from the disciplinary authority to that effect.

(d) The Marshalling Officer submitted his written argument (Annexure-7), wherein suggestion has been given to the Inquiring Officer about his duties and responsibilities, the relevant portion of which is quoted below:

> "x x x In other words, it is the duty of the enquiry officer to probe into the case and ensure that the enquiry is completed and conducted in such a manner that the guilty do not escape because of some lacuna in the prosecution case and the innocent do not suffer because of an incomplete defence case. To achieve this objective, the enquiry officer must consider himself more than just a judge in a Criminal or Civil case deciding the same on the basis of the materials placed by the parties. He should not allow his attempt to get the truth to be thwarted by observance of unnecessary technicalities, which are not essential for the observance of the principles of justice and enquiry. He should not, for instance, decline to accept the evidence just because the names of witnesses were not given in the Original List or if the evidence is likely to entail the amending or changing the charges already framed. X x x

Thus, from the above, it is evident that the Marshalling Officer is sure that there is some lacuna in the prosecution case and some of the evidences, which he relied upon in his arguments were not originally there in his list and for the said reason, he while submitting his arguments, did not refer much to the evidences adduced during inquiry, rather he thought it proper to refer to the evidences recorded during the inquiry conducted by Mr.P.Patra, ADM & Administrative Officer, VSS Medical College, Burla, which was done behind the back of the petitioner.

(e) From the above, it appears that charges had been framed as per Annexure-1, the statements of allegations though had a reference with regard to the inquiry conducted by two separate authorities, namely, Officer-in-Charge of the Guest House and Sri P.Patra, A.D.M-cum-Administrative Officer, VSS Medical College, Burla, who had recorded the statements of 13 persons on solemn affirmation as per Annexure-A and relied upon 32 nos. of documents as per the list in Annexure-B to the said report. The documents were not supplied to the petitioner even though the petitioner had asked for the same subsequently vide Annexures-2 and 6. Therefore, this was a clear case of non-supply of documents to the petitioner in a disciplinary proceeding.

(f) In **Kashinath Dikshita (supra)** in paragraph 12, the apex court held as follows :

> "The meaning of a reasonable opportunity of showing cause against the action proposed to be taken is that the Government servant is afforded a reasonable opportunity to defend himself against the charges on which inquiry is held. The Government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so when he is told what the charges against him are. He can do so by cross-examining the witnesses produced against him. X x x x "

(g) The decision in **Kashinath Dikshita case (supra)**, which has also been followed in **State of U.P. v. Saroj Kumar Sinha case (supra)**, the apex Court in para 36 has held as follows :

> "36.The proposition of law that a government employee facing a departmental inquiry is entitled to all the relevant statement, documents and other materials to enable him to have a reasonable opportunity to defend himself in the departmental inquiry against the charges is too well established to need any further reiteration. x x x x

(h) In the decisions referred to by Mr.B.K.Behuria, learned Sr.Counsel for the opposite parties, in **State Bank of Patiala and others v. S.K.Sharma (supra)**, principles have been evolved by the apex Court with regard to the applicability of the principles of natural justice in the context of disciplinary proceeding and orders of punishment imposed by the employer upon the employee. The said principles have been enumerated in para 32 of the said judgment, which are as follows:

> "32. We may summarize the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):
>
> (1)An order passed imposing a punishment on an employee consequent upon a disciplinary/ departmental inquiry in violation of the rules/ regulations/ statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.
>
> (2)A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3)In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the inquiry held or order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the inquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the inquiring officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4) (a)In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived if, then the order of punishment cannot be set aside on the ground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in B. Karunakar, (1994 AIR SCW 1050). The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the inquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action - the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and not adequate opportunity, i.e., between "no notice"/"no hearing" and "no fair hearing." (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (audi alteram partem). (b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the stand-point of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. (It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.)

(6)While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/ Tribunal/ Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7)There may be situations where the interests of state or public interest may call for a curtailing or the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

(i) The reliance place on the decisions in **State of U.P. and others v. Ramesh Ramesh Ch.Mangalik case (supra)**, **Vijay Kumar Nigam (dead) v. State of M.P. and others case (supra)**, **S.K.Singh case (surpa)** by the learned Senior counsel for the opposite parties has no application to the present context. On the other hand, the judgment relied upon by him in **Sarva U.P.Gramin Bank case (supra)** is applicable to the extent that prejudice was caused to the petitioner due to non-supply of the documents and the materials relied upon by the opposite parties had not been supplied by him even though asked for. The decision in **State Bank of Patiala (supra)** and **Sarva U.P.Gramin Bank case (supra)** relied upon by the opposite parties is squarely applicable to the case of the petitioner and goes against the opposite parties.

(j) Therefore, taking the above facts and circumstances into consideration, this Court has no hesitation to come to the conclusion that the opposite parties had denied reasonable opportunity to the petitioner to defend himself in the inquiry.

7. (ii) **Non- supply of inquiry report**

(a) On perusal of the writ application, it reveals that a letter was communicated to the petitioner on 24.6.2000 (Annexure-9) directing him to show cause as to why he shall not be dismissed from service, which shall be a future disqualification. In the said letter, it has also been stated that he has been found guilty of moral turpitude and misconduct and his further retention in the University service is undesirable. After concluding about the guilt of the petitioner, he was supplied with the copy of the inquiry report as well as

the report of the Vice-Chancellor/ Syndicate just to meet the formalities. This action of the opposite parties runs contrary to the settled principles of law as well as Rules 1962.

(b) As per Rule 15(10)(a) of the Rules, 1962, if the Inquiring Officer is not the disciplinary authority, the disciplinary authority shall furnish to the delinquent Government servant a copy of the report of the Inquiring Officer and give him a notice by registered post or otherwise calling upon him to submit within a period of fifteen days such representation as he may wish to make against the findings of the Inquiring Officer. Clause (b) of the said Rules, 1962 provides that on receipt of the representation referred to in sub-clause (a), if the disciplinary authority having regard to the findings on the charges, is of the opinion that any of the penalties specified in clauses (vi) to (ix) of Rule 13 should be imposed, he shall furnish to the delinquent Government servant a statement of its findings along with brief reasons for disagreement, if any, with the findings of the Inquiring Officer and give him a notice by registered post or otherwise stating the penalty proposed to be imposed on him and calling upon him to submit within a specified time such representation as he may wish to make against the proposed penalty.

(c) On receipt of the report from the Inquiring Officer, the disciplinary authority should furnish a copy of the said report asking the delinquent to submit representation to the findings of the Inquiring Officer, whereafter, the disciplinary authority on consideration of both, i.e., the inquiry report and the representation made by the delinquent, if concludes that any of the penalties specified in Rule 13 of 1962 Rules is to be imposed, then he will issue a notice to the delinquent to show cause with regard to the proposed penalty. But in the present case, the same has been given a complete go bye.

(d) So far as non-supply of the inquiry report, reliance has been placed on **Mohd.Ramzan Khan case (supra)**, which has also been taken into consideration in the subsequent judgment, wherein the apex Court has held that the right to represent against the findings in the inquiry report one's innocence is distinct from the right to represent against the proposed penalty and the right to represent against the findings in the report is not disturbed in any way. In fact any denial thereof will make the final order vulnerable. Such finding has been arrived at in view of the fact that right to represent against the findings in the inquiry report to prove once innocence is distinct from the right to represent against the proposed penalty. Therefore, by virtue of the amendment in Rule 15 (10)(a)&(b) on 25.2.2000, it was obligatory to follow

the procedure by supplying the inquiry report and obtaining representation of the delinquent and then to take a decision finally on the same.

8. (iii) **Bias of the authorities**

(a) On perusal of the pleadings available on record, it reveals that the Vice-Chancellor had prepared the notes in guise of a so-called proposed action to be taken by the Syndicate much earlier to the meeting of the Syndicate and the Syndicate without any application of mind had accepted the same. This fact gets corroborated from the fact that on 30.8.2000 at 4.30 P.M., the Syndicate met and accepted the same. If at all they prepared the report on the very same day, then it was almost impossible to prepare a 23 page report after considering the show cause reply submitted by all the delinquents. The report of the Syndicate was nothing but the opinion of the then Legal Advisor thereby the Syndicate had surrendered its discretion to the Legal Advisor, who had acted as the disciplinary authority.

(b) The apex Court in **State of Punjab v. V.K.Khanna (supra)** relying on the decision in **Kumaon Mandal Vikas Nigam Ltd. (supra)**, in paragraph 8 has observed thus:

> "8. The test, therefore, is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is in this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. In the event, however, the conclusion is otherwise that there is existing a real danger of bias administrative action cannot be sustained. If on the other hand, allegations pertain to rather fanciful apprehension in administrative action, question of declaring them to be unsustainable on the basis therefor would not arise."

Similarly in paragraph 34, the apex Court has also observed thus:

> "x x x It is well settled in Service Jurisprudence that the concerned authority has to apply its mind upon receipt of reply to the charge-sheet or show-cause as the case may be, as to whether a further inquiry is called for. In the event upon deliberations and due considerations it is in the affirmative- the inquiry follows, but not otherwise and it is this part of Service Jurisprudence on which reliance was placed by Mr.Subramaniam and on that score, strongly criticized the conduct of respondents here and accused them of being

biased. We do not find some justification in such criticism upon consideration of the materials on record."

Therefore, the orders impugned suffer from vice of bias of authorities.

9. For the foregoing reasons and keeping in view the law laid down by the apex Court, this Court holds that the order of punishment imposed by the disciplinary authority vide order dated 31.08.2000 (Annexure-11) and confirmation thereof made by the appellate authority vide order dated 30.12.2000 (Annexure-14) are vitiated. Accordingly, the same are quashed. The opposite parties are directed to reinstate the petitioner in service forthwith and all the consequential financial and service benefits as due and admissible to him be granted within a period of three months from the date of receipt of a copy of this judgment.

10. The writ application is thus allowed. No cost.

Writ petition allowed.

2015 (II) ILR - CUT-975

DR. B.R. SARANGI, J.

W.P.(C) NO.7574 OF 2010

BANAMBAR PANDA .....Petitioner

.Vrs.

UNITED BANK OF INDIA & ORS. ..... Opp.Parties

SERVICE LAW – Petitioner being a public servant dismissed from service on conviction under the prevention of corruption Act, 1988 – He was kept out of service due to corruption charge and not at the behest of the employer i.e. the Bank – Petitioner is not entitled to get any financial or service benefit – However he is entitled to gratuity in accordance with law. (Paras 13,14)

Case laws Referred to:-

1.(2011) 11 SCC 626 : (Shiv Nandan Mahto-V- State of Bihar & Ors.)

2.AIR 2004 SC 1005 : (Union of India & Ors.-V- Jaipal Singh)
3.AIR 1997 SC 1802 : (Ranchhodji Chaturji Thakore-V- Superintendent Engineer, Gujurat Electricity Board, Himmatnagar (Gujurat) & Ors.)
4.AIR 2001 SC 3320 : (K.C. Sareen-V- C.B.I. Chandigarh)

For Petitioner : M/s. Dhuliram Pattnaik, N. Biswal, N.S. Panda, L. Pattnayak.
For Opp.Parties : M/s. H.M. Dhal, B.B. Swain, A.K. Pattnayak.

Date of hearing : 03.11.2014
Date of judgment : 11.11.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner has filed this writ petition seeking the following relief:

> " …… to issue notice, call for the records, after hearing the parties, quash the order dated 05.02.2010 vide Annexure-7 and direct the opposite parties to grant all the benefits, such as salary from 29.11.1994 to 30.04.2006, pensionary benefits, gratuity, Provident Fund dues, Leave encashment commutation of 1/3 pension, House Rent, Leave Fare Concession in 4 years interval etc. as well as all retiral dues with 18% interest on monthly rest."

2. The petitioner's date of birth being 24.04.1946, he was selected and appointed as an Assistant on 16.03.1971 under the United Bank of India. Thereafter he was promoted to the post of Deputy Manager in the year 1978. While continuing as District Coordinating Officer in Sundargarh district he was placed under suspension w.e.f. 29.11.1994 in connection with T.R. Case No. 65/49/1999/1994 started before the Special Judge (C.B.I.), Bhubaneswar pursuant to investigation conducted by the C.B.I. Petitioner was convicted of the charge under Section 13(2) and 13(1) (d) of the Prevention of Corruption Act, 1988 and was sentenced of two years imprisonment vide judgment dated 30.09.1999. The said order of conviction and judgment being challenged before this Court in Criminal Appeal No. 256 of 1999, his conviction and sentence were set aside by judgment passed in appeal on 14.09.2007 by when he had already retired on superannuation w.e.f. 30.04.2006. It is stated that since the petitioner has been acquitted after the

date of his superannuation, he could not have been reinstated in service but he claims financial benefits admissible to him with effect from the date of his suspension, i.e. 29.11.1994.

3. Mr. D.R. Pattnaik, learned counsel for the petitioner strenuously urged that after being acquitted of the charges by judgment passed by this Court in Criminal Appeal No. 256 of 1999, the petitioner was entitled to the financial benefits from the date of his suspension from service till the date of his superannuation. He therefore approached this Court by filing W.P.(C) No. 17246 of 2008 wherein this Court directed the petitioner to file representation before opposite party no.3. Accordingly, the petitioner filed his representation on 04.01.2010 to opposite party no.3, who was the authority concerned claiming all financial, service and consequential benefits. Opposite party no.3 considering the representation, passed the impugned order rejecting the claim of the petitioner vide order dated 5.2.2010, Annexure-7. It is stated that since the petitioner was acquitted of the criminal charge, he is entitled to get all his service benefits. He further stated that even though the petitioner faced a criminal trial, the Bank authority did not initiate any disciplinary proceeding to disentitle him to get the benefits claimed by him in the writ petition. Merely, on the basis of a criminal charge which ultimately led to acquittal could not have disentitled the petitioner to the benefits due to him.

4. To substantiate his case, Mr. Pattnaik, relied upon the judgment of the apex Court in ***Shiv Nandan Mahto v. State of Bihar and Ors.,*** (2011) 11 SCC 626.

5. Mr. H.M. Dhal, learned counsel for the opposite party-bank, strenuously urged that even though the petitioner has been acquitted in the aforesaid Criminal Appeal on 14.09.2007, by then the petitioner had already attained the age of superannuation which was on 30.04.2006. Therefore question of his reinstatement in service did not arise.

So far as the claim for financial benefits is concerned, he is also not entitled to get the same and as such there is no need for initiation of a disciplinary proceeding in view of the fact that when a bank officer being a public servant is convicted of a corruption charge, he is not entitled to hold public office and consequently not entitled to any financial benefit. Therefore, irrespective of factum of non-initiation of any disciplinary proceeding against the petitioner, he is not entitled to get the financial benefit

as claimed by him. Thereby order passed by the authority is wholly and fully justified and this Court may not interfere with the same.

To substantiate his case, Mr. Dhal, relied upon the judgments of the apex Court in ***Union of India and others v. Jaipal Singh***, AIR 2004 SC 1005, ***Ranchhodji Chaturji Thakore v. Superintendent Engineer, Gujurat Electricity Board, Himmatnagar (Gujurat) and others***, AIR 1997 SC 1802 and ***K.C. Sareen v. C.B.I., Chandigarh***, AIR 2001 SC 3320.

6. Considering the facts pleaded above and after going through the records, it appears that admittedly the petitioner was a public servant being employee of a bank. He was convicted under Section 13(2) and 13 (1) (d) of the Prevention of Corruption Act, 1988 and was sentenced to two years' imprisonment in T.R. Case No. 65/49/1999/1994 by the Special Judge, CBI, Bhubaneswar. Against the said judgment and conviction, the petitioner preferred Criminal Appeal No. 256 of 1999 before this Court which was disposed of on 14.09.2007 setting aside the conviction of sentenced passed against the petitioner. It is admitted fact that pending criminal proceeding the petitioner was placed under suspension on 29.11.1994 and being convicted by the Special Judge on 30.09.1999, he was dismissed from service on 21.10.1999. In the meantime on attaining the age of superannuation he was retired from service on 30.04.2006. He was however acquitted of the charge in Criminal Appeal No. 256 of 1999 by this Court. Being acquitted by this Court, the petitioner claims that he is entitled to get the financial benefits. Therefore, he approached this Court earlier by filing W.P.(C) No. 17246 of 2008 and by order dated 7.12.2009 this Court directed the petitioner to file representation before opposite party no.3 and disposed of the said writ petition. Accordingly, the petitioner filed representation before the opposite party no.3 and on consideration of the grievance made by the petitioner, the said opposite party rejected his claim vide Annexure-7. The petitioner submits that although a criminal case was initiated against him, the authorities never initiated a disciplinary proceeding against him and therefore, the financial benefits admissible to him should be extended to him. His contention is that since he was placed under suspension w.e.f. 29.11.1994 which continued till 30.04.2006 which was the date of his attaining the age of superannuation, treating the said period as duty period, he ought to have been paid the dues as admissible to him. This Court is of the view that after suspension on 29.11.1994 the services of the petitioner had been terminated on 20.10.1999 and with that order the period of his

suspension having been merged, the petitioner cannot claim to be continuing in service being under suspension till his date of his superannuation date i.e. 30.04.2006. Therefore, the period from 29.11.1994 to 30.04.2006 cannot be treated as period of suspension.

7. In the counter affidavit it is specifically stated that the petitioner having been acquitted in Criminal Case No. 256 of 1999 vide judgment dated 14.09.2007, the bank had taken into consideration the entire service period of the petitioner up to 30.04.2006 on which he was superannuated on attaining the age of superannuation to be the qualifying service for determining the pension. Accordingly, he has been paid the dues he was entitled to pursuant to a payment order. His entitlement determined by the Bank was communicated to him vide Bank's letter No.PD/DIR/CC-647 in June 25, 2013 as follows:-

> "Although, it is observed that the Competent Authority of the Bank has duly approved the release of admissible retiral dues to you consequent upon your acquittal vide judgment dated 14.09.2007 of the Hon'ble Orissa High Court and the same has already been paid to you as per calculation of the Bank after effecting notional fitment of your basic pay since 29.11.1994 till the date of your normal retirement i.e. 30.04.2006 yet, in deference to the order dated 16.05.2013 passed by the Hon'ble Orissa High Court, the Bank has thoroughly re-examined entire records relating to payment of your retiral benefits and observed as follows:

1. The remaining salary benefit from the period of your suspension i.e. from 24.11.1994 to the date of dismissal i.e. 21.10.1999 amounting to Rs.3,81,088.42 has been paid to you by the Bank's Sundargarh Branch on 18.02.2009 as you had already received the 50% of salary by way of subsistence allowance during your suspension.

2. Staff Provident Fund dues amounting to Rs.92,304.00 has been paid to you on 04.04.2002 vide Cheque No. 569946 dated 04.04.2002.

3. Arrear salary of Rs.31,697.51 due to notional fitment of salary along with Leave Encashment of 94 days amounting to Rs.53,110.00 has been paid to you on 18.04.2009 by the Bank's Sundargarh Branch.

4. Being a pension-optee, the pensionary benefits including monthly pension has also been accorded to you by the Bank with continuity of

service till date of your notional superannuation i.e. 30.04.2006 and at present, you are receiving Rs.11,275.68 as monthly pension."

8 It appears from the above letter that so far as the gratuity amount is concerned that has not been paid and necessary instruction was issued to concerned department to release the said amount in favour of the petitioner immediately. In view of this, it is stated that petitioner is not entitled to any benefit more.

9. Mr. D.R. Pattnaik, learned counsel for the petitioner relying upon ***Shiv Nandan*** case (supra) strenuously urged that the petitioner is entitled to get the back wages as claimed in the writ petition as he was dismissed from service but subsequently was acquitted of the Criminal charge. Therefore he is entitled to get back wages. It is stated that since dismissal order was passed for no fault of the petitioner, the claim made by the petitioner is wholly and fully justified.

10. Per contra, Mr. Dhal, strenuously relied upon the judgment in ***Ranchhodji Chaturji Thakore*** case (supra), wherein the apex Court held that where there was termination of service on the ground of conviction for criminal offence and subsequent reinstatement in service on acquittal, the petitioner is not entitled to back wages since he was disabled from rendering service on account of his conviction and not on account of any disciplinary action taken by the employer and the claim was unsustainable in law.

11. Similar view has been taken in ***Union of India and others*** case (supra) wherein the apex Court held that where a public servant dismissed on conviction in a criminal case is reinstated on his subsequent acquittal, back wages cannot be granted as department cannot be found fault with for having kept him out of service. Therefore, direction given to the High Court for payment of back wages is erroneous and accordingly the same was set aside by the apex Court.

12. In ***K.C. Sareen*** case (supra), the apex Court held that the bank officer being a public servant convicted on a corruption charge under Section 13 (2) of Prevention of Corruption Act, 1988 is not entitled to hold public office. Therefore, suspension of order of conviction during pendency of the appeal or revision is not permissible.

13. On an analysis of the judgments cited above, it appears that reference made to ***Shiv Nandan*** case (supra) by the learned counsel for the petitioner has no application to the present context inasmuch by no stretch of

imagination it can be construed that the petitioner was kept out of employment at the behest of the employer, namely, the bank. Therefore, the question of no fault on the part of the petitioner does not arise in view of the fact that he was placed under suspension pending contemplation of disciplinary proceeding. Subsequently, in the criminal case he was sentenced to two years' rigorous imprisonment under Section 13 (2) and 13 (1) (d) of the Prevention of Corruption Act, 1988. As the petitioner being a public servant was convicted of a corruption charge, he was not entitled to hold a public office. Therefore, the claim of the petitioner for payment of any dues is absolutely misconceived one. More so, this position has been clarified in ***Ranchhodji Chaturji Thakore*** and ***Union of India and others*** cases (supra) which made it clear that to public servants dismissed on conviction in a criminal proceeding but reinstated on subsequent acquittal, back wages cannot be granted as department cannot be found fault with for having kept him out of service. Having convicted the petitioner was not entitled to hold the public office and as a consequence thereof no back wages he is entitled to.

14. In that view of the matter, this Court is of the considered opinion that the decision taken by the authority vide Annexure-7 is wholly and fully justified inasmuch as the petitioner is not entitled to get any financial or service benefit keeping in view the law laid down by the apex Court as discussed above. So far as the payment of gratuity is concerned, since the authorities have already passed an order in that regard and have communicated the same to the petitioner, vide letter dated 25th June, 2013, the same shall be paid to the petitioner in accordance with law.

15. In that view of the matter, the writ petition merits no consideration and accordingly the same is dismissed.

Writ petition dismissed.

2015 (II) ILR - CUT-982

DR. B.R.SARANGI, J.

O.J.C. NO. 2408 OF 1998

PUSPANJALI MISHRA ……...Petitioner

.Vrs.

VICE-CHANCELLOR, UTKAL UNIVERSITY AND ORS. ……...Opp. Parties

EXAMINATION – Petitioner was declared to have passed B.Ed. (Private) examination, 1996 – She joined service by virtue of the certificate issued to her – Subsequent cancellation of her result on the ground of adopting unfair means in the examination – Action taken after publication of the result was not in consonance with sub-clauses (1) to (4) of statute 214 of the "Orissa Universities first statues, 1990 – Held, since the result of the petitioner has already been published and on that basis she has joined service and by virtue of the interim order passed by this court she is continuing in service, the impugned order is quashed. (Paras 8,14)

Case Laws Referred to :-

1. 2015(I) OLR 212 : Rajanikanta Priyadarshy v. Utkal University.
2. AIR 1990 SC 1075 : Sanatan Gauda v. Berhampur University and others..
3. 1996 (II) OLR 268 : Prakash Chandra Kuanr v. Secretary, Board of Secondary Education, Orissa and others.
4. AIR 1999 ORISSA 129 : Amarjeet Jena v. Council of Higher Secondary Education, Orissa and others.
5. 119(2015) CLT 1099 : Narasingha Pattnaik v. Board of Secondary Education and others,

For Petitioner : Mr. Manoj Mishra, Sr.Adv.
For Opp. Parties : M/s.Rajib Das,T.N.Pattnaik.

Date of hearing : 03.09.2015
Date of judgment: 10.09.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner has filed this application challenging the letter dated 24.1.1998 in Annexure-8 issued by the Controller of Examinations of Utkal

University by which her result of B.Ed.(Private) Examination, 1996 has been cancelled and she has been called upon to surrender the original provisional certificate and mark-sheet of the said examination for cancellation.

2. The factual matrix of the case, in hand, is that the petitioner having fulfilled all the eligibility criteria was allowed to appear at the B.Ed.(Private) Examination, 1996 through the College of Teacher Education, Angul with Roll No.492D205 and registration No.14577/80, which commenced from November, 1996. The result of the said examination was published on 6.7.1997 wherein the petitioner was declared pass in 2nd division securing 507 marks out of total 950 marks. Accordingly, she has been issued with mark-sheet and provisional certificate for B.Ed.(Private) Examination, 1996 in the month of November, 1996. On 10.12.1997 opposite party no.2 issued a show cause notice stating that on 29.11.1996 the petitioner while appearing Paper-I has violated Rule 4 of the Rules for the guidance of the candidates as she was in possession of one piece of hand-written material. On receipt of such show cause notice on 27.12.1997 vide Annexure-4, the petitioner submitted her reply on 2.1.1998 before the date of enquiry as stated in the said show cause notice stating, inter alia, that the petitioner is quite ignorant of the source/ origin of the piece of paper in question alleged to have been in her possession at the time of examination. As such, she has not violated any of the disciplines of the examination. But the authorities without considering the same, cancelled her result by passing the impugned order in Annexure-8. It is stated that after passing the examination, the petitioner rendered service on the basis of such certificate and if the result of the said examination is cancelled, she would be rendered jobless. Hence, this application.

3. Mr.Manoj Mishra, learned Senior counsel for the petitioner states that the action of the authorities in cancelling the result of the petitioner of B.Ed. (Private) Examination, 1996 is in gross violation of Clause 240 of the Orissa Universities First Statutes, 1990 as the same has been passed without complying with the principles of natural justice. Once the result has been declared and on that basis the petitioner has already got employment, cancellation thereof is hit by the principles of estoppels and therefore, he seeks for quashing of the same.

4. Pursuant to the notice issued, though Mr.Rajib Das and Mr.T.N.Pattnaik, learned counsel have entered appearance for the opposite parties 1 and 2 and filed preliminary counter, in course of hearing Mr.Rajib Das was not present in Court and Mr.T.N.Pattnaik,learned counsel submitted

that he has got no instruction in the matter. Therefore, since this is year-old matter of 1998, this Court thought it proper to proceed with the hearing of the case on the basis of the counter filed by opposite parties 1 and 2.

5. In the counter affidavit, the opposite parties 1 and 2 have stated that on the very first day of examination (Paper-I), the Invigilator seized some hand-written incriminating materials from the petitioner's main answer script at about 11.45 A.M. while the examination was on process, which violates Rule 4 of the Rules for the guidance of the candidates. After the said fact was discovered, the candidate was asked to sign in the official form which was duly endorsed by the Centre Superintendent on 29.11.1996. As per the procedure, the same was sent to the Controller of Examination, Utkal University along with the seized hand-written material and the answer script. It is stated that there is mis-sending of the answer sheet by the Centre Superintendent as instead of dispatching the incriminating materials with answer sheet so far as the candidate bearing Roll No.492D205 is concerned, the same was sent with the answer sheet of the candidate bearing Roll No.492D295 in a sealed cover. It is further stated that due to mis-sending of the incriminating materials along with the answer sheet of the candidate bearing Roll No.492D295 the answer sheet of the petitioner bearing Roll No.492D205 was valued and result was published wherein she was declared pass, whereas the result of the candidate bearing Roll No.492D295 was withheld. After enquiry, the said fact was detected and was brought to the notice of the Principal –cum- Centre Superintendent, who was directed to cause an enquiry and submit a report as to how irregularities have been committed and to take immediate steps to collect the provisional certificate and mark-sheet issued to the petitioner and to send the same to the University for further action. Therefore, subsequently in partial modification of the result published, notification was issued keeping the result of the petitioner withheld and the petitioner was called upon to show cause on 10.12.1997, to which the petitioner submitted her reply on 5.1.1998 stating that she was totally ignorant about the said written paper, rather while she was sitting in the examination, the invigilator came near to her and forced her to sign in a form and threatened her to drive out from the examination hall if she will not sign in the said form. Accordingly, her result was cancelled as per Statute 214(5)(ii) of the Orissa Universities First Statutes, 1990. It is further stated that the impugned action of cancellation of the result of the petitioner having been taken in consonance with the provisions of law in view of the fact that the petitioner was in possession of incriminating

materials, which has been duly approved by the Vice-Chancellor on behalf of the Syndicate, no illegalities or irregularities have been committed by the authorities.

6. By way of rejoinder, the petitioner denied the allegations made in the counter and stated that she was neither in possession of the said incriminating material nor was it recovered from her possession. In spite of that the invigilator compelled her to put her signature in a prescribed form and she was further cautioned that if she denied to put her signature, she would not be allowed to sit in the examination. Therefore, under the compelling circumstances, the petitioner put her signature in the said form without verifying the contents thereof. In any case, since the result of the petitioner has already been declared and on that basis, she has already rendered service subsequent to the same, any action taken to rectify the mistake done by the authority, cannot sustain in the eye of law. Accordingly, she seeks for quashing of the same.

7. On the facts pleaded above, it is to be considered whether the authorities are justified in cancelling the result of the petitioner, which has already been published on the basis of which the petitioner has already got job and rendering service.

8. The admitted fact is that the petitioner being a candidate for the B.Ed.(Private) Examination, 1996, appeared the same, whose result has already been published. After the result was published, she having been declared pass, has joined service on the basis of the certificate granted by the authority. While she is discharging her duty, she has been issued a notice to show cause by the University authorities to which the petitioner responded and filed her reply denying the allegations. Without considering the same in proper perspective, the order impugned has been passed cancelling the result. In pursuance of the power conferred by sub-section (3) of Section 24 of the Orissa Universities Act, 1989 (Orissa Act 5 of 1989), the State Government has framed a statute, called the "Orissa Universities First Statutes, 1990". Statute 214 deals with "Unfair means in examination". Sub-clauses (1) to (4) of Statute 214 read as follows :

> "214 (1) All instances of unfair means in examinations whether reported by the Center superintendents/ invigilators/observers/examiners or otherwise shall be placed before the appropriate board of Conducting Examiners by the Controller of

> Examinations as soon as practicable but preferable before the results of the relevant examination are passed for publication. The Board of Conducting Examiners shall consider the report and other materials, if any, and make a report of the scope and extent of the unfair means resorted to and specifically whether use has been made of unauthorized or incriminating material referred to in the report or produced before the Board.
>
> (2) in cases the Board is satisfied that there is prima facie evidence of resort to unfair means in the examination, the Controller of Examination shall forthwith issue notices to the candidate concerned precisely specifying the nature of the charge and calling upon the candidate to furnish his written reply to the charges within a period of twenty one clear days. The notice shall also inform the candidate that he shall have the right to a personal hearing on a specified date which shall be after the last date for receipt of the written reply from the candidate.
>
> (3) The written reply of the candidate along with the report of the Board of Conducting Examiner and other reports and material pertaining to the matter shall be placed before the Examination Committee.
>
> (4) The Committee shall give a personal hearing to the candidate as indicated in the notice issued to the candidate by the Controller of Examinations and shall also consider the report of the Board of Conducting Examiners, and other reports and material relevant to the case, if any."

From the above mentioned provisions, it is very clear that all the instances of unfairmeans in the examination whether reported by the Centre Superintendent/ Invigilators/ Supervisors/ Observers/ Examiners or otherwise shall be placed before the appropriate Board of conducting examiners by the Controller of Examination as soon as practicable, but preferably before the results of the relevant examination are passed for publication. Admittedly, the alleged report of the Centre Superintendent was submitted after the result was published by the University and on that basis steps have been taken for cancellation of the result. Once the result is published, the authorities are estopped to cancel the same on the basis of the so-called materials collected from the possession of the candidate. After the

result was published, any steps taken by the Controller of Examination of the Utkal University on the so-called prima facie evidence calling for the show cause is an empty formality and that itself is not in consonance with the provisions contained in Statute 214. It is admitted in the counter affidavit that the Centre Superintendent instead of dispatching the incriminating materials seized from the candidate with answer sheet bearing Roll No.492D205, the said material was sent along with the answer sheet of the candidate bearing Roll No.492D295 in a sealed cover, as a result of such act of mis-sending, the answer sheet of the candidate (petitioner) bearing Roll No.492D205 was valued and result was published declaring her pass and fact of such mis-sending of the answer sheet by the Centre Superintendent is not within the knowledge of the petitioner. But fact remains that her answer sheet was duly evaluated the result was published by the authorities and on that basis the petitioner got employment and is continuing in service. Therefore, at this stage, the cancellation thereof having been contrary to the provisions contained in Statute 214, the authorities could not have passed the impugned order depriving the petitioner to continue in service.

9. Similar question came up for consideration before this Court in **Rajanikanta Priyadarshy v. Utkal University,** 2015(I) OLR 212 and this Court taking into account the various judgments of the apex Court has held that the action of the authorities is in gross violation of the principles of natural justice inasmuch as violative of the principle of estoppels.

10. In ***Sanatan Gauda v. Berhampur University and others***, AIR 1990 SC 1075, the apex Court has held that the candidate having been admitted to law course and permitted by the University to appear in the examination conducted by the University, refusal to declare results of examination by University on the ground of ineligibility to be admitted to law course is hit by principle of estoppel. Similar view has also been taken in ***Prakash Chandra Kuanr v. Secretary, Board of Secondary Education, Orissa and others***, 1996 (II) OLR 268 and ***Amarjeet Jena v. Council of Higher Secondary Education, Orissa and others***, AIR 1999 ORISSA 129.

11. In ***Prakash Chandra Kuanr*** (supra), this Court referred to ***Sanatan Gauda*** case (supra), wherein the petitioner after completion of 10^{th} class applied for appearing as regular candidate at the High School Certificate Examination, which was allowed by the Board of Secondary Education and consequentially admit card was issued in his favour and the petitioner appeared in the examination but result was not published. This Court held

that the action of the Board is not sustainable as it has been done one-sided without giving the petitioner opportunity to be heard and therefore the results of the examination should be declared.

12. In ***Amarjeet Jena*** case (supra), the result of the petitioner was withheld on the ground that Regulation-107 has not been complied with. In that case, this Court held that student can be admitted only if he or she has completed a regular course of study in one or more affiliated institutions recognized for the purpose of Council's Examination for not less than two academic years after passing the High School Certificate Examination of the Board of Secondary Education, Orissa or some other equivalent examination recognized by the Council and thereafter the result was published.

13. This Court in **Narasingha Pattnaik v. Board of Secondary Education and others,** 119(2015) CLT 1099 also held that cancellation of result of the petitioner having been published, it cannot be construed that the result of the petitioner has not been published.

14. Applying the above mentioned principles of law to the present context, since the result of the petitioner has already been published and on that basis she has already joined in service and by virtue of the interim order passed by this Court on 23.2.1998 the petitioner is continuing in service, the impugned cancellation of result in Annexure-8 dated 24.1.1998 is liable to be quashed and is hereby quashed.

15. The writ application is allowed. No cost.

Writ petition allowed.

2015 (II) ILR - CUT-989

DR. B. R. SARANGI, J.

W.P.(C) NO. 20339 OF 2014

DINESH MEHTA .....Petitioner

.Vrs.

STA, ODISHA & ORS. .....Opp. Parties

MOTOR VEHICLES ACT, 1988 – S.69(1)

Permanent Permit – Petitioner obtained such permit in respect of his vehicle on the inter-state route from Jharkhanda State as well as from Odisha State by providing his permanent address i.e. where he resides or his principal place of business – He has not suppressed any material facts – Rather the permit issued by Jharkhanda state was duly countersigned by the S.T.A Odisha – O.P. No. 2 being a rival passenger transport operator has no locus standi to challenge the transport permit issued in favour of the petitioner – Cancellation of the above permit by STA Odisha and consequential confirmation made in appeal by the State Transport Appellate Tribunal can not be sustained – Held, impugned orders are quashed and the permanent permit granted in favour of the petitioner is revived.

(Paras 18, 19, 20)

Case Laws Referred to :-

1. AIR 1963 MP 361 : Mathuradas Regular Motor Services, Gwalior and others v. State Transport Authority and others.
2. AIR 1999 Orissa 1. : Smt.Sushila Chand v. State Transport Authority, Orissa and others
3. AIR 1971 SC 246 : The Nagar Rice and Flour Mills and others v. N.Teekappa Gowda and Bros. and others.
4. AIR 1976 SC 578 : Jasbhai Motibhai Desai v. Roshan Kumar.

For Petitioners : M/s. B.N.Prasad, L.N.Das

For Opp. Parties : M/s. Pravakar Behera, P.Raj (for O.P. No.2)
Mr. J. Pal, (Standing Counsel for Tpt. Deppt.)

Date of hearing : 05. 02.2015
Date of Judgment: 19.02.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, a passengers transport operator, files this petition to set aside the order of cancellation of permit dated 04.11.2013 passed by the State Transport Authority (in short 'STA')-opposite party no.1, vide Annexure-7 and consequential confirmation made in appeal by the learned State Transport Appellate Tribunal, Orissa, Cuttack dated 29.09.2014, vide Annexure-10.

2. The short fact of the case, in hand, is that the petitioner in accordance with provisions of Sections 60 and 80 of the Motor Vehicles Act, 1988 (in short "MV Act"), applied to the State Transport Authority, Orissa, Cuttack under Section 66 read with Rule 45(1)(a) for grant of permanent permit in respect of Stage Carriage on the route Rourkela to Kutmakachar via Biramitrapur, Simdega and back. In the said application, vide Annexure-5 he has provided his address as "Quarter No. D-208, Koel Nagar, Rourkela-796014, Dist.- Sundargarh" and also specifically stated under Clause-9 that he has also got a permanent permit of other vehicle from Simdega to Rourkela in P.P. No. 03/2008.C/s. No.17G/2008 from Jharkhand State Transport Authority and such permit was for a period of five years. On consideration of such application, opposite party no.1 granted a permanent permit in respect of inter State route Rourkela to Kutmakachar via Biramitrapur, Simdega and back in respect of vehicle No. JH-07A-9311 which was valid till 29.06.2016 w.e.f. 30.06.2011 for a period of five years. While the petitioner was plying his vehicle pursuant to the permanent permit granted by opposite party no.1, opposite party no.2 raised an objection indicating the fact that the petitioner has obtained a permanent permit from Jharkhand authority vide P.P. No. 3/8 showing his address as " S.N. Ganguli Road, Ranchi, Kotwali, Dist- Ranchi, Jharkhand" but he has obtained a permanent permit from the Odisha State Transport authority showing his address as "Quarter No. D-208, Koel Nagar, Rourkela-796014, Dist.-Sundargarh". It is stated by opposite party no.2 that suppressing the material facts and misrepresenting his residence and principal place of business he has obtained permanent permit from the State of Odisha. Therefore, the opposite party no.1 should cancel the permanent permit granted in favour of the petitioner. Such objection was raised by opposite party no.2 in Misc. Case No. 72 of 2012. The petitioner was called upon to show cause as to why permanent permit granted in his favour, shall not be cancelled. Pursuant to such notice of show cause, the petitioner filed his reply raising a preliminary

objection with regard to the locus standi of opposite party no.2 and produced all the materials and documents including Voter ID Card, Addhar Card, Indian Union Driving Licence, copy of certificate of marriage issued by the local authority and documents showing his permanent residence and place of business at Rourkela and his maternal grandfather's house at Rourkela and has never suppressed or misrepresented the authority as alleged by opposite party no.2 and sought to drop the proceeding. But opposite party no.1 without considering the materials available on record and considering the same in proper perspective, upon hearing the parties on 20.09.2013 passed the impugned order of cancellation of permanent permit granted in favour of the petitioner on 04.11.2013, vide Annexure-7. Being aggrieved by the said order, the petitioner preferred an appeal before the State Transport Appellate Tribunal, Odisha, Cuttack in MV Appeal No. 2 of 2014. Though the petitioner sought for grant of stay of the impugned order dated 04.11.2013 till final adjudication of the matter, the same was refused. When grant of permanent permit of the very same route in question was published in local daily news paper, the petitioner again submitted another application seeking for a direction against opposite party no.1 not to proceed further. On consideration of the same, the learned Tribunal after hearing all the parties, passed the order directing the authorities not to take any final decision subject to result of the appeal. Finally, the matter was heard by the Tribunal vide order dated 29.09.2014 in Annexure-10 and the learned Tribunal dismissed the appeal. Hence this application.

3. Mr. B.N. Prasad, learned counsel for the petitioner strenuously urged that opposite party no.2 has no locus standi to raise any objection with regard to the grant of permanent permit in respect of the route in question. Therefore, the impugned order of cancellation at his behest is arbitrary, unreasonable and contrary to the provisions of law. In addition to the same, it is urged that the reasons for raising objection in respect of permanent permit granted by opposite party no.1 that the petitioner suppressed the material facts, is not correct as in the application filed under Annexure-5, under Clause-9, it was specifically indicated that the petitioner is permanent permit holder No. 3/8 in respect of very same route and the address which has been mentioned in Clause-3 being indicative of the fact that he is a resident of Rourkela, that ipso facto cannot take away the rights to carry out his business in Odisha even if the petitioner was granted the permanent permit from Jharkhand State indicating his address in the State of Jharkhand as his place of residence or place of business and being a citizen of India, he has got

every right to carry out business in any State which is in conformity with his rights as enshrined under Article 19 of the Constitution of India and as such there is no such provisions under M.V. Act to put a restriction in respect of operator for grant of permanent permit on the ground of residence or principal place of business. Therefore, the order of cancellation made by opposite party no.1 and consequential confirmation made by the State Appellate Tribunal cannot sustain. Therefore, Annexure-7 and Annexure-10 are liable to be quashed.

4. Mr. J. Pal, learned Standing Counsel for the Transport Department, stated that the petitioner had never taken a ground that he has got a principal place of business at Rourkela, thereby he has violated the statutory provisions contained under Section 69 of MV Act by obtaining two permits one from STA, Jharkhand and another from STA, Odisha. Under Sub-Section(2) of Section 69 of the MV Act, the petitioner could not have his place of residence or principal place of business in two States and that too at the same time. Therefore, by practising fraud on opposite party no.1, permit has been obtained though the factum mentioned in Clause-9 of the application that the petitioner has got permanent permit from the State of Jharkhanda, was over-looked by the authorities. Therefore, the petitioner having violated the provisions contained in Section 69 of the M.V. Act, grant of permanent permit in his favour in respect of the route in question cannot sustain. In addition to that if any reasonable restriction has been imposed, it cannot be construed as violation of Article 19 of the Constitution of India and that imposition of reasonable restriction is well within the competence of the authority and therefore, the action taken by the authority is justified.

5. Mr.P.Behera, learned counsel for opposite party no.2 strenuously urged that inter-State route has been opened pursuant to the inter-State agreement between the two States in accordance with the provisions contained in Section 88(5) and (6) of the M.V. Act, 1988. He further urged that the route in question has been opened pursuant to the reciprocal transport agreement made between the States of Odisha and Jharkhand published under Section 88(6) of the M.V. Act vide notification no. 1679 dated 28.3.2007. In the said notification, the route in question has been indicated as against Sl.No.7. As per such reciprocal transport agreement, quota has been fixed for grant of permit according to which one permit is to be granted in Oidsha and one permit is to be granted by Jharkhand. As per the provisions contained in Section 69 of the M.V. Act, restriction has been

imposed in making application for grant of such permit. As per the said provision, the applicant shall make application to the authority of the region in which he/she resides or has his/her principal place of business. The petitioner has availed permanent permit in respect of his vehicle bearing No.JH-01Q-1500 on the inter-State route from Simdega to Rourkela and back from S.T.A., Jharkhand, Ranchi showing his permanent address as "S.N. Ganguli Road, Ranchi, Kotwali, Dist- Ranchi, Jharkhand". Such permanent permit was submitted before the S.T.A., Odisha and was duly countersigned by it up to 7.6.2013. It is stated that while making application to opposite party no.1, the petitioner has shown his address in Col.No.3 as "Quarter No. D-208, Koel Nagar, Rourkela-796014, Dist.- Sundargarh". Therefore, he has suppressed the material facts before opposite party no.1 and accordingly, considering the objection raised by this opposite party no.2, authorities are justified in cancelling the permanent permit granted in favour of the petitioner and this Court may not interfere with the same. In support of the contention he has relied upon the decision of Madhya Pradesh High Court in **Mathuradas Regular Motor Services, Gwalior and others v. State Transport Authority and others,** AIR 1963 MP 361 and of this Court in **Smt.Sushila Chand v. State Transport Authority, Orissa and others,** AIR 1999 Orissa 1.

6. In view of the aforesaid pleaded facts, the following questions emerge for consideration:

(i) Whether the opposite party no.2 has got any locus standi to raise objection with regard to permanent permit granted in favour of the petitioner by opposite party no.1?

(ii) Whether opposite party no.1 is justified in cancelling the permanent permit granted in favour of the petitioner on the basis of the objection raised by opposite party no.2?

7. Coming to the first question regarding the locus standi of opposite party no.2 to raise objection, it appears that admittedly, opposite party no.2 is a passenger transport operator, may be a business rival of the petitioner. When the notification was issued for grant of permanent permit in respect of Jharkhanda State, opposite party no.2 was not the applicant for the same route in respect of which the petitioner submitted his application. However, on consideration of his application, the petitioner was granted permanent permit bearing P.P. No. 03/2008.C/s. No.17G/2008, basing upon which the

he is plying his vehicle in the route Simdega to Rourkela and back. Even pursuant to the notification issued by opposite party no.1, opposite party no.2 is not an applicant for grant of permanent permit in respect of Rourkela-Simdega and back via Biramitrapur. It is the further admitted case that opposite party no.2 had never raised any objection when the petitioner's application under Annexure-5 was under consideration by opposite party no.1. More so, when objection was invited by opposite party no.1, opposite party no.2 had never objected to the same. After grant of permanent permit in favour of the petitioner, while he was operating with effect from 30.6.2011, objection was raised by opposite party no.2 in the year 2013, basing upon which the petitioner was called upon to show cause on 26.2.2013. The opposite party no.2 having not made application pursuant to the notification issued by opposite party no.1 for the route for which the petitioner applied for and having not made any objection at the time of consideration of the application of the petitioner, at a subsequent stage, he cannot and could not have raised any objection and the authority should not have taken into consideration such objection. Since opposite party no.2 is one of the rival passenger transport operators, at his behest the authority could not have considered the objection and cancelled the permit granted in his favour, which itself is hit by Article 19(1(g) of the Constitution of India.

8. The question of "**locus standi**" of the competitor had come up for consideration before the apex Court in **The Nagar Rice and Flour Mills and others v. N.Teekappa Gowda and Bros. and others,** AIR 1971 SC 246, wherein the apex Court while considering the provisions of Section 8(3)(c) of Rice Milling Industry (Regulation) Act, 1958 in paragraph 9 has come to hold as follows :

> "Where the owners of an existing rice mill shifted its existing location and obtained the necessary permission for change of location from the Director of Food and Civil Supplies, even if it be assumed that the previous sanction has to be obtained from the authorities before the machinery is moved from its existing site, the competitor in the business (owner of another rice mill) can have no grievance against the grant of permission permitting the installation on a new site. The right to carry on business being a fundamental right under Art 19 (1) (g) of the Constitution, its exercise is subject only to the restrictions imposed by law in the interests of the general public under Art. 19 (6) (i)."

9. Similarly in **Jasbhai Motibhai Desai v. Roshan Kumar**, AIR 1976 SC 578, a four-Judge Bench speaking through Sarkaria,J. observed as below:

> "46. Thus, in substance, the appellants' stand is that the setting up of a rival cinema house in the town will adversely affect his monopolistic commercial interest, causing pecuniary harm and loss of business from competition. Such harm or loss is not wrongful in the eye of law, because it does not result in injury to a legal right or a legally protected interest, the business competition causing it being a lawful activity, Juridically, harm of this description is called damnum sine injuria, the term injuria being here used in its true sense of an act contrary to law.*The reason why the law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to society at large."

10. In **Mithilesh Garg v. Union of India**, AIR 1992 SC 443, the apex Court held that the existing operators have no locus to challenge the transport permits issued to other operators by observing as under:"

> "As mentioned above the petitioners are permit holders and are existing operators. They are plying their vehicles on the routes assigned to them under the permits. They are in the full enjoyment of their fundamental right guaranteed to them under Article 19(1)(g) of the Constitution of India. There is no threat of any kind whatsoever from any authority to the employment of their right to carry on the occupation of transport operators. There is no complaint of infringement of any of their statutory rights. Their only effort is to stop the new operators from coming in the field as competitors. We see no justification in the petitioners' stand."

11. In view of the ratio decided by the apex Court in the above judgments and also the subsequent judgments, it is evident that the rival operators have no locus standi to challenge the transport permit issued in favour of the other operator. Applying the same to the present context, admittedly, opposite party no.2 is a passenger transport operator, who had neither made any application for grant of permanent permit in his favour in the route to which the petitioner made the application nor has he raised any objection at the time of consideration of the application filed by the petitioner for grant of permit. Therefore, at a belated stage, he cannot raise any objection against grant of

permanent permit in favour of the petitioner. By this process, the petitioner is deprived of getting full enjoyment of his fundamental rights guaranteed to him under Article 19(1)(g) of the Constitution of India. That apart there is no complaint of infringement of statutory rights by opposite party no.2 but his only effort is to stop the petitioner from coming to the field as competitor. Therefore, the opposite party no.2 has no locus standi to raise any objection with regard to the grant of permanent permit in favour of the petitioner by opposite party no.1. Without considering this aspect, both the opposite party no.1 as well as the State Transport Appellate Tribunal have committed gross error apparent on the face of record by cancelling the permit at the instance of opposite party no.2, which cannot be sustained.

12. Considering question no.(ii),it is seen that the allegation made by opposite party no.2 is that the petitioner has obtained permanent permit from Jharkhand State showing his address as "S.N. Ganguli Road, Ranchi, Kotwali, Dist- Ranchi, Jharkhand" and also permanent permit from Orissa State showing his address as "Quarter No. D-208, Koel Nagar, Rourkela-796014, Dist.- Sundargarh". By indicating so, it is stated that the petitioner has suppressed and misrepresented the fact of his residence and principal place of business and prayed for cancellation of permanent permit granted in his favour for the inter-state route, Rourkela to Kutmakachar via Biramitrapur, Simdega and back. As it appears from Annexure-5, the application so submitted before the Odisha State Transport Authority, in clause-3, the petitioner has given the address as mentioned above. But at the same time, under clause-9 of the said application in Annexure-5, it is clearly indicated that the petitioner has got another stage carriage permit valid in the State in respect of other vehicle from Simdega to Rourkela in respect of P.P. No. 03/2008.C/s. No.17G/2008. Therefore, the petitioner has not suppressed any material facts before opposite party no.1 while considering his application in Annexure-5, rather, he has disclosed the fact that he has got another stage carriage permit, then it is left open to the authority, who could have verified the application and on consideration the same, granted permanent permit in his favour. While considering such application, a plea has been taken by the authority stating that the same has been over-looked and that ipso facto does not entitle the opposite party no.1 to cancel the permanent permit in favour of the petitioner. Section 69 of the M.V. Act, states about the general provision as to the application for grant of permit, which is as follows :-

> "69. General provisions as to application for permits –(1) Every application for a permit shall be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle or vehicles:"
>
> Provided that if it is proposed to use the vehicle or vehicles in two or more regions lying within the same State, the application shall be made to the Regional Transport Authority of the region in which the major portion of the proposed route or area lies, and in case the portion of the proposed route or area in each of the regions is approximately equal, to the Regional Transport Authority of the region in which it is proposed to keep the vehicle or vehicles:
>
> Provided further that if it is proposed to use the vehicle or vehicles in two or more regions lying in different States, the application shall be made to the Regional Transport Authority of the region in which the applicant resides or has his principal place of business.
>
> Provided further that if it is proposed to use the vehicle or vehicles in two or more regions lying in different States, the application shall be made to the Regional Transport Authority of the region in which the applicant resides or has his principal place of business.
>
> (2) Notwithstanding anything contained in sub-section (1), the State Government may, by notification in the Official Gazette, direct that in the case of any vehicle or vehicles proposed to be used in two or more regions lying in different States, the application under that sub-section shall be made to the State Transport Authority of the region in which the applicant resides or has his principal place of business."

13. As per the second proviso to sub-section (1) of Section 69, it is made clear that if it is proposed to use the vehicle or vehicles in two or more regions lying in different States, the application shall be made to the Regional Transport Authority of the region in which the applicant resides or has his principal place of business. (emphasis supplied)

14. '**Reside**' has been described in Oxford Dictionary, to mean, "dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place". The meaning of 'reside' as per Black Law Dictionary (5th Edn.) means live, abide, sojourn, stay, remain, lodge. To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell

permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as a quality to be vested as a right.

15. The apex Court in **Union of India v. Dudh Nath Prasad**, (2000) 2 SCC 20, considering the meaning of '**reside'** as has been described in Oxford Dictionary and Black Law Dictionary mentioned above, held that the meaning of '**reside'**, therefore, covers not only the place where the person has a permanent resident but also the place where the person has resided for a 'considerable time'.

16. In **Jeewanti Pandey v. Kishan Chandra Pandey**, AIR 1982 SC 3, the apex Court while considering the meaning of '**reside'** has held that '**reside'** means to make an abode for a considerable time to dwell permanently or for a length of time, to have a settled abode for a time. It is the place where a person has a fixed home or abode.

17. Coming to the question of consideration of "**principal place of business**", it is necessary to refer to the provisions of Order XXX, Rule 3(b), CPC and Section 58(1) (b) of the Indian Partnership Act, 1932, as per which "**principal place**" means office at which the business of the company is managed. Therefore, "**principal place of business**" means where the governing power of the corporation is exercised, where those meet in council who have a right to control its affairs and prescribe what policy of the corporation shall be pursued and not where the labour is performed in executing the requirements of the corporation in transacting its business. "**Principal place of business**" means the place designated as the principal place of business of the corporation in its certificate of incorporation.

18. Taking into consideration the above meaning of principal place of business attached to the second proviso to sub-section (1) of Section 69, the application submitted before Jharkhand State Transport Authority as well as Odisha State Transport Authority, only requires to provide the address where the applicant resides or of his principal place of business. Here the word used 'or' cannot be construed as 'and'. Therefore, if the petitioner has got either residence or principal place of business, he can make an application for grant of permanent permit. So far as the address given in Annexure-5, the petitioner has produced the documents the factum of Voter ID Card, Addhar Card, Indian Union Driving Licence, copy of certificate of marriage issued

by the local authority and the documents showing his permanent residence and place of business at Rourkela and his maternal grandfather's house at Rourkela. That ipso facto cannot be construed that the petitioner has suppressed any material facts before this Court with regard to the factum where he resides or his principal place of business. Therefore, opposite party no.1 while passing the order in Annexure-7 in cancelling the permanent permit in favour of the petitioner on consideration of the objection by opposite party no.2, who has no locus standi in the matter, has committed gross error by misconstruing the provisions contained in M.V. Act and the Rules framed thereunder and the State Transport Appellate Tribunal while considering the appeal has confirmed the order passed by opposite party no.1 without looking into the statutory provisions on misconstruction of both fact and law.

19. The reliance placed on **Mathuradas Regular Services, Gwalior and others (supra)** by learned counsel for opposite party no.2 is not applicable to the present context. In that case, the Madhya Pradesh High Court has stated that the applicant has no place of business within the region of Regional Transport Authority. Therefore, he cannot claim permit for inter-state route running through two adjoining States of Madhya Pradesh and Maharashtra while considering the parimateria provision for Section 45(2) of the MV Act, 1939. In **Smt. Sushila Chand (supra)** this Court had considered the proceeding of the State Transport authority on the ground of improper constitution of STA thereby raising a question of jurisdiction of the authority for grant of permanent permit and as such there is no allegation of non-compliance of principles of natural justice and therefore, this Court came to hold that since the petitioner did not raise a point that the STA was not properly constituted at the time of consideration of her application, thereby taking a chance of succeeding in the proceeding before it. Therefore, at subsequent stages he is debarred by her own conduct from raising an objection before the Court that the STA has not been properly constituted. Therefore, this Court held that by taking the decision, the STA has not committed any illegality or irregularity on the face of it, and therefore, rejected the contention of the petitioner. It is further held that there is no violation of principles of natural justice while considering the application of the petitioner in the said writ petition. The ratio of the said case is not applicable to the present context and as such the same is distinguishable.

20. In view of such position, the orders so passed by opposite party no.1 as well as the State Transport Appellate Tribunal vide Annexures-7 and 10

are hereby quashed and the permanent permit granted in favour of the petitioner is hereby revived.

21. Accordingly, the writ petition is allowed. There shall be no order as to cost.

Writ petition allowed.

2015 (II) ILR - CUT-1000

D. DASH, J.

R.S.A NO. 460 OF 2003

LORD JAGANNATH MAHAPRABHU .....Appellant

.Vrs.

LAXMIKANTA PRADHAN & ANR. ……..Respondents

SPECIFIC RELIEF ACT, 1963 – S.37

Permanent Injunction – Whether a decree for permanent injunction can be passed against the Landlord permanently restraining him from dispossessing the tenant ? – Permanent injuction is not permissible to be passed against the Landlord restraining him from recovering possession from the tenant for all times to come which in turn is a decree declaring the tenants right to possession of the property as if having non-evictable right. (Para10)

CIVIL PROCEDURE CODE, 1908 – O-26, R-9

Commissioner's report – No objection by the adversary – Acceptance of – Even if no objection filed against the report of the Commissioner, still then the Court has ample power to say the report is incorrect if the conclusions are not found acceptable.

(Para12)

For Appellant : M/s. R.C.Rath, S.K.Panda
For Respondent : M/s. S.K.Das, S.Swain S.R.Subudhi, N.N Mohapatra

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Date of hearing : 30.06.2015
Date of judgment:13 .08.2015

JUDGMENT

D. DASH, J.

The defendants are the appellants against the reversing judgment passed by the learned District Judge, Puri in Title Appeal No. 62 of 1995. The respondents as the plaintiffs has filed the suit for permanent injunction in respect of the land measuring Ac.1.92 decimals come under seven plots in the Town of Puri.

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

It may be stated that the original plaintiff having died during pendency of appeal before the lower appellate court, his legal representatives are prosecuting the appeal.

3. The case of the plaintiff is that the defendant no.2 Lord Jagannath Mahapravu- Bije- Shri Purusottam Khetra, Puri is the owner of the suit land whose character is 'Amruta Monohi'. The Mahamta of Radhakanta Matha was the marfatdar. In course of management of the affairs of math and properties under his marfatdarship; one Babaji Gour Govinda Das was engaged by him to look after the garden known as "Ai Tota" which is the land of an extent of Ac.6.00 and odd. It is further stated that during Car Festival huts are being constructed over the same to provide accommodation for the devotees and pilgrims. This Gour Govinda Das in course of time being in charge of looking after the properties, converted the suit land to kitchen garden and thereafter having constructed the hut over there began to reside. He then claimed the tenancy right over the suit properties. The plaintiff was then a Mohrir (Advocate's Clerk) and was looking after the affairs of Math. He was approached by the then Hereditary Trustees of the Math for necessary advise for eviction of said Gour Govinda Das and for necessary help. It was agreed that in that event, he would be rewarded being given with two acres of land. Finally aforesaid two acres of land was granted by way of lease and for the sake of evidence, there had come into existence an unregistered deed on 15.02.1970. The plaintiff also alternatively advances the claim of title by way of adverse possession.

4. The defendants aver that the plaintiff was merely the Gumastha of the Math and he was provided with a room for his residence in such capacity. Unregistered deed dated 15.02.2970 is challenged that it is forged one having

no sanction in the eye of law. The maintainability of the suit with the reliefs as prayed for is seriously questioned on the ground that the properties described in the plaint as the suit property is not identifiable for an effective decree if any to be passed, even an acceptance of the claim of the plaintiff. Maintainability of the suit is further challenged for non-impletion of Commissioner of Endowments as a party and none service of notice.

Further averments in the written statement are that the estate came into vested on 18.03.1974 and the land in question was settled in favour of the defendants on 16.10.1979. Thus the plaintiff cannot claim any interest therein when he himself was taking step on behalf of the defendants in the said proceeding and as well as before the settlement authority on behalf of the Matha. It is stated that the plaintiff was taking all required steps in O.S. No. 283 of 1974 in the court of Munsif, Puri as Gumastha of the Matha and thus he is precluded from advancing any claim, adverse to the Math. The State recognized the defendants to be the owner of the land in question and the compensation having been awarded to the defendants consequent to the acquisition of a portion of garden, the claim of the plaintiff is said to be wholly untenable. A stand also been taken that the suit for injunction as laid is not maintainable without the prayer for declaration of title.

5. On such rival pleadings, trial court framed necessary issues and rendered the following findings:

i) The unregistered permanent lease deed on which the plaintiff relies is not admissible in evidence for want of registration and it is invalid being contrary to the provisions of the Orissa Hindu Religious Endowments Act.

ii) The plaintiff was never a tenant under the defendants and had not acquired any title by prescription in respect of the suit land.

iii) The defendants are the owners of the suit land.

iv) The suit property has not been correctly described for which no relief can be granted to the plaintiff.

v) The plaintiff having not established his lawful possession over the suit property is not entitled to the relief of injunction.

6. With the aforesaid findings, the suit have been dismissed, the plaintiff carried an appeal (Title Appeal No. 1/34 of 1988). The appellate court set

aside the judgment and decree holding that the plaintiff had acquired right of tenancy by prescription. So the relief of injunction was granted.

The defendants then preferred the Second Appeal No. 410 of 1989. By judgment dated 15.12.1993, this Court remanded the matter to the trial court for the limited purpose of identification of the property that the plaintiff possessed by payment of rent to the defendants. This Court held that the lease purported to have been created under the Ext.1 is void from the inception for want of registration as well as lack of sanction of the competent authority under O.H.R.E.Act. So the document did not create any right in favour of the defendants in respect of the land descried therein. Thus the status of plaintiff vis-à-vis the land in suit was not held to be as that of the lessee and as such he was denied the right of a lessee either under Ext.1 or by of his possession if any by the date of vesting or b y the date of the suit. This Court in the Second Appeal found the plaintiff to be in possession of the some land out of the suit land belonging to the defendants-deity and that for the said possession, rent was collected by the Matha as the Marfatdar of Amrutmanohi property. The Court had observed that the description of the property given in the plaint however was not sufficient for providing proper identification of the land. Then next, it was held that when the plaintiff in the possession of some land by payment of rent to the Matha Marfatdar, he may be entitled to maintain his possession until evicted in due process of law. This judgment of the Second Appeal passed by this Court was challenged before the Hon'ble Apex Court by the defendants in S.L.P No. 6765 of 1994. The Hon'ble Apex Court by order dated 13.05.1994 dismissed the said appeal directing the trial court to identify the property and consequently pass order as directed by this Court. The order passed by this Court thus having been confirmed by the Hon'ble Apex Court, the matter came thereafter before the trial court. The plaintiff then amended the schedule of property providing the rough sketch map. This amendment was challenged in Civil Revision No. 1/46 of 1994 and that was dismissed. So, the amendment stood. Plaintiff thereafter sought for appointment of survey knowing commissioner under order 26, Rule 9 of the Code of Civil Procedure. The prayer having been allowed, the commissioner was deputed for the purpose of identification of the suit land. He submitted his report. Finally, the plaintiff did not adduce any evidence in the suit, when the defendants examined three more.

7. The trial court now answered the question as posed by this Court in the Second Appeal, while remanding the matter which was affirmed by the Hon'ble Apex Court taking up the exercise of scrutiny of the evidence with regard to identification of the suit land. For the purpose, it has taken into consideration the schedule of land given in the plaint. After amendment, the report of the survey knowing commissioner, the draft khatian of the suit property and the order of settlement of the land in favour of the deity in Claim Case No. 92 of 1974 providing schedule of land by the O.E.A. Collector-cum-Tahasildar, Puri and other evidence with regard to description of the property. Finally answer has been given that the description of the property given in the plaint schedule is not in conformity with the property demarcated/identified by the commissioner as reported and provided in the map. Further answer has been given that it is not in conformity with the land which finds mention in the draft khatian. In view of the all these, the trial court has held the description of the suit property given in the plaint to be insufficient for its identification. So it held that with such insufficient evidence as regards the identification of the property described in the plaint, the relief of injunction as prayed for cannot be passed in favour of the plaintiff and against the defendants. The suit thus ended with dismissal. The plaintiff then carried Title Appeal bearing T.A. No. 62 of 1995.

8. The learned District Judge, Puri by judgment dated 20.03.1999 again remanded the suit to the trial court with a direction to decide the same keeping in view the direction of this Court in Second Appeal No. 410 of 1989. This was challenged by the plaintiff before this Court in M.A. No. 338 of 1999. This Court on that occasion by order dated 07.01.2003 directed the appellate court to dispose of the appeal on its merit by clearly holding that all those observations made by the appellate court for the purpose of remand of the suit again to the trial court to decide the suit in conformity with the judgment of this Court in Second Appeal to be untenable. Thereafter, on remand of the appeal, the learned District Judge by judgment dated 13.05.2003 has allowed the appeal reversing the judgment and decree of the trial court and decreed the suit of the plaintiff for permanent injunction against the defendants. The ordering portion of the judgment runs as under :-

> "In the result, the appeal is allowed on contest against the respondents but in the circumstances without any cost. Impugned judgment and decree of the learned trial court are set aside. The suit of the plaintiff is decreed and consequently the defendants are

permanently restrained from dispossessing the plaintiff-appellants from the suit land."

9. The Second Appeal has been admitted on the following substantial questions of law :

(i) Whether the lower appellate court is correct and justified in reversing the decision of the trial court without giving good reason for not accepting the finding of the trial court as regards insufficiency of materials on record to identify the property said to be in possession of the plaintiff by acceptance of rent particularly when the description of the suit property in the plaint schedule was not in conformity either with the report of the commissioner or the land particulars given in the draft khatian (Ext.K) and the evidence on record did not lend any support to identify the land and thus the suit land was totally unidentifiable vide order dated 07.09.2004?

(ii) Whether a decree for permanent injunction can be passed against the land lord permanently restraining him from dispossessing the tenant vide order dated 23.11.2012 ?.

10. Learned counsel for the appellant submits that the trial court had in detail discussed all the evidence on record as regards identification of the suit property. The lower appellate court in slipshod manner without going to examine the defensibility of the trial court's finding as to the question as to whether the description of the suit and its identification simply relying on the Commissioner's report has concluded that the trial court has committed an error in dismissing the suit. He further contends that the findings of the trial court on that issue of sufficiency of evidence for identification of the suit land as described in the plaint ought not to have so lightly disturbed by the appellate court without discussing the evidence on record and without having arrived at an independent conclusion on that score contrary what had been held by the trial court by specifically indicating that the reasons assigned by the trial court are not proper. Therefore, he urges that the said conclusion of the lower appellate court is not tenable in the eye of law. It is his next contention that in view of the order passed by this Court in Second Appeal No. 410 of 1989 as confirmed by the Hon'ble Apex Court, the lower court has committed gross error of law by passing the decree for permanent injunction against the Landlord and restraining from dispossessing the plaintiff forever. According to him, even in the event the lower appellate court would have held the plaintiff to be entitled to the relief in view of the

clear discussion of the subject by this Court in the above Second Appeal, the decree of permanent injunction ought to have been that the plaintiff would remain in possession until he is evicted by following the due process of law. It is his submission that it being unthinkable that the decree for permanent injunction is permissible to be passed against the Landlord restraining him from recovering possession from the tenant for all times to come in future which in turn is a decree declaring the plaintiff's right to possession of the property as if having non-evictable right.

11. Learned counsel for the respondents on the other hand supports the order of the lower appellate court. According to him, the finding of fact given by the lower appellate court is based on report of the survey knowing commissioner and this Court should not render its own finding as it is not permissible for re-appreciation of the evidence. It is his further submission that the trial court had committed grave error in passing the judgment and decree by going behind the direction given by this Court in Second Appeal No. 410 of 1989 and that has been rightly rectified by the lower appellate court. He further submits that the judgment and decree of the lower appellate court are wholly in conformity with the order passed by this Court in Second Appeal No. 410 of 1989 and Misc. Appeal No. 338 of 1999, basing upon the report of the civil court commissioner, which is clear.

12. Keeping in view the rival submission, let us take up the exercise of answering the substantial questions of law as involved in this appeal. The discussions of the trial court as regards the in sufficiency of the identification of the suit property, which ultimately has led the trial court to refuse to pass the decree as that of would be unenforceable land issue un-executable are there at para 8 to 14 of the judgment. The lower appellate court has dealt it at para-10 of its judgment.

It is seen that the lower appellate court has very rightly said that the duty of the court is to see if the identification of the suit land has been properly made or not as that was what had been held in second appeal and for which limited purpose the matter was remitted. However, having said so, the abrupt conclusion is that the proper identification has been made through civil court commissioner and there was no further occasion for by the trial court to decide that in any manner. While so saying the lower appellate court has forgotten the position of law that simply because the report of the civil court commissioner with the conclusion arrived at in the report is accepted, the court has still the scope of saying the report as incorrect if by taking into

the consideration the same with osame, the conclusions are not found acceptable. The power appellate court has in this connection writes as under:-

> "In view of the clear detailed report of the civil court commissioner available on record, the trial court has gone wrong in dismissing the suit on the ground that the description of the suit of the property is not sufficient for its identification."
>
> The dismissal of the suit is apparently wrong without any basis and lastly the order is that the suit of the plaintiff is decreed and consequently the defendants are permanently restrained from dispossessing the plaintiff-appellants from the suit land".

13. The suit property described in schedule of the plaint comprises of six full plots and one plot in part as per the record of the sabik settlement. That part plot bears number 62 and in total it measures Ac.4.790 decimals, out of which Ac.1.743 decimals is the suit land. It reveals from the order of the O.E.A. Collector-cum-Tahasildar in Claim Case No. 92 of 1974 marked Ext.G. Ext.1, the basis on which the plaintiff claims to be in possession of the suit land all along concerns with land of Ac1.923 decimals. The version of the plaintiff on oath is that in the year 1981 there was acquisition of Ac.0.500 decimals by the Municipality out of the total lease hold area for construction of the road for the Bus Stand for which the lease hold area is one compact block got divided into two blocks, one lying with the southern and other to the northern. However, the schedule of the plaint goes to show that the Municipality had acquired Ac0.480 decimals. Thus there again crops up the discrepancy in total area of land in dispute. The rent receipt Ext.2 is silent on the total area of plot no.62. The trial court has gone through the Commissioner's report, maps and the field book. The report shows that during the measurement, the Commissioner had referred to the settlement map of 1989 and as well as hal not final map. Admittedly both the maps are not as per one scale. However, the report remains silent that for super imposition either the scale one map was reduced to be inconsonance with the other map or scale of the other map was increased for the purpose. This is of much importance and its non-mention in the report puts the court at dark as regards proper identification of the land. The trial court has found this to be the first infirmity. It has noted that the description of the property given in the plaint which should have in conformity with the property demarcated or identified by the commissioner and the plaint particulars given in draft

khatian Ext.K as well. On comparison it has been found to be not in accord with one another. For the purpose, the trial court has described the detailed reasons and said that the plaintiff has only given the dimension in hal final plot in the schedule. It is next seen from the report of the Commissioner that the suit land comprises of three strips and he has reported as to land described under which sabik plot corresponding to which hal plot are there in each of the strip. However, on calculation the report as regards the total area of southern block stands in with the corresponding area given in the plaint schedule i.e. Ac0.925 as against reported to be Ac0.728 decimals. Then again it is seen that as per the report, the suit property is Ac.1.858 decimals which is different from the claim advanced in the plaint as regards the extent of Ac1.923 decimals. This is irreconcilable. Apart from that when the Commissioner states that the disputed land measures an area of Ac.1.378 decimals**,** in the plaint schedule the same is stated to be Ac.1.443 decimals. This goes without any explanation by the plaintiff so as to be taken into consideration for reconciling the discrepancy. No such evidence is stated to have been led. There is no material on record to show as to from sabik plots corresponding to which hal plot, the acquired area was reduced. Therefore, the trial court's view is that in spite of amendment of the schedule of the plaint in respect of the description of the suit property, the said averments of the plaint, and the evidence of the original plaintiff are not reconcilable is not found fault with. Another glaring fact is noticed that the description of the property and the report of the commissioner go to show that for construction of the road acquisition of land was from out of the plots 58, 62, 65 and 66. When such is the state of thing as described, the sabik plot no.58 however is not seen to be a part of the suit property. The other one remains that when Ext.K shows hal plot no.832 measures Ac.1.672 decimals corresponding to sabik plot Nos. 56, 65, 66 and 67, curious enough land under plot no.67 is not there as a part of the suit property. The report of the Commissioner contradicts the plaint schedule in so far as the assignment of the plot number as to the road. Plaint schedule when gives that road appertains to hal plot no.832, the report goes to state that it appertains to hal plot nos. 832 and 833. Due to this the description of the property as regard the land area of road cannot be accepted in toto. It has also been noted that the plaint schedule shows that an area Ac.052 decimals out of the plot no.833 forms a part of the suit property in southern block. At the same time, Ext.K shows that the plot no.833 measures Ac.0.273 decimals in total and that corresponds to sabik plot nos. 58 and 62. This sabik plot no. 62 as found from Ext.G comprises of an area of Ac.4.790 decimals. So in that respect, the report of the

commissioner does not provide support to the plaint schedule, which also does not find mention of the land under Plot no. 833. Ext.K, the khatian negates the report of the commissioner that the southern block of the suit property corresponds to sabik plot no.55 which has come from hal plot no.832. Similarly, the total area of plot nos. 829 i.e. Ac0.015 decimals does not tally with the corresponding area of the sabik plot no. 64 whose total area is Ac0.050 decimals as mentioned in the plaint schedule. The same is the state of affair in respect of hal plot no.830. In view of all these infirmity, the trial court having said that the said report of the survey knowing commissioner does not come to the aid of the plaintiff for receiving a finding that the suit land has been sufficiently described for its proper identification, this Court finds all the justification for the same.

In that view of the matter, the trial court has rightly held that the burden lying upon the plaintiff for establishing the fact that the land described in the plaint schedule as the suit property is sufficient enough for identification has remained undischarged. Thus it has been rightly answered by the trial court against the plaintiff. The lower appellate court as already stated has erred in law by even without examining the sustainability of the infirmities in the report of the commissioner as pointed out by the trial court as also other irreconcilable discrepancies as noted by it. The finding is simply accepting the report of the commissioner as the conclusive evidence on the score of sufficiency of the description and identification of the suit property.

14. It had already been held in the earlier Second Appeal that in the absence of sufficient description of the suit property for its proper identification, no effective order of injunction can be passed against the defendants. Therefore, the plaintiff is found to have not been able to establish those aspect by clear, cogent and acceptable of evidence. So that precondition for grant of injunction having remained unfulfilled, there arises no question of favouring the plaintiff by a decree of injunction which in that event will not be effective.

15. The first substantial question of law receives its answer from the aforesaid discussions that the lower appellate court is not justified in reversing the decision of the trial court as regards insufficiency of the materials on record with regard to the description of property in the plaint for due identification. In view of that the second one does no more survive for being answered.

16. In the result, the appeal stands allowed, and in the peculiar facts and circumstances of the case without cost throughout. The judgment and decree dated 13.05.2003 and 18.05.2003 respectively passed by the lower appellate court in T.A. No. 62 of 1995 are hereby set aside and the judgment and decree dated 29.04.1995 and 21.06.1995 respectively passed by the learned Civil Judge (Junior Division), Puri in O.S. No. 21 of 1983-I are thus restored. The suit of the plaintiff as laid thus stands dismissed.

Appeal allowed.

2015 (II) ILR - CUT-1010

D. DASH, J.

R.S.A. NO. 267 OF 2015

KISHORE ROUT .....Appellant

.Vrs.

STATE OF ODISHA & ORS. .....Respondents

LIMITATION ACT, 1963 – S.5

Condonation of delay – Lower appellate court refused to condone delay of 22 months in filing the appeal – Appellant was working in Surat and he was absent on the date of pronouncement of the judgment – Due to his ill luck he suffered from typhoid and Malaria, his wife also fell ill and expired while under treatment and there after when he was coming to contact his lawyer he met with an accident and received injury causing paralytic effect – All the events are beyond his control for which he could not file the appeal in time which is neither intentional nor deliberate – He was prevented by sufficient cause – Moreover the appellant does not stand to gain benefit by filing the appeal late – Held, the impugned order passed by the learned lower appellate court is set aside, delay in filing the appeal before the lower appellate court is condoned and matter is remitted back to decide the appeal on merit. (para 8)

Case Laws Referred to :-

1. (2012) 5 SCC 157 : Maniben Devraj Shah -V- Municipal Corpn. of Brihan Mumbai

For Appellant : M/s. A.K.Choudhury, K.K.Das
For Respondents Addl. Standing Counsel
M/s. P.R.Routray

Date of hearing : 26.08.2015
Date of judgment: 26.08.2015

JUDGMENT

D. DASH, J.

1. This appeal has been filed challenging the judgment and decree dated 8.9.2006 passed by the learned Additional District Judge, 1.This appeal has been filed against the order dated 29.06.2015 passed in CMA No. 7 of 2014, arising out of RFA No. 12 of 2014 in the matter of an application under Section 5 of the Limitation Act refusing to condone the delay in filing the appeal.

2. Heard the learned counsel for the parties.
Perused the case record.

The appellant as the plaintiff had filed C.S. No. 16/2012 in the court of learned Civil Judge (Jr.Divn.), Hinjilicut, Ganjam. The suit had been dismissed by judgment and decree dated 30.8.2012 and 6.9.2012 respectively. The delay is for a period of 22 months in filing the appeal before the learned Addl. District Judge, Chatrapur.

3. It is stated that the appellant was working in Surat and on the date of pronouncement of the judgment, he was absent. He returned from Surat on 30.10.2012, thereafter as ill luck would have it, he fell ill and suffered from typhoid and malaria which forced him to remain under the treatment of a doctor. It is further stated that his wife also fell ill in January, 2013 which kept the appellant engaged in taking her care for treatment and ultimately she died on 4.6.2013. After that in the month of July 2013 when he was coming to Berhampur to the contact his lawyer, he met with an accident and received injury causing paralytic effect. So it is stated that for all these events and reasons beyond the control of the appellant, the appellant could not file the

appeal in time. The delay in filing the appeal is thus said to be neither intentional nor deliberate.

The appellant in the case has projected his absence in the native place; his illness on return; illness of his wife leading to her death and lastly his meeting with an accident and remaining confined for further period as the sufficient cause to have prevented him from filing the appeal in time.

4. The lower appellate court having taken these averments made in the petition for condonation of delay into consideration and on going through the certificates of the doctors filed by the appellant has gone to analyze those in coming to a conclusion that such explanations furnished by the appellant are neither causable nor satisfactory.

5. Learned counsel for the appellant submits that the approach of the lower appellate court in the matter of condonation of delay in the facts and circumstances of the case has been pedantic instead of being rational and pragmatic. It is his submission that in the particular case the appellant does not stand to gain benefit by filing the appeal late and therefore, to serve the cause of substantial justice, the appellant ought to have been afforded with an opportunity of getting his appeal heard and decided on merits.

6. Learned counsel for the State appearing for respondent nos. 1 and 2 and learned counsel for respondent nos. 3 and 4 refute the above submission. According to them, the delay is not of small period and therefore, the explanations ought not to have been satisfactory.

7. It has been held in **Maniben Devraj Shah v. Municipal Corpn. Of Brihan Mumbai**; (2012) 5 SCC 157, referring to some of the judicial precedents that:-

> "24. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

8. In the light of the propositions laid down in the aforementioned judgment when the facts and circumstances of the case as stated in the petition supported by affidavit are gone through, this Court is of the considered view that the lower appellate court should have condoned the delay in filing the appeal by accepting the explanations as sufficient cause for not filing the appeal in time.

Accordingly, the appeal is allowed. The impugned order passed by the lower appellate court is set aside, delay in filing the appeal before the lower appellate court is condoned and the matter is remitted to it to decide the appeal on merits in accordance with law after giving an opportunity of hearing to the parties. Let the hearing of the appeal be expedited.

Appeal allowed.

2015 (II) ILR - CUT- 1013

BISWANATH RATH, J.

W.P.(C) NO. 29443 OF 2011

PARSURAM BEHARI ……..Petitioner

.Vrs.

O.U.A.T. & ORS. ……..Opp. Parties

SERVICE LAW – Suspension of petitioner owing to conviction in a criminal case – Upon acquittal he was re-instated in service but his entire period of absence was treated as "No work no Pay" under provisions 45(1)&(2) of OUAT Statute, 1986 – Action challenged – Since the petitioner was not absent from duty nor resumed duty after remaining on leave for a continuous period of five years, but he was absenting from duty under an exceptional / compelling circumstance, the above provision has no application to his case – Held, the impugned order is quashed – Direction issued to the opposite parties to treat the petitioner to have been continuing in service without any break – Since the petitioner was prevented from joining his duty for his suffering on account of bad judgment of conviction by the trial court and considering that he had not performed his duty for the entire period he may be paid 50% back wages for the period under dispute.

(Paras 8 to 11)

For Petitioner : M/s. Digambara Mishra & P.Swain
For Opp. Parties : M/s. Ashok Mishra & S.C.Rath

Date of hearing : 26.08.2014
Date of Judgment : 04.09.2014

JUDGMENT

B.RATH, J.

By filing the present writ petition, the petitioner has sought for issuance of a writ of mandamus quashing the impugned order under Annexure-9 of the writ petition. The facts involved in the writ as borne out from the writ petition as well as the submission of the petitioner is that the petitioner was appointed as a Field Man Demonstrator in the establishment of the opposite party. He claimed to have been discharging his duties with dutifulness and to the best satisfaction of his authority. He has not suffered during his entire service career, while he was working as such on 09.07.2003 an office order was issued by the opposite party no.1 placing the petitioner under suspension indicating therein that he has been placed under suspension on account of his detention in custody on 07.02.2003 and the detention by exceeding 48 hours. He has been suspended from the date of detention, i.e., 07.02.2003 in terms of Rule-12(2) of the Orissa Civil Services (CCA) Rules, 1962 and under Statute 46 of the OUAT Employee Detention of Service Statute, 1989 as appearing vide Annexure-1.

2. The petitioner further contended that consequent upon the development a regular disciplinary proceeding was initiated against him on 30.12.2003 following service of article of charges on his alleged unauthorized absence from Headquarters and suppression of factum of arrest as well as detention in jail custody and misconduct. The petitioner submitted his reply on 26.01.2004 denying the allegations made therein.

3. In the meanwhile, the petitioner faced with a Criminal Proceeding vide Nayagarh P.S. Case No.166 of 2002 and upon completion of trial in connection with the aforesaid Criminal Proceeding, the petitioner was convicted by the judgment of the learned Additional Sessions Judge, Nayagarh in S.T. Case Nos.174/101/107 of 2005/2004, S.T. Case Nos.175/102/204 of 2005/2004 and S.T. Case Nos.176/8/26 of 2005 convicting the petitioner under Sections 302/120-B, I.P.C. and sentencing him to undergo R.I. for life with fine of Rs.5,000/-, and in default to undergo R.I. for further period of six months.

The petitioner challenged the above judgment in this Court in Criminal Appeal No.38 of 2007 and this Court by judgment dated 04.11.2009 passed in Criminal Appeal Nos.564 of 2006 and 38 of 2007 as appearing at Annexure-4, pleased to set aside the order of conviction and sentences and acquitted petitioner and others entangled in both appeals from the charges under Sections 302/120-B, I.P.C.

4. Be it stated here that following his acquittal in the Criminal Appeal by this Court vide Annexure-4, the University vide officer order dated 26.02.2010 reinstated the petitioner into service with effect from 17.11.2009 and posted the petitioner at the disposal of Dean, College of Agriculture, Bhubaneswar pending finalization of the Disciplinary Proceeding.

It is the further case of the petitioner that being aggrieved by the above office order, the petitioner submitted a representation before the Registrar of the opposite party University for regularization of his service and allowing him with all other consequential service and financial benefits. The petitioner made a specific claim, claiming his regularization of all the period of service with effect from 07.02.2003, the date on which the petitioner was placed under suspension. He further submitted that in the meanwhile, the enquiry proceeding also proceeded and the enquiry was closed with a single sitting submitting a report thereby against the petitioner. Being noticed to show-cause, the petitioner objected the enquiry proceeding on the ground that he has not been given a chance in the enquiry, while the position stood thus the petitioner was served with an office order dated 15.07.2011 referring therein to the decision of the Board of Management by Resolution No.3703 dated 02.07.2011 treating the period of suspension of the petitioner as "No work no Pay" and disallowing any other service or pensionary benefit for the period between 04.02.2003 to 25.02.2010 as appearing at Annexure-9.

5. The petitioner assailed the above order of punishment in this writ petition on the ground that the entire action of the opposite party University in issuing the letter is dehors under OCS (CCA) Rules, 1962 at OUAT Statute, 1989 as well as cannons of law, before imposing major penalty, the petitioner alleged that he was not even issued with a show-cause notice before the impugned action was taken. The petitioner also assailed the impugned order for lack of opportunity of hearing in the proceeding. While referring to Rule 91(2) and 93 of the Orissa Service Code (for short 'the OSC') Rules, 1962 the petitioner claimed that when he has been fully exonerated from the charges based on which the impugned suspension order

and the disciplinary proceeding was initiated, he is entitled to all his back wages along with treatment of no break in service.

6. Per contra, the university on its appearance filed a counter inter alia contending that the university had rightly placed him under suspension for his unauthorized absence from service from 04.02.2003 to 05.02.2003 on the plea of his daughter's marriage. During that period, he was detained in custody in connection with Nayagarh P.S. Case No.166 of 2002 and was detained in police custody up to 07.02.2003. Consequently his detention exceeded 48 hours, the university also claimed its action is valid in view of provisions contained under Statute 46 of Orissa University Agriculture and Technology Employees Conditions of Service Statute, 1989. Further its action being protected under Rule 12, 15 and 16 of Orissa Civil Service (Classification, Control and Appeal) Rules, 1962. Further claim of the opposite parties is that the petitioner faced with a disciplinary proceeding and the Enquiry Officer submitted a report on 17.08.2010 with specific recommendations, which is quoted herein below:-

> "The arrest and confinement of the petitioner is a result of criminal case from which he has already been acquitted by the Hon'ble Court, Odisha, He spent more than 6 years in custody and definitely would have gone mental stress and financial loss. As explained, therefore, all the charges leveled against him may not be treated as deliberative or intentional, rather co-incidental and circumstantial"

7. The university contended that since the petitioner had suffered more than 6 years in Jail custody it called for a clarification from the Government regarding regularization of his service vide their letter No.58758/UAT, dated 24.11.2010 in response to which Government by communication dated 06.04.2011 while giving a clarification asked by the university, instructed it to obtain clarification from S.P., C.I.D., Crime Branch, Cuttack in the matter if, there is any development to the criminal case. To the quarries of the university, the S.P. Crime Branch, Cuttack submitted the reply indicating that they have not preferred any appeal against the judgment of the High Court, the opposite party university justified its action taking the protection of Statute 45(1)(2) of the OUAT University Statute, which provides no university employee shall be granted leave of any kind for continuous period exceeding five years. On placing the clarification of the State Government as well as the inputs provided by the S.P. Crime Branch, Cuttack, the Board of Management while considering the matter of the petitioner resolved for no

service benefit including the pensionary benefits for the period of absence of the petitioner.

8. In the above premises, it is now necessary to consider as to whether the petitioner's absence from service over 5 years is bona fide and he has to suffer the entire period of his absence, in view of the provision at 45(1) and (2) of the Orissa University of Agriculture and Technology Statute, 1986? And further if the petitioner had suffered on account of non-compliance of principle of natural justice before providing a major penalty vide Annexure-9.

Before proceeding to answer the above issues, it is necessary here to reproduce the provisions contained at provision 45(1) and (2) of the University of Agriculture and Technology Statute, 1986.

> "45.(1) No University employee shall be granted leave of any kind for a continuous period exceeding 5 years.
>
> (2) Where a University employees does not reasume duty after remaining on leave for a continuous period of 5 years or where a University employee after expiry of his leave remains absent from duty otherwise than on foreign service or an account of suspension, for any period which together with the period of the leave granted to him exceeds 5 years, he shall unless the University in view of the exceptional circumstances of the case otherwise determine, be deemed to have resigned and shall accordingly cease to be in the employment of the University."

9. On bare perusal of the above provisions makes it clear that the provision applies to a person/employee, who does not resume duty after remaining on leave for a continuous period of five years or where a university employee after expiry of his leave remains absent from duty otherwise than on foreign service on account of suspension for any period which together with the period of the leave granted to him during suspension exceeds five years, he shall unless the university in view of the exceptional circumstances of the case otherwise determine, be deemed to have resigned. It is in this context since the petitioner remains absent for his languishing in jail as because of his suffering a judgment of conviction in a criminal proceeding in S.T. Case Nos.174/101/107 of 2005/2004, S.T. Case Nos.175/102/204 of 2005/2004 and S.T. Case Nos.176/8/26 of 2005, he was absenting from his duty under the compelling circumstance. For his acquittal by this Court in Criminal Appeal No.564 of 2006 and Criminal Appeal No.38 of 2007 ought

to have been treated an exceptional circumstance and as such provision contained in 45(1) and (2) of the OUAT Statute, 1966, have been misapplied to the present case. The opposite party failed to understand the provisions contained in its statute and has proceeded wrongly in the matter. The impugned order under Annexure-9 being passed in above wrong premises ought to suffer and observe to interfere and set aside.

10. Besides the perusal of the opposite parties counter as well as the argument made through their counsel during the course of hearing it could not be made clear that the petitioner was provided with an opportunity of show-cause before the passing of the impugned major penalty order. The petitioner's submission to the above regard is found to have force.

11. Under the above premises and the findings arrived at while answering both the issues in favour of the petitioner and as against the opposite parties, I declare the impugned order vide Annexure-9 as bad in law and while setting aside the same I direct the opposite parties to treat the petitioner to have been continuing in service without any break in his service. So far as the prayer of the petitioner for back wages is concerned, even though the petitioner was prevented from joining his duty for his suffering on account of bad judgment of conviction by the trial court yet keeping in mind that he had not performed his duty for the entire period, he may be paid with 50% of back wages for the period under dispute.

12. Under the above circumstance, the writ petition succeeds to the extent directed hereinabove. However, there shall be no order as to costs.

Writ petition allowed.

2015 (II) ILR – CUT- 1019

S. K. SAHOO, J.

CRLMA NO. 259 OF 2015

NAGA DAS & ANR. .....Petitioners

.Vrs.

STATE OF ORISSA .....Opp. Party

CRIMINAL PROCEEDURE CODE, 1973 – S.439 (1)(b)

Bail – Offence U/ss. 379/34 I.P.C. – Conditions imposed – Petition to wave condition No. (ii) to deposit cash security of Rs. 20,000/- – No specific provision in the code to insist on furnishing cash security – It can be imposed only in exceptional cases in a proper and judicious manner – Basic concept of bail is to release a person from custody in the hands of sureties who undertake to produce him in Court whenever required – Direction to furnish cash security in addition to bail bond of other surety is untenable – Gross abuse of judicial discretion – Held, the impugned condition is waved.

(Paras 7, 8)

For Petitioners : Mr. Amulya Ratna Panda
For Opp.Party : Mr. Deepak Kumar Pani, A.S.C.

Date of Heraing : 06.08.2015
Date of Judgment : 06.08. 2015

JUDGMENT

S.K.SAHOO, J.

This is an application filed by the petitioners Naga Das and Pinkuna Das under section 439 (1) (b) Cr.P.C. for waiving/modifying the condition no. (ii) as imposed by the learned Sessions Judge, Bhadrak while admitting the petitioners on bail vide order dated 15.7.2015 in BLAPL No.1105 of 2015. The condition no. (ii) was a direction to each of the petitioners to deposit cash security of Rs.20,000/-.

2. On 2.3.2015 on the First Information report submitted by one Sk. Solemn of village Gujidarada before Inspector-in-charge, Bhadrak Town Police Station, Bhadrak Town P.S. Case No.77 of 2015 was registered against unknown persons for offence punishable under sections 379/34 IPC. The said case corresponds to G.R. Case 404 of 2015 pending in the Court of learned S.D.J.M., Bhadrak.

In the First Information Report, the informant alleged that on 2.3.2015 at about 11.30 a.m., he withdrew cash of Rs.39,000/- from State Bank of India and kept Rs.9000/- in one of his pockets and the balance Rs.30,000/- in a plastic bag which was hanging from the handle of his cycle. While the informant was purchasing grocery near Tarini Temple, two persons came in a motorcycle and took away the plastic bag. Even though the informant shouted and chased the culprits but he could not be able to catch hold of them.

3. During course of investigation, the petitioners were taken into custody and their application for bail was rejected by the learned S.D.J.M., Bhadrak. Though the petitioners moved an application for bail before the learned Sessions Judge, Bhadrak which was allowed vide order dated 15.7.2015 in BLAPL No.1105 of 2015 but the following conditions were imposed:-

(i) The petitioners be released on bail on their furnishing bail bond of Rs.20,000/- only each with one solvent surety each for the like amount to the satisfaction of the learned S.D.J.M., Bhadrak;

(ii) They shall deposit cash security of Rs.20,000/- only each;

(iii) They shall not involve themselves in similar type of crimes in future;

(iv) They shall attend the Court on each date of hearing without fail, failing which the liberty so granted shall stand cancelled automatically.

4. Being unable to comply the condition no. (ii) i.e. deposit of cash security of Rs.20,000/- each, the petitioners have filed this application for modification/waiving the condition no. (ii).

5. The learned counsel for the petitioners Mr. Amulya Ratna Panda submitted that the condition no. (ii) imposed by the learned Sessions Judge, Bhadrak is very harsh and not at all warranted in the facts and circumstances of the case. He further submitted that the petitioners are unemployed persons and they belong to BPL category and imposition of such condition is practically denial of bail and since the petitioners are unable to comply with such condition, they are still in jail custody in an offence under section 379 IPC which is triable by Court of Magistrate.

The learned counsel for the State Mr. Deepak Kumar Pani submitted that the Court has discretion to impose cash security in appropriate cases and taking into nature and gravity of the offences, when s uch a condition has

been imposed, it cannot be said that it was quite unjustified on the part of learned Sessions Judge, Bhadrak to impose such a condition.

6. There is no dispute that the petitioners were taken into custody in an offence under section 379/34 Indian Penal Code which is triable by Magistrate. There is also no dispute that they could not furnish cash security of Rs. 20,000/- each for which in spite of the order of bail dated 15.7.2015, they are unable to be released from jail custody.

7. The very word 'bail' means the process by which the liberty of a citizen, which is under cloud, is to be restored, with or without conditions imposed by the competent court. Every person at the pre-trial stage is presumed to be an innocent person until his guilt is established as per the provisions of law. The trial may take years together and if the liberty of the person is jeopardised for such a long time, it will amount to violation of his fundamental right to protection of life and personal liberty as per provisions contained under Article 21 of the Constitution of India.

The basic concept of bail is release of a person from the custody and delivery into the hands of sureties, who undertake to produce him in Court whenever required to do so. Such a purpose cannot be achieved by releasing an accused from custody on furnishing of cash security, in the lieu of solvent sureties who can take effort to produce the accused released, at a given date, time and place. There is no specific provision in the Code of Criminal Procedure empowering the Magistrate to insist on furnishing cash security while granting bail to a person. Therefore, it can be reasonably said that the matter is left to the exercise of judicial discretion by the Magistrate concerned subject to the provisions in the Code.

Section 437 Cr.P.C. which deals with grant of bail by a Magistrate in a case of non-bailable offence provides in sub-sec. (3) that when a person accused or suspected of commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI, or Chapter XVII of the Indian Penal Code or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the Court shall impose conditions which are mentioned under (a), (b) and (c) of sub-section (3). The Court has also power to impose any other conditions as would be necessary in the interest of justice. A High Court or Court of Session while dealing with the bail in respect of the nature of offences specified in sub-section (3) of section

437 Cr.P.C. or any other offences can also impose any of the conditions enumerated in sub-section (3), if it considers necessary but such Court not bound to impose all those conditions.

No doubt the cash deposit in lieu of execution of a bond by the accused is an alternative system of granting bail and can be stated to be no less efficacious than granting bail of certain amount with or without surety or sureties of the like amount. In the cash deposit system, the cash is deposited right down and in the event of failure of accused to appear, the Court has the least trouble to realise as the amount is already in its custody. In case of bail on personal bond of recognisance, the Court has to rely on the personal promise under bail with surety. In case of failure to appear on the part of the accused, the Court has power to realise the amount from the surety.

Section 445 Cr.P.C. provides for taking of deposit instead of recognisance i.e. when any person is required by any Court or officer to execute a bond, with or without sureties, such Court or officer may, except in the case of bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix in lieu of executing such bond. Thus under this section 445 Cr.P.C., the Court has the discretion to allow the accused to deposit payment in cash or Government promissory notes, if he offers it when he is unable to produce sureties except when the bond is for good behaviour. This concession is however available only to the accused and not to the sureties.

The discretionary power exercised by the Magistrate or the Court, as the case may be, under sections 441 Cr.P.C. and 445 Cr.P.C., is mutually exclusive and not concurrent. On the Court requiring a person to execute a personal bond with sureties or without sureties, it is at the option of the accused to furnish cash deposit in lieu of executing such bond that the Court may make an order under section 445 Cr.P.C.

The order of bail should not be harsh and oppressive which would indirectly cause denial of bail thus depriving the person's individual liberty. While granting bail, insisting on good behaviour or prompt attendance, executing personal bond, further to safeguard his good behaviour and personal attendance may be supported by insisting upon additional sureties as the Court deems fit but insisting upon cash security is incorrect and indirectly results in denial of bail. The entire chapter of Cr.P.C. which deals with the provisions relating to bail nowhere says that when a person is released on bail, the Court can also insist upon him to give cash security. The power has

to be exercised in a proper and judicious manner and not in an arbitrary, capricious or whimsical manner and the discretion exercised shall appear to be just and reasonable one. It is the duty of the Court to see that any order to be passed or conditions to be imposed while granting bail shall always be in the interest of both the accused and the State.

If the Court is satisfied, after taking into account, on the basis of information placed before it, that the accused has his roots in the community and is, not likely to abscond, it can safely release the accused on his personal bond. As held in a catena of decisions, to determine whether the accused has his roots in the community which would deter him from fleeing, the Court should take into account the length of accused's residents in the community, his employment, status, history and his financial condition, his family ties and relationship, his reputation, character and monetary condition, his prior criminal record including any record or, prior release on recognizance or on bail, the identity of responsible members of the community who would vouch for his reliability, the nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non-appearance, and any other factors indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear.

While releasing the accused even on personal bond, it is necessary to caution the Court that the amount of the bond which it fixes should not be based merely on the nature of the charge. The decision as regards the amount of the bond should be an individualised decision depending on the individual financial circumstances of the accused and the probability of his absconding. The amount of the bond should be determined having regard to these relevant factors and should not be fixed mechanically according to a schedule keyed to the nature of the charge. The enquiry into the solvency of the accused can become a source of great harassment to him and often result in denial of bail and deprivation of liberty and should not, therefore be insisted upon as a condition of acceptance of the personal bond.

Insistence on furnishing cash security has not been approved by the Courts. Though in the absence of any specific prohibition or any statutory norm for exercise of judicial discretion in the matter of bail, it cannot be said that the Magistrate or Court, as the case may be, has no jurisdiction at all to impose cash security as a condition for bail. Such a condition has been held by the Apex Court and different High Courts to be harsh, oppressive and

virtually amounting to denial of bail. From section 445 Cr.P.C., it can be reasonably inferred that it is not the mandate of the Code that the Magistrate should insist on cash security in addition to personal bond with or without sureties.

Surety amount demand is dependent on several variable factors. Heavy amount should not be demanded as surety amount. Courts should be liberal in releasing poor or young or infirm persons and women on their own recognizance putting, however, reasonable conditions if necessary and permissible.

The Magistrates must always bear in mind that monetary bail is not a necessary element of the criminal process and even if risk of monetary loss is a deterrent against fleeing from justice, it is not the only deterrent and there are other factors which are sufficient deterrents against flight. The Magistrate must abandon the antiquated concept under which pre-trial release could be ordered only against monetary bail. It would bring more harm to the justice delivery system than good. Every other feasible method of pre-trial release should be exhausted before resorting to monetary bail. Unless it is shown that there is substantial risk of non-appearance or there are circumstances justifying imposition of such conditions, the same should not be adhered to. If a Magistrate is satisfied after making an enquiry into the condition and background of the accused that the accused has his roots in the community and is not likely to abscond, he can safely release the accused on order to appear or on his own recognizance.

There are very few people in this country who can furnish cash security for availing bail and, therefore, the Court while granting bail should as far as practicable avoid directing deposit of cash security as a condition. Only in exceptional cases where the Court thinks it proper to impose a condition for furnishing cash security, such order may be passed.

8. Judged in the aforesaid background, the direction to furnish cash security in addition to bail bond of other surety is clearly untenable. No reason has been assigned by the learned Sessions Judge. The offence is under section 379 IPC which carries maximum punishment for three years, or with fine, or with both. The offence is triable by any Magistrate. The allegation is commission of theft of a plastic bag of the informant from the handle of the cycle of the informant carrying cash of Rs.30,000/-, I am of the view that the imposition of cash security is totally unwarranted and reflects gross abuse of

power of judicial discretion. It is deplorable that even after the position relating to cash security has been elaborated by Apex Court and this Court, learned Sessions Judge without any basis and without application of judicial mind has directed the accused-petitioners to furnish cash security without any cogent reasons. Accordingly said condition no.(ii) is set aside.

9. In the result, the CRLMA application is allowed and condition no. (ii) i.e., deposit of cash security of Rs.20,000/- by each of the petitioners as was imposed by the learned Sessions Judge, Bhadrak vide order dated 15.7.2015 in BLAPL No.1105 of 2015 is waived. All other conditions imposed by the learned Sessions Judge, Bhadrak remain unaltered.

Application allowed.

2015 (II) ILR – CUT-1025

S. N. PRASAD, J

W.P.(C) NO. 3429 OF 2003

B. SATYANARAYAN .....Petitioner

.Vrs.

INSPECTOR GENERAL,
NEW DELHI & ORS. .....Opp. Parties

SERVICE LAW – Petitioner is CISF constable – Admittedly he has received gratification while deployed in the main gate – Offence is considered more serious as the petitioner is a member of the

disciplinary force – Punishment of compulsory retirement imposed – Punishment not only confirmed by the appellate authority but also by the revisional authority – Concurrent finding of the authorities – Scope of interference is limited under article 226 of the Constitution of India – Writ petition deserves to be dismissed.

(Paras 20 to 27)

Case Laws Referred to :-

1. (2006)5 SCC 673 : State of U.P. and others -vs- Raj Kishore Yadav and another.
2. (2011)15 SCC 310 : Panchmahal Vadodara Gramin Bank –vs- D.M.Parmar.
3. (2009) 8 SCC 310 : State of Uttar Pradesh and another –vs- Man Mohan Nath Sinha and another.
4. (2012)13 SCC 142 : Avinash Sadashiv Bhosale v. Union of India.

For Petitioner : M/s. S.K.Ray, K.K.Jena & S.P.Swain
For Opp. Parties : Sri P.V.Balakrishna
Standing Counsel (Central Govt)

Date of hearing : 05.05.2015
Date of judgment: 05.05.2015

JUDGMENT

S.N.PRASAD,J.

Mr. Aurobind Mohanty, Central Government Standing Counsel submits that he has filed memo of appearance on behalf opposite parties 1 to 4. Office is directed to trace out and bring on record.

2. The petitioner being aggrieved with the order dated 25.2.2003 passed by the Inspector General, Central Industrial Security Force, Patna by which order of punishment of compulsory retirement has been confirmed by the regional authority has approached this Court.

3. Brief facts of the case is that the petitioner who was performing his duty as Guard of C.I.S.F. Unit, NALCO, Damanjodi and detailed for 'A' shift duty from 0500 hours to 13 hours on 12.2.2001 at Plant main gate collected money from the incoming trucks illegally. When checked a sum of Rs.130/- excess than the pocket money of Rs.10/- was found and recovered.

4. Accordingly, article of charge has been served on the petitioner directing to face regular disciplinary proceeding by appointing an Enquiry Officer. The petitioner has participated in the enquiry, witnesses have been examined and cross-examined, Enquiry Officer has found the charge proved against the petitioner and thereafter he referred before the disciplinary authority. The disciplinary authority after accepting the same has issued certain show cause with the proposed punishment, petitioner has given reply to the show cause and the disciplinary authority has not found satisfactory to the show cause reply and thereafter order of punishment of compulsory retirement was imposed upon the petitioner.

5. The petitioner being aggrieved with the order passed by the disciplinary authority, has preferred appeal before the Deputy Inspector General, Eastern Zone and against the order of the appellate authority, the petitioner preferred revision against the penalty of compulsory retirement from service awarded by the as provided under the statute and the original authority has also confirmed the order of punishment vide order dated 25.2.2003, against which the petitioner has filed this writ petition.

6. Grounds taken by the petitioner is that the order of punishment is disproportionate to the charges. The enquiry officer has conducted enquiry without appreciating defence of the petitioner and as such finding given by the Enquiry Officer is perverse. It is submitted that on the basis of the perverse finding, order of punishment will be vitiated in the eye of law.

7. The Enquiry Officer without any eyewitness to the occurrence has proved the charge against the petitioner, hence the order of punishment is absolutely improper and is not sustainable in the eye of law.

8. On the other hand the opposite party has supported the order passed by the disciplinary authority on the ground that the memo of charge has been issued against the petitioner against serious allegation of commission of corruption i.e. taking gratification from truck drivers and when pocket of the petitioner was searched, amount more than Rs.10/- which is permissible to a CISF personnel by way of pocket money, was found from the pocket of the petitioner and as such article of charge has been issued against the petitioner on the basis of such allegation.

9. Regular disciplinary proceeding has been initiated against the petitioner before the Enquiry Officer and the petitioner has been provided with opportunity of hearing i.e. to make his defence, cross-examine

witnesses, etc. and thereafter the Enquiry Officer after appreciating the submission of the petitioner, has found charge proved.

10. The finding of the Enquiry Office was forwarded before the disciplinary authority and after accepting it has issued second show cause notice to the petitioner, the petitioner has given due reply to the second show cause which has found to be dissatisfactory by the disciplinary authority and thereafter as provided under Central Industrial Security Force Rules,2001 the authority thought it proper to impose punishment of compulsory retirement.

11. The authorities have taken lenient view while passing order of punishment of compulsory retirement because the petitioner will get retirement benefits after order of compulsory retirement.

12. The petitioner has preferred appeal and revision before the appellate and revisional authorities, after appreciating defence of the petitioner, has found that the disciplinary authority has taken decision in right prospective.

13. Further submission made by the learned counsel for the opposite party submitted that concurrent finding of the disciplinary authority cannot be challenged under Article 226 of the Constitution of India and sitting as appellate authority to reappraise the evidence. On the basis of such submission, it has been submitted that the order impugned needs no interference by this Court.

14. Heard learned counsel for the parties and perused the documents on record.

15. Admitted fact in this case is that the petitioner has been awarded compulsory retirement from service by the disciplinary authority and the same has been confirmed by the Inspector General, CISF.

16. Memorandum of charge has been issued against the petitioner for commission of taking gratification while on duty on 12.2.2001 at Plant main gate from the incoming trucks illegally. On the basis of such allegation when the petitioner's pocket was searched out it was found in his pocket excess money of Rs.10/- which was permissible to keep by way of pocket money and accordingly article of charge has been framed against the petitioner.

17. The petitioner being found receiving illegal gratification while on duty, an enquiry was directed to be conducted by appointing Enquiry Officer before whom petitioner was directed to appear, petitioner had appeared and put his defence. The Enquiry Officer has taken statement of witnesses before

whom the pocket of the petitioner was searched out and Rs.130/- was recovered. While the witnesses have been given statement in presence of the petitioner, which the petitioner has not objected, rather the petitioner has admitted this fact of commission of omission, the Enquiry Officer on the basis of the statements having been recorded by the witnesses, has found the charge proved and thereafter the Enquiry Officer has forwarded the same to the disciplinary authority who after its acceptance has issued second show cause notice to the petitioner which has been replied but not found satisfactory by the disciplinary authority, the disciplinary authority has taken decision to impose punishment of compulsory retirement.

18. The petitioner being aggrieved with the order of compulsory retirement has challenged before the appellate authority by raising all points and the appellate authority has found the order of the disciplinary authority against the petitioner, the petitioner preferred revision as provided under the statute and the revisional authority has also found that the order of compulsory retirement is not illegal.

19. Now the question of interference by this Court under Article 226 of the Constitution of India is concerned, this has been answered by the Hon'ble Supreme court in the case of **State of U.P. and others –vs- Raj Kishore Yadav and another**, reported in (2006)5 SCC 673 wherein at paragraph-4 it has been held:

> " xxx It is a settled law that the High Court has limited scope of interference in the administrative action of the State in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India and,therefore, the findings recorded by the enquiry officer and the consequent order of punishment of dismissal from service should not be disturbed. xxx"

In the case of **Panchmahal Vadodara Gramin Bank –vs- D.M.Parmar,** reported in (2011)15 SCC 310 at paragraph-18 Hon'ble Supreme Court held:

> " As has been held by this Court in the recent decision in Punjab & Sind Bank v.Daya Singh, (2010)11 SCC 233, in which one of us (H.L.Gokhale,J.) was a party, as long as there are materials and evidence in support of the findings, the High Court cannot interfere with such findings in exercise of powers of judicial review under Article 226 of the Constitution of India. xxx "

In the case of **State of Uttar Pradesh and another –vs- Man Mohan Nath Sinha and another**, reported in (2009) 8 SCC 310 at paragraph-15 the Honble Supreme Court held:

> "The legal position is well settled that the power of judicial review is not directed against the decision but is confined to the decision-making process. The court does not sit in judgment o merits of the decision. It is not open to the High Court to reappreciate and reappraise the evidence led before the inquiry officer and examine the findings recorded by the inquiry officer as a court of appeal and reach its own conclusions. xxx"

In the case of **Avinash Sadashiv Bhosale v. Union of India**,reported in (2012)13 SCC 142 at paragraph-58 Hon'ble Supreme Court held :

> " It is a settled proposition of law that the findings of an enquiry officer cannot be nullified so long as there is some relevant evidence in support of the conclusions recorded by the inquiry officer.xxx"

In this case, nothing is given which can suggest that finding of the Enquiry Officer can be said to be unjust since based on some relevant facts. Hence, relating to the ratio relied upon by the Hon'ble Supreme Court as referred to above, it cannot be said that finding of the Enquiry Officer which is the basis of imposing punishment upon the petitioner is improper.

20. Here in this case, there are four concurrent findings, right from the finding of Enquiry Officer up to the finding of the revisional authority. This Court cannot sit as appellate court to prove the factual facts and to disturb the fact finding that too in a case like corruption committed by the CISF constable.

21. All the authorities have considered all aspects of the matter. From perusal of revisional order this Court finds that all the 13 truck drivers/helpers have given their statement/written complaints at their own without compulsion in presence of the petitioner and the petitioner signed thereon without any compulsion.

22. Money was recovered by P.W.1 who is eyewitness of the incident of taking money by the petitioner.

23. Moreover, from perusal of the record and the order passed by the revisional authority where finding given by the Enquiry Officer has been

discussed, it is settled that finding of Enquiry Officer cannot be nullified so long as there is some relevant facts in support of the conclusion recorded by the Enquiry Officer.

24. In this case the authority has taken a lenient view against the petitioner which cannot be said to be disproportionate punishment against the petitioner rather it seems reasonable considering the length of service of the petitioner.

25. In view of the fact that the petitioner being a member of disciplinary force has committed serious irregularities/misconduct of taking gratification from truck drivers for the purpose of which he has been deployed in the main gate of the Corporation for checking and as such he has failed in discharging official duty rather he has involved himself in getting gratification.

26. In view of the facts stated hereinabove, I find no reason to interfere with the order impugned.

27. Accordingly, the writ petition is dismissed being devoid of merit.

Writ petition dismissed.

2015 (II) ILR – CUT-1032

K. R. MOHAPATRA, J.

F.A. NO. 251 OF 1991

SRIPATI KARMI & ORS. …….. Appellants

.Vrs.

GHARJUGI PATRANI (DEAD)
L.R.s SMT. UNKULI BARKANI & ORS. ……Respondents

HINDU LAW – Partial partition – Hindu undivided family governed by Mitakshara school – Whether partial partition is permissible under law ? Held, yes – Father has a right to effect partial partition of the joint family properties between himself and his minor son whether in exercise of his superior right as father or in exercise of his right as Partia Potestas has necessarily to be exercised bonafide by the father and is subject to the right of the sons to challenge such partition, if the partition is not fair and just.

In this case defendant Nos. 5 & 7 having not challenged the partial partition and allotment of share made in favour of Daman at any point of time the same is binding on them – Since Daman is separated from the joint family since long by virtue of the above partition, neither he nor his legal heirs are necessary or proper parties to the suit in question. (Paras 8,9,10)

For Appellants : Mr. Pradip Kumar Mohapatra
For Respondents : M/s. U.C.Panda & M.K. Das

Date of Judgment: 24.08.2015

JUDGMENT

K.R. MOHAPATRA, J.

In this appeal, appellants, who are defendant Nos. 5, 6 and 7 in Title Suit No.44 of 1986, assail the judgment and decree dated 8th May, 1991 and 28th June, 1991 respectively passed therein by learned Sub-Judge, Sonepur.

2. One Parasu Patra was the common ancestor in a Hindu joint family. He died leaving behind his five sons, namely, Daman, Chaitan, Abhiram, Sankuri and Pandab. Successors in interest of the branch of Chaitan, Sankuri and Pandab filed Title Suit No.44 of 1986 for partition contending that Parasu had properties in village Jamgaon and Gandabahal. The eldest son,

Daman had separated himself since long by taking his share in village Jamgaon. Other properties in village Gandabahal measuring an area of Ac.20.399 decimals remained joint and the successors in interest of the rest four branches of the common ancestor (Parasu) were enjoying the same jointly. But, for the sake of convenience, they were possessing and cultivating different parcels of the land without any partition between them by metes and bounds. Thus, their names were jointly recorded in the 4th Settlement ROR published in the year 1954 in Khata No.43 (for short, 'Suit land'). When the matter stood thus, defendants 5 to 7, without consent of other co-sharers, sold an area of Ac.0.630 decimals from out of Ac.1.200 decimals of Plot No.97 and Ac.0.440 decimals out of Ac.0.920 decimals from Plot No.96 to defendant No.10 by Registered Sale Deed on 6th April, 1981. Those were valuable pieces of land of the joint family. When the plaintiffs came to know about such act of defendants 5 to 7, they claimed partition of the suit properties to which the defendants did not pay any heed. Finding no other alternative, the plaintiffs filed the suit for the aforesaid relief. They also prayed that the land sold by defendants 5 to 7 may be allotted and adjusted to their share and in case it is found that they have sold lands in excess of their share, direction should be made to pay compensation for the land they sold in excess of their share.

3. Defendants 1 to 4, 8 and 9 were set *ex parte*. Defendants 5 to 7 filed their joint written statement refuting the allegations made in the plaint contending that there was a partition between the five sons of Parasu 70 years back and in that partition, eldest son, Daman, got his share in village Jamgaon. Other four sons got their share of land in village Gandabahal. Each of the five sons were dealing with their share of properties independently by sale, mortgage and otherwise. The legal heirs of Pandab had already disposed of their share. Son of late Chaitan, Jagabandhu, being aggrieved by the act of Pandab, had filed Title Suit No.39 of 1969 for partition which was dismissed. Hence, the present suit for partition would be barred by res judiciata. The entries in the R.O.R. published in the 4th Settlement in 1954, were not correct. Since there was a complete partition in respect of five sons of Parasu, the suit was not maintainable. Hence, they prayed for dismissal of the suit.

4. Defendant No.10 filed his separate written statement denying the allegations made in the plaint and contended that he was under a bona fide belief that the land including plot Nos.96 and 97 which he had purchased from defendant No.5 was his exclusive property. Defendant No.5 executed

the sale deed on 06.04.1981 and delivered possession to him. Defendans 6 and 7 had consented to such sale. Defendant No.10 after purchase has been residing over the said plots by constructing his residential house. Thus, he contended that the sale was binding on all the co-sharers and the suit was not maintainable being barred by law of limitation. Hence, he prayed for dismissal of the suit as against him.

5. Taking into consideration the rival pleadings of the parties, learned Civil Judge framed as many as seven issues, out of which Issue Nos. 2 and 3 are relevant for consideration in this appeal. The same are reproduced hereunder.

"2. Whether the suit properties are joint family ancestral properties of the plaintiffs and defendant nos. 1 to 9?

3. Whether there was partition of suit properties 70 years back?"

6. Learned Civil Judge considering the materials on record and respective cases of the parties came to the conclusion that the eldest member of the family, namely, Daman has separated himself from the joint family. He was allotted with properties in the village Jamgaon to his share. The rest of the members continued to remain joint as members of joint family. There was no partition of suit properties 70 years back as alleged by defendants 5 to 7. Thus, the suit properties are liable for partition. Accordingly, learned Civil Judge passed a preliminary decree holding that the plaintiffs 1 and 2 are entitled to $1/4^{th}$ share, plaintiffs 3 to 9 are entitled to $1/8^{th}$ share and plaintiffs 10 to 12 are entitled to $1/4^{th}$ share. The defendants 1 to 8 are entitled to $1/4^{th}$ share and defendant No.9 is entitled to $1/8^{th}$ share. It was further held that the land sold to defendant No.10 be allotted to the share of defendants 5 to 7 and in case it is found that land sold was in excess of their share, the value of such land in excess of their share would be compensated to their co-sharers accordingly. Being aggrieved by the said judgment and decree, defendants 5 to 7 have filed this appeal.

7. During pendency of the appeal, Gharjugi Patrani (respondent no. 1) having been died, her legal heirs were substituted as respondent nos. 1(a) to 1(d) vide order dated 19.12.2014.

8. Mr. Mohapatra, learned counsel for the appellants submitted that though it is the admitted case of the parties that Daman, the eldest son, had separated himself and got his share of land in village Jamgaon, but the very separation is not partition. This being a suit for partition his legal heirs ought

to have been made parties to the suit and in their absence the suit is not maintainable for non-joinder of necessary parties. Further, Mr. Mohapatra relying upon the decision in the case of ***Addagada Raghavamma and Anr. Vs. Addagada Chenchamma and Anr***., reported in AIR 1964 SC 136, submitted that where it is admitted by the plaintiffs that one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. Hence, he submitted that burden of proof heavily lies on the plaintiffs to prove that the suit properties are still joint. On the other hand, Mr. U.C.Panda, learned counsel for the plaintiffs/ respondents submitted that the defendants 5 to 7 (present appellants) cannot blow hot and cold at the same time. It is the specific case of defendants 5 to 7 that there was a partition of the property of late Parasu 70 years back and the land in village Jamgaon fell to the share of Daman. He further submitted that during the life time of late Parasu, (the common ancestor), Daman had separated himself from the joint family by taking share in village Jamgaon. Since then, he was, and after his death, his legal heirs are dealing with the properties at village Jamgaon independently and the rest of the family members including defendants 5 and 7 have not raised any objection to the same at any point of time. Moreover, partial partition of the joint family is permissible under Hindu Mitakhara School of Law. When Daman has separated from the joint family since long, neither he nor his legal heirs are necessary or proper parties to the suit.

9. Admittedly, Daman, the eldest son of Parasu, had separated himself from the joint family by taking his share in village Jamgaon. It is also not disputed that Daman and his legal heirs are dealing with properties at village Jamgaon independently. The only question may arise whether a partial partition in the joint family is permissible under law. The answer would be obviously in the affirmative. Law is no more *res integra* to the effect that a partial partition in the Hindu joint family is permissible under law. In a decision in the case of ***Apoorva Shantilal Shah Vs. Commissioner Of Income Tax Gujarat I, Ahmedabad***, reported in 1983 SC 409, the Hon'ble Supreme Court held that a partition of the properties brought about by the father between himself and his minor son cannot be held to be invalid in Hindu law and it must be held to be valid and binding. The right of the father to effect a partial partition of the joint family properties between himself and his minor son whether in exercise of his superior right as father or in exercise of his right as *partia potestas* has necessarily to be exercised bona fide by the

father and is subject to the right of the sons to challenge the partition, if the partition is not fair and just.

10. In the case at hand, defendants 5 and 7 have never challenged the partition and allotment of share to Daman at village Jamgaon at any point of time and hence the same is binding on them. In a recent decision in the case of ***Dhapibai & Anr. Vs. Tejubai & others***, reported in AIR 2013 MP 149, it was held that a partition may be partial either in respect of property or in respect of the person making it. It is open to the members of joint family to make a division and severance of interest in respect of part of the joint estate. Hence, it can be safely concluded that after being separated from the joint family by virtue of a partial partition, as aforesaid, neither Daman nor his legal heirs can claim any right over the suit properties. Thus, they are neither necessary nor proper parties to the suit.

To analyze the contention of Mr. Mohapatra that burden of proof on the plaintiffs to establish that the properties at Gandabahal are still joint, it would be profitable to analyze the contention after reading paragraph-22 of the decision in the case of *Addagada Raghavamma and Anr. (supra),* which is reproduced hereunder:-

> "22. Some argument is made on the question of burden of proof in the context of separation in a family. The legal position is now very well settled. This Court in Bhagwati Prasad Sah v. Dulhin Rameshwari Kuer, 1951 SCR 603 at p.607: (AIR 1952 SC 72 at p.74), stated the law thus:
>
> "The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but where it is admitted that one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the other side too that because one member of the family separated himself, there has been separation with regard to all. It would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other coparceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief."

> Whether there is a partition in a Hindu joint family is, therefore, a question of fact; notwithstanding the fact that one or more of the members of the joint family were separated from the rest, the plaintiff who seeks to get a specified extent of land on the ground that it fell to the share of the testator has to prove that the said extent of land fell to his share; but when evidence has been adduced on both sides, the burden of proof ceases to have any practical importance. On the evidence adduced in this case, both the Courts below found that there was no partition between Chimpirayya and Pitchayya as alleged by the appellant. The finding is one of fact. We have broadly considered the evidence only for the purpose of ascertaining whether the said concurrent finding of fact is supported by evidence or whether it is in any way vitiated by errors of law. We find that there is ample evidence for the finding and it is not vitiated by any error of law."

Learned Trial Court while answering issue Nos. 2 and 3 has vividly discussed the evidence of the parties and analyzed the same in its proper perspective. I find no reason to differ with the same. Added to it, Ext.2 stands jointly and the DW-1 in his evidence has deposed in unambiguous terms that he was paying rent in respect of the entire properties at Gandabahal. Thus, it can be safely concluded that the properties of Gandabhal was joint.

11. Mr. Mohapatra further contended that one Jagabandhu, the youngest son of Chaitan, had filed Title Suit No.39/63 of 1968-73 for partition, which was dismissed on 22.10.1973. Thus, the present suit is hit by principles of *res judicata*. He submitted that the learned trial Court though framed an issue to that effect has not given any finding on the same. Mr. Panda refuting such contention submitted that the learned Civil Judge has discussed the question of *res judicata* while answering Issue No.6. On perusal of Ext.D, the certified copy of the order passed in T.S. No.39/63 of 1968-73, it appears that the aforesaid suit was dismissed for default. Order 9 Rule 9, CPC bars the plaintiff to bring a fresh suit on the self-same cause of action, if a suit is dismissed for default. Thus, it is to be examined as to whether dismissal of the aforesaid suit would preclude the plaintiffs to bring a fresh suit. In order to satisfy the bar imposed under Order 9 Rule 9 C.P.C. to bring a fresh suit, it is to be established that the earlier suit was filed by the parties who bring the subsequent suit. Secondly, the subsequent suit arises out of self-same cause of action. In the instant case, though defendants 5 to 7 (appellants herein) in

order to substantiate their plea that the suit is hit by principles of res judicata produced the order passed in TS No.39-63/1968-73 (Ext.D), but there is no material to come to a definite conclusion that the said suit was in respect of the properties involved in the present suit. In absence of such materials, it would not be proper to hold that the plaintiffs are precluded from bringing the present suit for partition. Moreover, Section-11 of CPC has no application to the case in hand as the earlier suit was dismissed for default.

12. Mr.Mohapatra submitted that after death of the common ancestor, Parasu, the properties left by him devolved upon his five sons and succession opened on the death of common ancestor, namely, Parasu. Parasu having died prior to commencement of Hindu Succession Act, 1956, the successor, Mathura, the daughter of late Chaitan cannot claim any right over the same. Mr.Mohapatra, further contended that the learned Court below did not consider the effect of commencement of Hindu Succession Act, 1956, which is a vital issue to be adjudicated in the suit. On the other hand, Mr.Panda refuted such contention submitting that the effect of commencement of Hindu Succession Act is a question of law and the same can be adjudicated in this appeal on the basis of the materials available on record. Mathura along with other co-sharers succeeded to the properties devolved upon late Chaitan on his death. In order to exclude the plaintiffs from getting the benefit under the Hindu Succession Act, defendants 5 to 7 had opportunity to prove that Chaitan died prior to 1956 and there was a complete partition by metes and bounds between the legal heirs of said Chaitan prior to 1956. Apparently, there is no evidence on record with regard to the date of death of Chaitan, more particularly, as to whether it is prior to 1956. Moreover, it is not the case of defendants 5 to 7 that there was a complete partition between the legal heirs of said Chaitan prior to 1956. In view of the above, it is very difficult to accept the contention of Mr.Mohapatra to come to a conclusion that the plaintiffs had no right to claim for partition.

13. Mr.Mohapatra further contended that the plaintiffs being either son's daughter or son's daughter's son or son's daughter's daughter cannot claim a march over defendant Nos. 5 to 7 who by birth have right over the suit property. Thus, he submitted that Gharjugi being granddaughter of Parasu could not have brought the suit for partition, as women were not entitled to bring any suit for partition before commencement of Hindu Succession Act, 1956. As discussed earlier, the suit land belongs to Hindu joint family and Daman, the eldest son, has already been separated since long. Thus, on the

death of Parasu, his share in the suit property devolved upon his four sons except Daman. Gharjugi being the daughter of Pandab is entitled to succeed to the share of Pranab after his death even though he might have died prior to commencement of Hindu Succession Act, 1956. Likewise, other plaintiffs are also entitled to succeed to the share of properties in the Hindu joint family of their respective branches. Mr. Mohapatra does not dispute that the plaintiffs are Class 1 heirs. Thus, there remains no element of doubt that the plaintiffs can maintain a suit for partition and they are entitled to specific share in the suit property. Mr. Mohapatra questioned the correctness of the answer to Issue No.4 in the impugned judgment, contending that the finding of learned Trial Court that defendant No.10 was not a bona fide purchaser is not correct and for that reason, the impugned judgment should be set aside.

Mr. Panda, learned counsel for the plaintiffs/ respondents, on the other hand, submits that defendant No.10 against whom the finding is given in Issue No.4, has not come up in appeal and has not filed any cross-appeal/objection to the present appeal. Thus, the defendants 5 to 7 (appellants herein) have no locus standi who challenge such finding. He further submitted that the learned Trial Court taking note of the sale made by defendant Nos. 5 to 7 has categorically observed that it would be very harsh and injustice to defendant No.10 to dispossess him from the said land at the time of partition among the plaintiffs and his other co-sharers and the plaintiffs have clearly agreed for adjustment of the said land to the shares of defendants 5 to 7. Thus, while answering Issue Nos. 4 and 5, learned Trial Court in clear terms has observed that the land sold to defendant No.10 are to be allotted to the share of defendant Nos. 5 to 7 at the time of partition by metes and bounds at the spot. Thus, taking into consideration the rival contentions of the learned counsel for the parties, I feel that the appellants cannot have any grievance to the fining on Issue Nos. 4 and 5. Hence, I find no force in the submissions of Mr.Mohapatra, learned counsel for the appellants on this score.

14. Admittedly, Daman, the eldest son of Parasu, has separated himself by taking his share in the joint family property at village Jamgaon, which is permissible in law. So far as properties in Gandabahal village are concerned, Exts. 1 and 2 make it clear that those properties were recorded jointly in the names of branches of other four sons of Parasu. DW-1, who is none other than the defendant No.5, has deposed that he was paying rent in respect of the entire land of Gandabahal, i.e., the suit land. It is also admitted case of the parties that the members of the joint family are in enjoyment of separate

partition of the suit land for their convenience. The dispute arose, when a portion of the suit land, i.e., from plot Nos. 96 and 97 was sold by defendant nos. 5 to 7 to defendant no. 10, without taking consent of the other co-sharers, gives a clear picture that the suit land was not partitioned by metes and bounds. Moreover, the appellants do not dispute the allotment of shares of the parties made by the learned Trial Court.

15. In view of the above, I find no reason to interfere with the impugned judgment and decree. Thus, the appeal being devoid of any merit is accordingly dismissed. Parties are directed to bear their own cost.

Appeal dismissed.

2015 (II) ILR – CUT-1040

DR. D.P. CHOUDHURY, J

CRLA NO. 352 OF 1992

ASHOK KUMAR GUPTA …….. Appellant

.Vrs.

STATE …… Respondent

ESSENTIAL COMMODITIES ACT, 1955 – S. 7(1) (a) (ii)

Seizure of 100 bags of paddy – Conviction of the petitioner U/s. 7 (1) (a) (ii) of the Act for violation of Cl.3(2) and II (aa) of the Odisha Rice and Paddy control order 1965 – Hence the appeal – Prosecution failed to prove that the dealer has stored paddy exceeding ten quintals inside the state of Odisha, rather the seizure was made from a running truck – Prosecution has also failed to prove that the accused purchased the paddy at a lesser price than fixed by the Government – Held, there is neither contravention of Cl.3 nor Cl.II (aa) of the control order 2005 punishable U/s. 7 of the Act – The impugned order of conviction and sentence is setaside. (Paras 11 to 14)

For Appellant : M/s. D.S.Mohanty, B.Mishra & Manoj Misra
For Respondent : A.S.C

Date of Argument : 05.05.2015
Date of Judgment :18.06. 2015

JUDGMENT

DR. D.P. CHOUDHURY, J.

The captioned appeal assails the judgment of conviction and order of sentence dated 30.09.1992 passed by the learned Special Judge, Koraput-Jeypore in T.R. Case No.28 of 1991 under section 7(1)(a)(ii) of the Essential Commodities Act, 1955 (hereinafter called the "Act").

FACTS :

2. The factual matrix leading to the case of the prosecution is that on 28.10.1988, while the Inspector of Supplies Kotpad was patrolling on the border area, he found a truck bearing registration No.ORK-3999 standing with 100 bags of paddy at Dhanamahandi village. The Inspector of Supplies asked the driver of the truck about the stock of paddy to which the driver replied that the stock belongs to the appellant (hereinafter called the "accused") and as per the instructions of the accused, the stock has been brought from Bansuli. The accused reached the spot and claimed the stock of paddy. Since the accused was in possession of more than 10 quintals of paddy, contravening the provisions of the Act, the Inspector of Supplies seized the said stock of paddy from the possession of the accused. During enquiry, it was further found that the accused had purchased the paddy from different persons at lesser price than fixed by the Government. After due enquiry, it is alleged by prosecution that the accused had contravened Cl.3(2) and Cl.11(aa) of the Orissa Rice and Paddy Control Order, 1965 (hereinafter called the "Order"), punishable under section 7(1)(a)(ii) of the Act. Hence, P.R. was filed against the accused.

3. Plea of the accused, as revealed from his statement recorded under section 313 of the Cr. P.C. and cross-examination made to P.Ws., is that the paddy in question belongs to him, which was harvested from his paddy land. He completely denied the charge levelled against him.

4. Learned Special Judge, after examining six witnesses from the side of prosecution and two witnesses from the side of defence and after going through some documents filed by prosecution held that prosecution has not

been able to prove that the accused had purchased paddy at a lesser price than fixed by the Government, but the prosecution has well proved about illegal possession of the seized paddy by the accused, in contravention of Cl.3 of the Order. So, the learned Court below convicted the accused and sentenced him to undergo rigorous imprisonment for four months.

SUBMISSIONS :

5. Learned counsel appearing for the appellant submitted that the order of conviction and sentence is absolutely against the law and the principles upon which the prosecution case stands. According to him, the learned Court below has not appreciated the evidence on its proper perspective inasmuch as P.Ws.3 and 4 categorically denied to have sold paddy to the accused. The learned Court below has also erred in law by not believing the defence story, which is proved by defence by adducing evidence and by not taking into consideration the sale-deed filed by the accused and, as such, the impugned order is vulnerable. It was further argued by learned counsel for the appellant that the impugned order is bad, illegal and contrary to the evidence on record. Relying upon the decision of this Court in the case of ***Nilamani Pradhan*** Vs**.** ***State of Orissa*** reported in **2000 (II) OLR-708**, he submitted that mere recovery from the transport carrier of the accused does not make out any offence. So, it is prayed by him to set aside the impugned judgment of conviction and order of sentence and allow the appeal.

6. On the other hand, learned Addl. Standing Counsel appearing for the State submitted that the judgment passed by the learned Court below is legally correct. According to him, the decision cited by learned counsel for the appellant is not applicable to this case. While supporting the judgment and order of the learned Court below, he prayed to confirm the same and dismiss the appeal.

DISCUSSIONS :

7. The main point for consideration is whether the accused was selling the paddy in question, which was loaded in a truck after being collected from different persons ? The other point as to selling of paddy at a lesser price than the price fixed by the Government needs no elaboration, as the learned Court below has not believed the story of the prosecution in this context.

8. After going through the evidence of P.Ws., it appears that P.Ws.2, 3 & 4 have been cross-examined by prosecution, as they have not supported the

prosecution. There is nothing found from the cross-examination made by the prosecution to P.Ws.2, 3 & 4 about the complicity of the accused with the alleged offence. So, at this juncture, it is submitted by the State that they can be arrayed as hostile witnesses. P.W.2 was allowed to be cross-examined by the prosecution as he has admitted the seizure of paddy vide Ext.1 as well as his signature therein; but, at the same time, he stated that the alleged paddy has been collected from the thrashing floor of the accused. He is none other than the driver of the truck. During cross-examination by prosecution, nothing is revealed to declare him hostile to the prosecution. Similarly, P.W.3, during cross-examination by prosecution, denied to have stated before the Investigating Officer (I.O.) that on 26.10.1988, he (P.W.3) sold three bags of new paddy to the accused @ Rs.105/- per bag and received Rs.315/- from him (accused). Such statement of P.W.3 elicited during cross-examination has not been confronted to the I.O. for which it cannot be said that he has contradicted his earlier statement inasmuch as before declaring the witness hostile, his statement made in the Court should be confronted to the I.O. to show that he has contradicted his earlier statement so that the credibility of the witness can be tested. Most of the times, duty of prosecution and defence is lost sight of because either prosecution witness or defence witness being cross-examined by prosecution or defence, as the case may be, by bringing to his notice about his earlier statement, forget about confronting the same to the Investigating Officer, who has to either confirm or decline, where one can find the prosecution witness either is hostile to the prosecution by suppressing material facts or the witness has omitted to state the material facts, as the case may be. Duty of the Court is equally to assess the credibility of such witness if aforesaid duty of prosecution or defence has been well discharged by them.

9. Similarly, P.W.4 has denied during cross-examination by prosecution to have stated before police about selling of paddy to the accused at a lesser price. But, such statement has not been confronted to the I.O. In the case of ***Anil Rai*** Vs. ***State of Bihar*** reported in **AIR 2001 S.C. 3173,** Their Lordships have been pleased to observe as under :

> "It is for the Judge to consider in each case whether the witness stands thoroughly discredited and can still be believed in regard to part of his evidence. If the witness is not completely shaken, Court may, after considering his evidence as a whole with due care and caution, accept in the light of other evidence on the record, that part

of evidence which is found creditworthy and act upon it. The testimony of such a witness may not be rejected outright".

With due respect to the said decision, it must be held that the evidence, which is not shaken in cross-examination and stands to test, cannot be brushed aside and the fact that the witness was declared hostile at the request of prosecuting counsel and allowed to be cross-examined, furnishes no justification for rejecting whole of the evidence of the witnesses. After considering the evidence of P.Ws.2, 3 & 4, it is found that the paddy being harvested from the land of the accused was being carried in the truck and P.W.1 seized the same vide Ext.1. Similarly, P.W.1 revealed that while the truck was carrying the paddy of the accused, he seized the same vide Ext.1. He ascertained from the Revenue Inspector that the accused has got five acres of land. On the other hand, the evidence of P.W.1 does not disclose that the seized paddy does not belong to the land of the accused. The evidence of P.W.5 does not reveal that the accused has no landed property. P.W.6 is a witness to the issue of receipt of Rs.120/- towards purchase tax in the name of the accused for carrying 100 bags of paddy in the truck in question. But, no receipt has been filed by him. So, the question of granting purchase tax receipt is not proved by P.W.6.

10. On analysis of the evidence of P.Ws., it only appears that paddy of the accused being transported in the truck was seized by P.W.1 vide Ext.1. Learned Special Judge did not appreciate rightly the evidence of the prosecution to the effect that the paddy in question was bought by the accused at a lesser price, which was being carried in the truck. The questions now arise whether the truck in question carrying the paddy bags of the accused can be said to have contravened the Order punishable under the Act, as on this count, the accused has been found guilty by the learned Court below; and whether the seizure of paddy from the transporter beyond the quantity of 10 quintals can be taken as storage of paddy ? In the case of ***Nilamani Pradhan*** Vs**.** ***State of Orissa*** (supra), His Lordship has observed as under :

> "This aspect was vividly dealt with by the apex Court in the case of **Bijaya Kumar Agarwala** v. **State of Orissa** and **Jagdish Prasad Agarwal** v. **State of Orissa**, reported in *(1996) 11 OCR (SC) 573* wherein it was held that a truck moving with paddy without permit could not be termed as storing of goods and as such it would not attract violation of Clause 3 (ii)(b) of the Orissa Rice and Paddy

> Control Order, 1965 and thereby warranting conviction under Sec.7 of the E.C. Act. This case was relied upon by this Court in **Pratap Rudra Mishra *alias* Pratap Chandra Mishra** v. **Susanta Kumar Hota, Inspector of Supplies**, reported in *(2000) 18 OCR 644* wherein it has been held that carrying goods in a vehicle cannot per se be 'storing' although it may be quite possible that a vehicle is used as a store. Transporting is not storing".

11. With due respect to the above decision, it is found that in the aforesaid case, seizure of paddy from the truck being intercepted did not make out any offence under the Act for which this Court quashed the order of taking cognizance. Now, adverting to the facts of the present case, it is found that there is seizure of 100 bags of paddy as per Ext.1 from the truck and there is nothing found from the evidence of P.Ws.1 and 2 that while the truck was standing, the paddy was seized; but while the paddy was being transported, P.W.1 stopped the truck at Dharamahandi and made seizure of 100 bags of paddy. So, the seizure of paddy from the truck in question cannot per say be made out any offence because the truck is not used as a store in this case in view of the above decision. Moreover, it has not been proved by prosecution that paddy has been collected from other persons and then carried in truck as per the discussions made above. Cl.3(2) of the order prescribes as under :

> "For the purpose of this clause person who stores rice or paddy or rice and paddy taken together in quantity exceeding ten quintals inside the State of Orissa shall, unless the contrary is proved, be deemed to act as a dealer".

Thus, the order penalises a person who has stored rice or paddy or rice and paddy taken together above ten quintals, as he becomes a dealer requiring licence as per Cl.3(1) of the Order to deal with such paddy and rice. The said ingredients must be proved by prosecution, after which onus will shift to the accused to rebut the same. It is well settled in law that where onus lies on the accused to discharge, either he would elicit defence plea from the cross-examination of prosecution witnesses or adduce evidence to discharge his plea or both. It is no more *res integra* that onus lies on the accused to prove his plea is not that heavy as prosecution is required to discharge. On the other hand, the plea of the accused can be discharged by principle of preponderance of probability.

12. Now, adverting to the facts and circumstances of the present case, as has been discussed above, prosecution has not been able to prove that paddy in question has been collected or purchased by the accused from different persons and the same has been stored; but it is revealed from the cross-examination of P.Ws.2, 3 & 4 that paddy has been raised by the accused in his father's land. When prosecution has failed to prove the storage of paddy, as understood under the law as per the above discussion, and seizure of the same from the running truck is not an offence under Cl.3 of the Order, it must be held that the ingredient of Cl.3(2) of the Order has not been established by the prosecution. When prosecution fails to discharge the onus, no onus is liable to be shifted to the accused to disprove the same for which the evidence of D.Ws.1 & 2 are not necessary to be dealt.

13. Cl.11(aa) of the Order states in the following manner :

> "purchase paddy at prices lower than those declared by the Government by a Notification in the *Official Gazette* to be the prices at which paddy may be bought;
>
> Provided that it shall be competent for the Government to fix different Kharif years, each beginning on 1st October".

The ingredient of this clause is that where there is purchase of paddy by the dealer at prices lower than those declared by the Government, he is found to have contravened the provision under Cl.11(aa) of the Order. In the instant case, it has already been discussed that prosecution has failed to prove that paddy was being collected from different persons for which ingredient of Cl.11(aa) of the Order remained far from proof. Now, it appears that prosecution has not been able to prove the violation of Cl.3 or Cl.11(aa) of the Order, for which section 7 of the Act does not come to play. Learned Court below has committed error by not paying attention to all these provisions of law and wrongly based her finding to the effect that the seized truck was not having the produce of the land of the accused and he was in illegal possession of the seized paddy. But, at the same time, learned Court below has rightly observed that prosecution has not been able to prove that the accused purchased the paddy at a lesser price than fixed by the Government. Hence, I am in disagreement with the incorrect finding of the learned Court below. In that view of the matter, having regard to the facts and circumstances of the case and the evidence on record, as discussed above, it

must be held that there is neither contravention of Cl.3 nor Cl.11(aa) of the Order, punishable under section 7 of the Act.

14. In the result, the appeal is allowed, the impugned order of conviction and sentence passed by learned Court below is set aside and the accused is acquitted of the charge levelled against him. The bail-bonds furnished stand discharged.

Appeal allowed.