2017 (II) ILR - CUT- 1224 (S.C.)

SUPREME COURT OF INDIA

ADARSH KUMAR GOEL, J. & UDAY UMESH LALIT, J.

CRIMINAL APPEAL NO. 2068 OF 2017
(ARISING OUT OF SPECIAL LEAVE PETITION (CRL.) NO.10700 OF 2015)

B. SUNITHA ……..Appellant

.Vrs.

THE STATE OF TELENGANA & ANR. ……Respondents

NEGOTIABLE INSTRUMENTS ACT, 1881 – S.138

Cheque executed by the appellant-Client in favour of the respondent No.2-advocate towards fees in a motor accident case – Fees based on percentage of the decretal amount – Cheque dishonoured – Respondent No.2 instituted proceeding U/s. 138 N.I.Act – Appellant approached the High Court for quashing of the proceeding which was rejected – Hence this appeal.

Charging exorbitant fee by an Advocate with reference to percentage of the decretal amount is not the legally enforceable debt to attract the provision U/s. 138 of the N.I.Act, 1881 and it is also hit by section 23 of the Contract Act, 1872 – Moreover, an advocate should not exploit his client by taking signature on a cheque by using his professional position – Such action is against professional ethics and public policy – Held, the proceeding against the appellant U/s. 138 N.I. Act 1881 is quashed – However, the respondent No.2-advocate may be dealt with at an appropriate forum for his serious professional misconduct. (Paras 18 to 21)

Case Laws Referred to :-

1. (2000) 7 SCC 264 para 41 : R.D.Saxena -V- Balram Prasad Sharma
   V.C. Rangadurai -V- D. Gopalan[2]
2. 8 (1979) 1 SCC 308 para 31 : VC Rangadurai -V- D. Gopalan[8]
3. 10 1993 Supp. (3) SCC 256 : In Tahil Ram Issardas Sadarangani -V-
   Ramchand Issardas Sadarangani.[10]

For Appellant : Mr. K.Parameswar
For Respondents : M/s. S. Udaya Kumar Sagar
Mr. C.S.N Mohan Rao

Date of judgment: 5.12.2017

JUDGMENT

ADARSH KUMAR GOEL, J.

1. This appeal has been preferred against the order dated 14th October, 2015 of the High Court of Judicature at Hyderabad in CRLP No.3526 of 2015, thereby, the High Court declined to quash the proceedings initiated against the appellant under Section 138 of the Negotiable Instruments Act, 1881('the Act').

2. The proceedings were initiated by the respondent who is an advocate in whose favour the appellant executed a cheque allegedly towards his fee. The same was dishonoured. The stand of the appellant is that Section 138 of the Act is not attracted as there was no legally enforceable debt. The appellant having already paid a sum of Rs.10 lakhs towards fee, the cheque was taken from the appellant by way of abuse of position and the transaction was void under Section 23 of the Indian Contract Act, 1872 ('Contract Act'). Claim for fee based on percentage of the decretal amount was unethical. It was submitted that the appellant, as a client, being in fiduciary relationship, burden to prove that the fee was reasonable and had been voluntarily agreed to be paid was on the Advocate. The Advocate by using his professional position could not be allowed to exploit a client by taking signatures on a cheque and no presumption of enforceable debt arises, specially when no account maintained in regular course of business was furnished.

3. Reference may be briefly made to the facts on record. The appellant's husband died in a motor accident on 30th July, 1998. She along with her children and parents of the deceased filed a claim before the Motor Accident Claims Tribunal (MACT) through the respondent as an advocate. The MACT awarded compensation. The appellant paid a sum of Rs.10 lakhs towards fee on various dates. However, the respondent forced the appellant to sign another cheque of Rs.3 lakh on 25th October, 2014 despite her stating that she was unable to pay more fee as she had no funds in her account. The respondent sent e-mail dated 2nd November, 2014 claiming his fee to be 16% of the amount received by the appellant.

4. Complaint dated 11th December, 2014 was filed before the Court under Section 138 of the Act stating inter alia that the cheque which was issued in discharge of liability having been returned unpaid for want of funds, the appellant committed the offence for which she was liable to be punished. The appellant was summoned by the Court against which she approached the High Court stating that there was no legally enforceable debt as fee claimed was exorbitant and against law. The claim was in violation of Advocates Fee

Rules and Ethics as fee could not be demanded on percentage of amount awarded as compensation to the appellant. Her signatures were taken when she was under distress.

5. The petition was contested by the respondent by submitting that the appellant having agreed to pay the professional fee and having availed his professional services, she could not contest the claim for fee. It was submitted that the respondent had engaged services of other senior advocates and paid huge amount for their services at various courts including the Supreme Court.

6. The appellant, in support of her prayer for quashing, inter alia, argued before the High Court that the fee claimed by the respondent was against the A.P. Adovcates' Fee Rules, 2010 of Subordinate Courts. It was also submitted that the claim of the respondent was against ethics and public policy and hit by Section 23 of the Contract Act.

7. The High Court held that Advocates' Fee Rules are only for guidance and there was no bar to fee being claimed beyond what is fixed under the Rules. The claim of the respondent was that the amount included his fee for engaging an advocate in the High Court and the Supreme Court. Thus, the High Court dismissed the quashing petition.

8. We have heard learned counsel for the parties and perused the record.

9. The main contention raised on behalf of the appellant is that charging percentage of decretal amount by an advocate is hit by Section 23 of the Contract Act being against professional ethics and public policy, the cheque issued by the appellant could not be treated as being in discharge of any liability by the appellant. No presumption arose in favour of the respondent that the cheque represented legally enforceable debt. In any case, such presumption stood rebutted by settled law that claim towards Advocate's fee based on percentage of result of litigation was illegal. Signing of the cheque was by way of exploitation of fiduciary relationship of Advocate and the client.

10. In support of his submission that charging of exorbitant fee and calculating the sum with reference to the result of the litigation was against public policy, reliance has been placed on judgments of this Court in ***In the matter of Mr. G., a Senior Advocate of the Supreme Court1, R.D. Saxena versus Balram Prasad Sharma[2], V.C. Rangadurai versus D. Gopalan[3]***

[1] (1955) 1 SCR 490 at 494, [2] (2000) 7 SCC 264, para 41, [3] (1979) 1 SCC 308

11. Learned counsel for Respondent No.2-complainant supports the impugned order. He submitted that the cheque of the appellant having dishonored, statutory presumption was available in his favour and no ground was made out for quashing. There was no legal bar to the claim of the complainant towards his professional fees. Learned counsel for the complainant did not dispute that a sum of Rs.10 lakhs has already been received towards fee. There was no written agreement about the quantum of fee nor any account was maintained. He also did not dispute the e-mail dated 2nd November, 2014 wherein basis of the claim of fee is 16% of the decretal amount received by the appellant.

12. The first question which needs consideration is whether fee can be determined with reference to percentage of the decretal amount. Second question is whether the determination of fee can be unilateral4 and if the client disputes the quantum of fee whether the burden to prove the contract of fee will be on the advocate or the client. Third question is whether the professional ethics require regulation of exploitation in the matter of fee.

13. One of the issues was dealt with by a single Bench Judgment of the Madras High Court in ***C. Manohar versus B.R. Poornima***[5]**.** R. Banumathi, J (as her Lordship then was) held that no presumption could arise merely by issuance of a cheque that amount stipulated in the cheque was payable towards fee. In absence of independent proof, issuance of cheque could not furnish cause of action under Section 138 of the Act in the context 4 of an advocate or client. The observations relevant in the context are as follows :

> *"The case in hand is an example of the present day trend of the legal profession. Legal profession is essentially service oriental. Ancestor of today's lawyers was no more than a spokesperson, who rendered his services to the needy members of the society, by putting forth their case before the authorities. Their services were rendered without regard to remuneration received or to be received. With the growth of litigation, legal profession became a full time occupation. The trend of the legal profession has changed ... profession has almost became a trade. There is no more service orientation.*
>
> *12. The relationship between the lawyer and the client is one of trust and confidence. The client engages a lawyer for personal reasons and is at liberty to leave him for the same reasons. Considering the relationship between the lawyer and the client and the present day*

[5] (2004) Crl.L.J 443

trend in the profession, it has to be carefully seen whether the complainant has proved that the amount due of Rs. 43.600/- is being payable towards him.

13. To attract the penal provisions under Section 138 N. I. Act, a cheque must have been drawn by the accused on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge in whole or in part, of any debt or other liability due. That means, the cheque must have been issued in discharge of debt or other liability wholly or in part. The cheque given for any other reasons not for the satisfaction of any debt or other liability, even if it is returned unpaid-, will not meet with penal consequences.

14. Case of the complainant is that on behalf of the accused, he has filed claim petitions in M. C. O. P. Nos. 2339 of 1992 and 246 of 1993. Two civil cases were also filed. There is nothing to show that the complainant/Advocate himself has paid the stamp duty and bore the legal fees. The complainant has not produced any agreement showing as to what was the arrangement between him and the accused, as to how much is the fee payable and whether the accused agreed for payment of stamp duty by her counsel itself. In the absence of any agreement, Ex. P-1 cheque cannot be said to have been issued for the purpose of discharge of any substantial debt or liability. Urging the Court to raise the presumption under Section 139 N. I. Act, the learned counsel for the appellant has relied upon M/s. Modi Cements Ltd. versus Kuchil Kumar Nandi [(1998) 3 SCC 249] wherein the Supreme Court has held that once the cheque is issued by the drawer a presumption under Section 139 N. I. Act must follow and merely because the drawer issues a notice to the drawee (Payee) or to the Bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee (Payee) or the holder of a cheque in due course. Of course, under Section 139 N. I. Act, there is a presumption that unless the contrary is proved, the holder of the cheque received the cheque for the discharge in whole or in part of any debt or other liability. But even in Section 139 N. I. Act, the legal presumption is created only for the cheque so received for the discharge in whole or in part of any debt or other liability. In the case on hand, the complainant being a practising advocate, has not proved the debt amount payable towards him by th e accused, who has

> *engaged him as his lawyer to conduct the case. The finding of the trial Court that there is no debt or legally enforceable liability' does not suffer from any infirmity warranting interference."*

14. The Bombay High Court in ***Re: KL Gauba***[6] held that fees conditional on the success of a case and which gives the lawyer [6] AIR 1954 Bom 478 an interest in the subject matter tends to undermine the status of the profession. The same has always been condemned as unworthy of the legal profession. If an advocate has interest in success of litigation, he may tend to depart from ethics.

15. In ***in the matter of Mr. G.: A Senior Advocate of the Supreme Court***[7], this Court held that the claim of an advocate based on a share in the subject matter is a professional misconduct.

16. In ***VC Rangadurai versus D. Gopalan***[8], it was observed that relation between a lawyer and his client is highly fiduciary in nature. The advocate is in the position of trust.

17. Rule 20 of Part VI, Chapter II, Section II of the Standard of Professional Conduct and Etiquette reads as follows :

> "An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof."

18. Thus, mere issuance of cheque by the client may not debar him from contesting the liability. If liability is disputed, the advocate has to independently prove the contract. Claim based on percentage of subject matter in litigation cannot be the basis of a complaint under Section 138 of the Act.

19. In view of the above, the claim of the respondent advocate being against public policy and being an act of professional misconduct, proceedings in the complaint filed by him have to be held to be abuse of the process of law and have to be quashed.

20. We may note that after the hearing was concluded, learned counsel for Respondent No.2 mentioned the matter to the effect that Respondent No.2 wanted to withdraw the complaint. An e-mail to this effect was also handed over to Court. The same has been kept on the record. However, we did not permit this prayer. Having committed a serious professional misconduct, the respondent No.2 could not be allowed to avoid the adverse consequences

[6] AIR 1954 Bom 478 ,[7] (1955) 1 SCR 490, [8] (1979) 1 SCC 308, para 31,

which he may suffer for his professional misconduct. The issue of professional misconduct may be dealt with at appropriate forum.

21. Thus, while proceedings against the appellant will stand quashed, the issue of professional misconduct is left to be dealt with at the appropriate forum.

22. However, apart from the present individual case, the general issue, having been highlighted, may need further consideration by this Court in the larger interest of the legal profession and the system of administration of justice.

23. Undoubtedly, the legal profession is the major component of the justice delivery system and has a significant role to play in upholding the rule of law. Significance of the profession is on account of its role in providing access to justice and assisting the citizens in securing their fundamental and other rights. Can justice be secured with the legal professionals failing to uphold the professional ethics? This Court has even earlier expressed the concern on the falling professional norms in the legal profession[9]. In ***Tahil Ram Issardas Sadarangani versus Ramchand Issardas Sadarangani***[10] , this Court noted the trend of increasing element of commercialization and decreasing element of service. In ***VC Rangadurai (supra)***[11]**,** this Court observed that confidence of the public in the legal profession was integral to the confidence of the public in the legal system. Commercialization to the extent of exploiting the litigant and misbehavior to the extent of 9 R.K. Anand v. Delhi High Court (2009) 8 SCC 106, para 333 ; Sanjiv Datta, Deputy Secretary, Ministry of Information and Broadcasting, In Re. (1995) 3 SCC 619, para 20. browbeating the Court, breach of professional duties to the court and the litigant on the part of some members of the legal profession, affecting the right of the litigants to speedy and inexpensive justice, need to be checked. This has also been observed earlier in the decisions of this Court[12].

24. In its [13]1st Report dated 31st August, 1988, the Law Commission of India, examined the role of the legal profession in strengthening the system of administration of justice. The issue considered included :

(i) the state of profession and its public image;

[9] R.K. Anand v. Delhi High Court (2009) 8 SCC 106, para 333 ; Sanjiv Datta, Deputy Secretary, Ministry of Information and Broadcasting, In Re. (1995) 3 SCC 619, para, [10] 1993 Supp. (3) SCC 256, [11] Paras 30 to 32, [12] O.P. Sharma versus State of Punjab (2011) 6 SCC 86, paras 18 to 23; R.D. Saxena versus Balram Prasad Sharma (2000) 7 SCC 264, paras 14,28,41,42, [13] Para 2. 17

(ii) profession's attitude towards the policy of social change intended under the Constitution;

(iii) the functioning of the Bar Councils and the question of disciplinary jurisdiction;

(iv) the strike by lawyers, its implications and fall out;

(v) the question of hobnobbing between the Bar and politicians, between the Bar and the Judiciary;

(vi) regulation and standardization of fees chargeable by the members of the profession in relation to the 12 O.P. Sharma versus State of Punjab Profession."

25. It was observed that recurring strikes by the bar had contributed to the piling up of arrears jeopardizing the consumers of justice and has thus led to weakening the system of administration of justice[13]. While considering the mounting cost of litigation, it was observed that fee charged by some senior advocates are astronomical in character. The corporate sector is willing to retain talent at a high cost. It develops into a culture and it permeates down below14. Role of the legal profession in strengthening the administration of justice must be in consonance with the mandate of Article 39A to ensure equal opportunity forcess to justice. The legal profession must make its services available to the needy by developing its public sector. It was observed that like public hospitals for medical services, the public sector should have a role in providing legal services for those who cannot afford fee15. Maintenance of irreducible minimum standards of the profession is a must for ensuring accountability of the legal profession[16]. The methodology was required to be devised as a part of social audit of the profession wherein consumers of justice were required to be given role[17].

26. Referring to the lawyers' fee as barrier to access to justice, it was observed that it was the duty of the Parliament to prescribe fee for services rendered by members of the legal profession. First step should be taken to prescribe floor and ceiling in fees[18].

27. With regard to the role of the legal profession for strengthening the administration of justice, it was observed that members of the legal profession could have a decisive say in law making being largest group in legislative bodies[19]. They could contribute to reduce the litigation instead of perpetuating disputes by counseling the parties and could contribute to reduce the delay in proceedings[20]. Alternative modes of resolution of disputes should

17 Para 3.31,18 Para 3.28, 19 Para 3.6, 20 Para 3.11, 3.13

be explored and one such may be pre-trial conciliation proceedings[21]. Reducing the number of witnesses to be examined by deleting the irrelevant witnesses reducing the length of cross-examination by avoiding unnecessary questions[22] and avoiding adjournments could help the administration of justice.

28. Though the 131st Report was submitted in the year 1988, no effective law appears to have enacted to regularize the fee or for providing the public sector services to utmost needy litigants without any fee or at standardized fee. Mechanism to deal with violation of professional ethics also does not appear to have been strengthened. Success of administration of justice to a great extent depends on successful regulation of legal profession in the light of mandate under Article 39A for access to justice. Deficiency in the working of the present regulatory mechanism has been acknowledged by this Court in several decisions23. Mandate for the Bench and the bar is to provide speedy and inexpensive justice to the victim of justice and to protect their rights. The legal system must continue to serve the victims of injustice.

29. In view of this mandate, this Court requested the Law Commission to have a re-look at the regulatory mechanism and expressed the hope that the Government of India will consider the recommendation of the Law Commission. In its 266th Report dated 23rd March, 2017 submitted in the light of decision of this Court in **Mahipal Singh Rana (supra),** it was noted that conduct of members of the legal profession who do not follow ethics [23] Mahipal Singh Rana Advocate versus State of Uttar Pradesh (2016) 8 SCC 335, para 56 contributes to the pendency of cases. Element of public service has to remain predominant. The Commission noted that there was a huge loss of working days by call of unjustified strikes in jurisdiction of various High Courts resulting in denial of justice to the litigant in public[24]. Such dilatory tactics including seeking adjournments on unjustified grounds affect the speedy disposal of cases. The Commission also noted the instances of browbeating the courts for getting favourable orders obstructing administration of justice[25]. The Law Commission also noted the contemptuous conduct of some members of the legal profession[26].

30. The Law Commission thereafter considered the issue of review of regulatory framework of the legal profession. Referring to the developments in other countries it was observed that there was dire necessity of reviewing

[21] Para 3.21, [22] Para 3.17, [24] Para 6.3, [25] Paras paras 8.7 to 8.12, 8.14 to 8.19, [26] Chapter IX

regulatory mechanism not only in the matter of discipline and misconduct but also in other areas. It was suggested that constitution of the Bar Council required a change for which an Amendment Bill was also recommended27.

31. We hope that the concerned authorities in the Government will take cognizance of the issue of introducing requisite legislative changes for an effective regulatory mechanism to check violation of professional ethics and also to ensure access to legal services which is major component of access to justice mandated under Article 39A of the Constitution.

32. The appeal stands disposed of accordingly.

[27] Para 17.10

Appeal disposed of.

2017 (II) ILR - CUT-1233

VINEET SARAN, C.J. & DR. B.R.SARANGI, J.

W.A. NO. 481 OF 2014

L.I.C. OF INDIA & ORS. ……..Appellants

.Vrs.

TARAKESWAR MOHANTY ……Respondent

SERVICE LAW – "Consequential benefit" – Meaning of – Consequential benefit to a person does not mean only back wages but it includes promotion, fixation of seniority and grant of financial benefits admissible to the post, etc.

In this case Division Bench of this Court while setting aside the order of removal of the respondent from service directed that the respondent would be re-instated in service without any financial benefits but his seniority would be maintained and his pay would be fixed notionally, so this Court has already granted the benefit of continuity of service which has the effect of consequential benefits admissible to the respondent – Held, the respondent is entitled to service benefits for the period from 19.09.1996 to 24.10.1999 which shall be taken into consideration for the purpose of his future promotion. (Paras 7,8)

Case Law Referred to :-

1. AIR 2007 SC (Supp.) 637 : J.K.Synthetics -V- K.P.Agarwal

For Appellants : Mr. J.K.Rath, Sr. Adv. & Karunakar Sahoo
For Respondent : Mr. M.R.Mohanty, Sr. Adv. & M/s. S.Jena, R.Choudhury, Mr. Subhashree Mohanty & A.K.Dei

Date of judgment : 18.12.2017

JUDGMENT

DR. B.R. SARANGI, J.

The appellants have filed this intra-Court appeal challenging order dated 21.08.2014 passed by the learned Single Judge in OJC No. 6450 of 2000, whereby the writ petition has been disposed of by relying upon judgment dated 23.12.2008 passed by a Division Bench of this Court in W.P.(C) No. 2548 of 2004, by which the direction has been given to the appellants to count the period from 19.09.1996 to 24.10.1999 in respect of the respondent as in service and such period to be reckoned for the purpose of his future promotion.

2. The factual matrix of the case is that the respondent, while working as Development Officer, remained unauthorized absence from the headquarters and committed various irregularities, for which charge sheet was issued against him on 30.12.1995. On completion of enquiry to the charges framed against him and receipt of report, necessary notice for show cause was issued on 06.07.1996, to which the respondent submitted reply on 24.07.1996 and 26.08.1996. The disciplinary authority, after due consideration of the show cause, vide order dated 19.09.1996, imposed penalty of removal from service under Regulation 39(1)b) of the LIC of India Staff Regulations, 1960 (hereinafter to be referred as "Regulations, 1960"). Against the said order of punishment, the respondent under Regulation 40 of the 1960 Regulations, preferred an appeal, which was dismissed on 21.10.1997. The respondent then made a memorial under Regulation 49 of the Regulations, 1960 to the Chairman, LIC of India, who, vide order dated 14.09.1999, set aside the order of the disciplinary authority so also the appellate authority and remitted the matter back to the disciplinary authority with the direction to conduct a fresh enquiry affording reasonable opportunity to the respondent. While doing so, the Chairman also directed that the period from the date of removal of the respondent from service till the date he rejoined to be treated as the period not spent on duty. After accepting such order passed by the Chairman, the respondent submitted his joining report and he was allowed to join in service on 25.10.1999 and discharged his duty.

2.1 Subsequently, challenging the part of the order passed by the Chairman directing for de novo enquiry, the respondent filed OJC No. 6450 of 2000. In the same, the respondent took the ground that the enquiry was not conducted by following the principle of natural justice and since the order of the disciplinary authority and the appellate authority were quashed, there was no occasion on the part of the reviewing authority for issuing a direction for de novo inquiry. His further stand was that, if the order of punishment like dismissal from service is set aside, the respondent is deemed to have been continuing in service. The respondent having been permitted to join as Development Officer with effect from 25.10.1999, the fixation of pay of the respondent at the lowest level, though he was a recruitee of the year 1993, such fixation of pay was illegal and not binding in law. Since the respondent was not in a position to work as Development Officer, he made a prayer for the Zonal Manager to post him to discharge his administrative job in Class-III on the terms and conditions to be decided by the Corporation. Since the said prayer was rejected by the Zonal Manager, the respondent challenged its legality and propriety in the writ petition with the prayer to treat the period from 19.09.1996 to 24.10.1999 to be continuing in service and for direction to the appellants to post the respondent in administrative side.

2.2 The Division Bench of this Court, after due adjudication, disposed of W.P.(C) No. 2584 of 2004 by order dated 23.12.2008, the relevant part of which runs as follows:

> *"As we find, in this case the charges are not specific. But the Enquiry Officer has submitted his report on five charges. The Disciplinary Authority has concurred with the findings of the Enquiry Officer, but has taken new ground for imposing the major penalty, which is not legally available to the Disciplinary Authority. When charge has not been framed, punishment cannot be imposed basing upon certain new charges, without giving an opportunity to the petitioner to defend his case. Therefore, the order imposing penalty is not legally tenable. Once the order imposing penalty goes, the subsequent orders passed by the Appellate Authority and the Reviewing Authority are bound to fail.*
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> *We would have remanded the matter to the authorities for imposing a lesser punishment but as we find this is the second round of litigation of the petitioner in this Court and the petitioner is out of job since 1995, save and except a brief spell during which he was allowed to*

serve by the order of the Chairman of the Corporation. In order to cut short the delay, we set aside the impugned order of removal from service passed by the Disciplinary Authority in Annexure-9 so also the affirming orders passed by the Appellate Authority and the Reviewing Authority in Annexures-11 and 12 respectively and direct reinstatement of the petitioner to service without any financial benefit. The seniority of the petitioner shall, however, be maintained and his pay shall be fixed notionally."

3. In compliance of the aforesaid order, though the respondent was reinstated in service without any financial benefit and his seniority was maintained and his pay was notionally fixed, but he was not granted the benefit for the period from 19.09.1996 to 24.10.1999. Consequentially, the respondent again approached this Court by filing OJC No. 6450 of 2000, which came to be disposed of by the learned Single Judge by order dated 21.08.2014, the effective part of which runs as follows:

"In the present writ petition, the petitioner seeks direction directing the opposite parties treating the period from 19.09.1996 to 24.10.1999 as continuing in service. On perusal of the direction in the previous writ vide Para-8, it appears that this Court in allowing the said writ petition while setting aside the dismissal order, the order of the appellate authority and the reviewing authority has already directed that the petitioner shall be reinstated in service without financial benefit and the seniority of the petitioner shall, however, be maintained and his pay shall be fixed notionally. It appears that the relief claimed by the petitioner in the present writ petition has already been covered by the direction of this Court in the previous writ petition. In such view of the matter and since the claim of the petitioner is already protected under the direction in the previous order, no further direction need be issued. It is stated here that in view of the specific direction in the previous writ petition, the opposite parties are bound to count the period from 19.09.1996 to 24.10.1999 in respect of the petitioner as in service and the said period is to be reckoned for the purpose of his future promotions."

Aggrieved by the order directing to count the period from 19.09.1996 to 24.10.1999 as spent by the respondent in service and said period be reckoned for the purpose of future promotion, the appellants have filed the present appeal.

4. Mr. J.K. Rath, learned Senior Counsel appearing along with Mr. Karunakar Sahoo, learned counsel for the appellants urged that the respondent is not entitled to get the benefits for the period from 19.09.1996 to 24.10.1999 and, as such, said period should not have been considered for future promotion. It is further contended that in view of order passed on 14.09.1999 by the reviewing authority, wherein it has been specifically mentioned that the period of absence from the date of his removal in terms of order dated 19.09.1996 till date of rejoin his duty pursuant to his order be treated as the period not spent in duty, the direction given for counting the said period for the purpose of promotion cannot sustain in the eye of law. Therefore, the order passed by the learned Single Judge is liable to be set aside.

5. Per contra, Mr. M.R. Mohanty, learned Senior Counsel appearing along with Ms. Subhashree Mohanty, learned counsel for the respondent contended that the order passed by the learned Single Judge emanates from the order of the Division Bench of this Court dated 23.12.2008 passed in W.P. (C) No. 2584 of 2004, by which the Division Bench of this Court has specifically come to a conclusion that since the charges are not specific and on that basis the inquiry officer has submitted a report and the disciplinary authority, while concurring with the findings of the inquiry officer, imposed major penalty taking new ground which cannot be sustainable. It was further observed by the Division Bench of this Court that when charges were not framed, punishment could not have been imposed basing upon certain new charges without giving an opportunity to the respondent to defend his case. It is further urged that since the Division Bench of this Court, by setting aside the order of removal passed by the disciplinary authority, has already directed the respondent to be reinstated in service without any financial benefit and his seniority to be maintained, the claim of the appellants, that for the period from 19.09.1996 to 24.10.1999 the respondent is not entitled to get the benefit, cannot sustain in the eye of law.

6. Having heard Mr. J.K. Rath, learned Senior Counsel for the appellants and Mr. M.R. Mohanty, learned Senior Counsel for the respondent and since pleadings between the parties have been exchanged, with their consent the matter is being disposed of finally at the stage of admission.

7. The facts of the case, as delineated above, are undisputed. The only question to be decided in this case is whether the period from 19.09.1996 to 24.10.1999 the respondent is entitled to get the benefits or not. This question

also cannot be reopened in view of the fact that the judgment dated 23.12.2008 passed by a Division Bench of this Court in W.P. (C) No. 2584 of 2004 has reached its finality, as the same has not been challenged by the appellants before the higher forum, which fact has also been admitted by Mr. J.K. Rath, learned Senior Counsel appearing for the appellants. Once the judgment dated 23.12.2008 rendered by this Court reached its finality, the benefit accrued thereof has to be extended to the respondent. Particularly when the Division Bench of this Court has come to a conclusion that the charges are not specific but the inquiry officer has submitted his report on five charges, basing upon which the disciplinary authority has concurred with the said finding and has also taken new grounds for imposing major penalty, which is not legally available, therefore punishment so imposed without giving any opportunity to the respondent to defend his case is not legally tenable. Once the order imposing penalty goes, the subsequent order passed by the appellate authority and reviewing authority are bound to fail. Consequentially, the Division Bench of this Court set aside the order of removal from service passed by the disciplinary authority, which was confirmed by the appellate authority, as well as reviewing authority, and directed that the respondent would be reinstated in service without any financial benefits and his seniority would be maintained and his pay would be fixed notionally. Meaning thereby, on reinstatement in service, the respondent may not get the financial benefits, but his seniority has to be retained and his pay has to be fixed notionally. As a consequence thereof, this Court already granted the benefit of continuity of service of the respondent, which has the effect of consequential benefits admissible to the respondent.

8. In ***J.K. Synthetics v. K.P. Agarwal***, AIR 2007 SC (Supp.) 637, while considering the provision of Section 6(6) of U.P. Industrial Disputes Act,1947 read with Section 11-A of the Industrial Disputes Act, 1947, the apex Court held as follows:

> *"There is also a misconception that whenever reinstatement is directed, "continuity of service" and "consequential benefits" should follow, as a matter of course. The disastrous effect of granting several promotions as a "consequential benefit" to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualized while granting*

> *consequential benefits automatically. Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether "continuity of service" and/or "consequential benefits" should also be directed. Coming back to back wages, even if the court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case."*

In view of the above, "consequential benefit" to a person does not mean only back wages. It includes much more things beyond back wages, such as promotion, fixation of seniority and grant of financial benefits admissible to the post etc. Therefore, if the respondent had been removed from service illegally by the disciplinary authority, which was confirmed by the appellate authority as well as the reviewing authority, but ultimately such order of illegal removal from service having been set aside by this Court allowing the respondent to be reinstated in service without any financial benefit, as he had not discharged the duty for the said period, and directing to maintain his seniority and fix his pay notionally, that itself cannot disentitle the respondent from getting service benefits for the period from 19.09.1996 to 24.10.1999. Since the order of the Division Bench with regard to counting of seniority and fixation of pay of the respondent notionally has reached its finality, the period from 19.09.1996 to 24.10.1999 is bound to be taken into consideration for the purpose of his future promotion.

9. In view of the aforesaid facts and circumstances, this Court is of the considered opinion that the learned Single Judge has not committed any illegality or irregularity so as to warrant interference of this Court. Hence, we find no merits in this appeal, which is accordingly dismissed.

Appeal dismissed.

2017 (II) ILR - CUT-1240

VINEET SARAN, C.J. & DR. B.R.SARANGI, J.

W.A. NO. 24 OF 2017

DURGA CHARAN ROUL & ORS. .....Appellants

.Vrs.

BHAGIRATHI ROUL & ORS. .....Respondents

ODISHA SURVEY AND SETTLEMENT ACT, 1958 – S.15(b)

Meaning of the word "or there after" appearing in section 15(b) of the Act ? No restriction put to file a revision petition after expiry of one year period but it must be within a reasonable time.

In this case proceeding U/s. 15(b) of the Act initiated before the Revisional authority after 37 years – Even though the statute does not prescribe any period of limitation, but for entertaining an application at such a belated stage no specific reason has been assigned by the Revisional authority – Held, dispute can always be raised within reasonable period as delay would defeat equity – The appellants, having not approached the Revisional Authority within reasonable time are to suffer for their own negligence and laches.

(Paras 5, 6, 7)

Case Laws Referred to :-

1. 1991(I)OLR82(FB): Laxminarayan Sahu -V- State of Orissa.
2. 1993 (II) OLR 365 : Labanyabati Devi -V- Member, Board of Revenue
3. 72 (1991) CLT 49 : Laxman Konda -V- State of Orissa
4. AIR 1999 SC 517 : Union of India -V- Kishorilal Bablani
5. AIR 2009 SCW 6305 : Santosh Kumar Shivgonda Patil -V- Balasahe Tukaram Shevale

For Appellants : M/s.S.Mishra, B.Mohanty, A.Mohanta, E.Agarwal, L.K.Moharana & S.K.Samantray

For Respondents : Mr. B.P.Pradhan, Addl.Govt.Adv.

Date of hearing : 14.12.2017
Date of Judgment : 20.12.2017

JUDGMENT

DR. B.R. SARANGI, J.

The appellants, being opposite parties no.3 to 6 before the writ Court, have filed this intra-Court appeal impugning the order dated 15.12.2016 passed by the learned Single Judge in W.P.(C) No.21270 of 2015, whereby,

while allowing the writ petition, the order dated 16.11.2015 passed by the Additional Commissioner of Settlement, Sambalpur in R.P. Case No.76 of 2014 has been set aside.

2. The factual matrix of the case in hand is that the present appellants, as the revision petitioners, filed an application under Section 15 (b) of the Orissa Survey and Settlement Act,1958 and Rules framed thereunder before the Addl. Commissioner Settlement and Consolidation, Sambalpur registered as R.P. Case No.76 of 2014, wherein the present private respondents were impleaded as contesting opposite parties, for recording the land in question separately in their name by correction of Record of Right (ROR). The appellants pleaded that Sabik khata no.14/1 of village Mochigaon measuring Ac.1.94 decimals, which corresponds to Sabik plot no.5 measuring Ac.1.86 decimals and plot no.90/225 measuring Ac.0.08 decimals, originally recorded in the name of their grandfather, namely, Lambodar Roul. Plot no.90/225 measuring Ac.0.08 decimals was acquired by the State Government vide L.A. Case no.01/1958-59. Therefore, the remaining area of Ac.1.86 decimals was exclusively recorded in the name of grandfather of the appellants, who was in absolute physical possession over the same, and after death of their grandfather, the present appellants have been in continuous possession over such land with its right and title. During the last settlement operation, the settlement authorities recorded the name of father of the appellants in respect of the suit land and also included the name of father of the private respondents. Therefore, the appellants prayed that hal khata no.72, plot no.6 corresponding to sabik plot no.5 should be exclusively recorded in the name of the appellants and the name of the private respondents be deleted and accordingly necessary correction be carried out in the ROR. On being noticed, the private respondents advanced their arguments contending that the case land was in joint possession of the ancestors of the parties and after them, the appellants and the private respondents, being the legal heirs, are possessing said land without any interference from any quarter. Considering the possession of the land, the settlement authority in the settlement operation has prepared the ROR jointly. The question of delay was also raised, as the revision petition was filed beyond the statutory period of limitation. The revisional authority called for parawise report from the Tahasildar and Addl. Sub-Collector (Settlement), Keonjhar to ascertain the fact of possession of the parties over the case land. Accordingly, the Tahasildar reported the fact of possession in favour of the present appellants whereas the report of the Addl. Sub-Collector (Settlement), Keonjhar reveals the name of sabik recorded

tenant who was the common ancestor of the present appellants. On the basis of the pleadings available on record, the revisional authority framed as many as five issues and, while considering the issue nos.2 and 5 regarding right, title and interest of the parties over the disputed land and the question of limitation, came to a definite finding that the application has been filed beyond the statutory period of limitation and the common ancestors of the present appellants having been made available only in sabik recorded tenant of the suit land, the grandfather of the private respondents are no way concerned to such property and wrongly the name of grandfather of the private respondents has been included with the name of grandfather of the appellants in respect of the case land during hal settlement and, as such, the same needs to be corrected by deleting the name of Siropani Roul from the suit khata. While considering the question of limitation, the revisional authority in paragraph-23 of the judgment has elaborately discussed the same and came to a conclusion that the Court should decide the case on the basis of materials available on record and technicalities should not stand as a bar while granting justice to a party who is otherwise entitled to be granted with such relief. Consequentially, vide order dated 16.11.2015, the revisional authority allowed R.P. Case No.76 of 2014 in favour of the appellants/revision petitioners and issued direction to the Tahasildar to delete hal plot no.6 from hal khata no.72 of village Mochigaon and prepare separate record in the name of the appellants. Being aggrieved by the said order dated 16.11.2015 passed in R.P. Case No.76 of 2014, the private respondents preferred W.P.(C) No.21270 of 2015 impleading the present appellants as opposite parties no.3 to 6 with a prayer to set aside the order dated 15.11.2015 passed in R.P. Case No.76 of 2014 by the revisional authority and to include their name in the hal ROR in respect of the disputed land. The learned Single Judge, after hearing both parties, allowed the writ petition on 15.12.2016 and set aside the order dated 16.11.2015 on the ground that the revisional authority has not considered the question of delay of more than three decades in its appropriate spirit, hence this application.

3. Mr. S.K. Samantray, learned counsel for the appellants vehemently contended that though Section 15(b) of the Orissa Survey and Settlement Act, 1958 specifically prescribes to file revision within a period of one year from the date of final publication under Section 12-B of the Act or thereafter, the word ‘or thereafter’ has no restricted meaning rather the said application can be filed even after expiry of one year and even it is not necessary to show sufficient cause for filing of the revision by filing application under Section 5

of the Limitation Act. It is further contended that such provision contained in Orissa Survey and Settlement Act, 1958 is a procedural one and its object is to do substantial justice in order to check the litigants to come to the Court with a mala fide intention to harass the other side. It is urged that not a scrap of paper has been filed by the private respondents to establish their prima facie case and without delving into the merits of the case the learned Single Judge could not and should not have disposed of the matter on the ground of limitation. It is further urged that the reference made by the learned Single Judge to the cases in ***Laxminarayan Sahu v. State of Orissa***, 1991 (I) OLR 82 (FB) and ***Labanyabati Devi v. Member, Board of Revenue***, 1993 (II) OLR 365 relate to Section 59 (2) of the OLR Act, wherein suo motu power of revisional authority had been described, but the said decisions are no way related to the present facts and circumstance of the case. Therefore, he seeks to set aside the order dated 15.12.2016 passed by the learned Single Judge in W.P.(C) No.21270 of 2015.

4. We have heard Mr. S.K. Samantray, learned counsel for the appellants and Mr. B.P. Pradhan, learned Addl. Government Advocate for respondent nos.5 and 6. Since the matter has been heard at the stage of fresh admission, no notice has been issued to respondents no.1 to 4 (opposite parties before the revisional authority and petitioners before the writ Court).

5. It is profitable to refer the provisions contained under Section 15 (b) of the Orissa Survey Settlement Act, 1958. Section 15 (b) reads thus:-

> *"15. Revision by Board of Revenue – The Board of Revenue may in any case direct –*
>
> *xxx xxx xxx*
>
> *(b) on application, made within one year from the date of final publication under Section 12-B, the revision of record of rights or any portion thereof whether within the said period of one year or thereafter but not so as to affect order passed by a Civil Court under section 42:*
>
> *Provided that no such direction shall be made until reasonable opportunity has been given to the parties concerned to appear and be heard in the matter."*

From the aforementioned provision, it is made clear that on an application, made within one year from the date of final publication under Section 12-B of the Act, revision of ROR or any portion thereof has to be made within the

said period of one year or thereafter. The said provision provides that application is to be made within a period of one year after final publication under Section 12-B seeking for revision for record of rights or any portion thereof. However, the meaning of the word 'or thereafter', as mentioned in the said section, can be construed to mean that even after one year from the date of final publication under Section 15 (b), the revision can be filed. Thereby, no restriction can be put to file a revision application after expiry of one year period as contemplated under Section 15 (b) of the Survey and Settlement Act, 1958 for correction of records. So far as maintainability of revisional application is concerned, there is no iota of doubt that such application is maintainable even after the period of one year of final publication under Section 12-B of the Survey and Settlement Act, 1958.

6. Admittedly, the proceeding was initiated before the revisional authority after long lapse of 37 years. Even though the statute does not prescribe any period of limitation, but for entertaining an application at such a belated stage specific reason has to be assigned by the revisional authority. The learned Single Judge therefore by order dated 15.12.2016; on perusal of the pleadings made by the appellants/revision petitioners before the revisional authority in paragraph-5, as well as issue no.5 framed by the revisional authority with regard to question of delay of more than three decades; came to a finding that since the revision was filed after three decades, even though the statute nowhere provides any period of limitation; in view of the decisions in ***Laxman Konda v. State of Orissa***, 72 (1991) CLT 49 and ***Union of India v. Kishorilal Bablani***, AIR 1999 SC 517, wherein law has been settled that no prescription of limitation does not mean that the dispute can be raised beyond unreasonable period, and further taking into consideration the judgments of this Court in ***Laxminarayan Sahu v. State of Orissa***, 1991 (I) OLR 82 (FB); ***Labanyabati Devi v. Member, Board of Revenue***, 1993 (II) OLR 365; ***Santosh Kumar Shivgonda Patil v. Balasaheb Tukaram Shevale***, AIR 2009 SCW 6305; and W.P.(C) No.3651 of 2002 (***Chaitanya Das v. Bibhuti Charan Das***) disposed of on 14.12.2016; wherein it has been held that entertaining the claim after twelve years cannot be held to be within reasonable period; allowed the writ petition on the ground that the revisional authority has not considered the question of delay of more than three decades in its appropriate spirit.

7. Having regard to the facts and circumstances of the case and keeping in view the law settled in the present context by the apex Court as well as this

Court, we concur with the finding of the learned Single Judge that the revisional authority, while passing the order dated 16.11.2015 in R.P. Case No.76 of 2014, has not dealt with the issue relating to limitation in its proper perspective. Even though no specific period of limitation has been prescribed under the Act, after long lapse of three decades, a settled position cannot and should not have been allowed to be unsettled. The appellants, having not approached the revisional authority within reasonable time, are to suffer for their own negligence and laches.

8. In view of the above, this Court does not find any illegality or irregularity in the impugned order dated 15.12.2016 passed by the learned Single Judge so as to warrant interference. Accordingly, we do not find any merits in the writ appeal and the same is hereby dismissed.

Appeal dismissed.

2017 (II) ILR - CUT-1245

S. PANDA, J. & K.R. MOHAPATRA, J.

W.P.(C) NO. 11307 OF 2016

THE DIRECTOR OF HORTICULTURE, ODISHA .....Petitioner

.Vrs.

PRAVAT KUMAR DASH & ORS. .....Opp. Parties

W.P.(C) NO.19570 OF 2015

STATE OF ODISHA & ORS. .....Petitioners

.Vrs.

PRAVAT KUMAR DASH & ORS. .....Opp. Parties

SERVICE LAW– Applicants successfully passed Gardeners training – Their representation for regularisation rejected by the management – However, Tribunal allowed their prayer – Action challenged by the management.

In this case, the applicants while continuing on ad hoc basis, selected and sponsored by the Director Horticulture, Odisha to undergo gardeners training in the School of Horticulture at Khurda in

the year 1998-99 and on successful completion of training, certificates were issued in their favour – Since Gardener posts were lying vacant and Government has taken a decision to upgrade such posts as Horticulture Extension Workers, there was no reason for not considering the case of the applicants against such vacancies – Held, there is no error apparent on the face of the order passed by the learned Tribunal warranting interference by this Court – Since more posts, than the number of applicants are lying vacant, direction issued to the authorities to regularize the applicants in the post of Gardeners.

(Paras 8, 9)

For Petitioner : Addl. Govt. Advocate
For Opp. Parties : M/s. J.K.Rath, D.N.Rath, P.K.Rout & A.K.Saa

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Date of Judgment : 22.12.2017

JUDGMENT

S. PANDA, J.

W.P.(C) No.11307 of 2016 has been filed by the State functionaries challenging the common order dated 27.06.2014 passed by the Odisha Administrative Tribunal, Bhubaneswar Bench, Bhubaneswar in O.A. No.1510 of 2012 along with eight Original Applications i.e. O.A. No.1644 of 2012, O.A. No.2443 of 2013, O.A. No.3341 of 2013, O.A. No.3342 of 2013, O.A. No.3343 of 2013, O.A. No.3344 of 2013, O.A. No.268 of 2014 and O.A. No.269 of 2014 whereas W.P.(C) No.19570 of 2015 has been filed by the State challenging the orders dated 30.07.2015 and 04.09.2015 passed by the Tribunal in C.P. No.701 of 2014 arising out of the said O.A. No.1510 of 2012.

2. As common questions of law are involved in both the Writ Petitions and the orders challenged by the State have been passed by the Tribunal in one and the same Original Application, the matters are taken up for hearing together.

3. Odisha is a State with maximum percentage of population depending upon agriculture and in the scenario of climatic change as prevails in the present days the green revolution is the need of the hour. The State Government taking into consideration the development of the agriculture as well as the green revolution should take steps to give adequate training to the persons within the age group of 35 so that they will extend helping hand to the people in general for such green revolution. On the above back ground the brief facts of the case has been considered. It appears that 356 candidates

including the applicants of the aforesaid Original Applications have undergone ten months Gardeners training course during the year 1999 for appointment as Gardener in different departmental farms under the petitioners. They have successfully completed the training course and certificates were issued in their favour. Thereafter, the Government has taken a decision that the candidates were selected irregularly and some of them were imparted training in some unidentified farms, outside the School of Horticulture at Khurda. In view of such decision, the candidates, who had already been appointed were terminated. The order of termination was challenged before the Odisha Administrative Tribunal, Cuttack Bench, Cuttack by the aggrieved candidates in O.A. Nos.1144 (C) of 2001, 1181 (C) of 2001, 1374 (C) of 2001 and 1435 (C) of 2001. The Tribunal by order dated 13.09.2006 quashed the order of termination. Being aggrieved the State preferred W.P.(C) Nos.3527 of 2007, 3528 of 2007, 3529 of 2007 and 3445 of 2007. This Court by judgment dated 05.12.2009 dismissed the said Writ Petitions with an observation that the action of the opposite parties was discriminatory and they should not have adopted pick and choose method. The applicants were regularly appointed by order dated 30.06.1999 against the substantive vacancies and continued as such almost for two years. Therefore, they are protected under Article 311 (2) of the Constitution of India as well as Rule 15 of the O.C.S. (C.C.A.) Rules, 1962 and their services could not have been terminated without a notice to show cause. Since this Court had decided the case on principle in general in favour of the trainees of the year 1999, the applicants who were trainees of the said batch, were expecting to get the benefits of the judgment of this Court. Accordingly, the authorities reinstated the terminated employees. However, the case of the applicants was ignored by the authorities on the ground that the re-instated employees had got an order from the court of law. Finding no other way, the applicants again approached the Tribunal in O.A. No.924 of 2011, which was disposed of on 08.08.2011. Alleging non compliance of the order dated 08.08.2011, the applicants filed C.P. No.135 of 2012. While matter stood thus, the authorities vide order dated 15.09.2012 rejected the claim of the applicants. The applicants, who have successfully completed the training course in the year 1999, have not yet been appointed. It is alleged by the applicants that since some of the candidates, who had completed training in the year 1999, have already been appointed, refusal to give similar benefits to the applicants has resulted hostile discrimination. Therefore, the applicants approached the Tribunal in the aforesaid Original Applications challenging the order dated 15.09.2012.

4. The State authorities filed their counter before the Tribunal contending that the claim of the applicants for their appointment against the vacant posts of Gardener was rejected in view of the policy decision of the Government not to fill up the posts of Gardener while restructuring the Directorate of Horticulture. In pursuance of the direction of this Court, the eligible candidates have already been adjusted against the permanent posts created in lieu of posts of Gardener by relaxing their upper age limit. The guidelines for selection of Gardener clearly stipulate that no guarantee can be given in the matter of employment after successful completion of training. The applicants along with other candidates were imparted training in Government farm under the Chairmanship of the Director of Horticulture in order to equip skilful hands for organizing massive graft production programme for prompt self employment. It is stated that 64 candidates were given training in the School of Horticulture, out of whom some candidates were selected by the authorities. These candidates were working as Gardener on *ad hoc* basis before being sent on training and on completion of training, they were given appointment as Gardener. On the basis of the order passed by this Court, the legality of the appointment of these persons were enquired into and being found irregular, they were terminated by order dated 24.04.2001. The order of termination challenged before the Tribunal was quashed. Challenging the said order the State approached this Court and this Court did not interfere with the order passed by the Tribunal. Accordingly, six candidates were taken back into service. The present applicants are not on the same footing with that of the candidates, who were terminated and subsequently taken back.

5. The Tribunal after hearing the parties and perusing the materials available on record, recorded a finding that the Government have taken a policy decision for abolition of the posts of Gardener, is false. The posts of Gardener are still in existence and are lying vacant and trained persons like the applicants were denied appointment on the above plea. Accordingly, the Tribunal by order dated 27.06.2014 directed the State authorities to consider the case of the applicants for their appointment against the existing vacant posts of Gardener, as has been done in the case of similarly placed trained candidates pursuant to the order of this Court, within a period of three months from the date of receipt of copy of the order. It was further directed that since the opposite parties have been fighting for their right for the last more than 15 years, the State authorities are directed to stick to the deadline fixed by the Tribunal.

6. Learned Addl. Government Advocate submitted that after disposal of the aforesaid Original Application by the Tribunal, the case of the applicants

were considered and rejected by the Director of Horticulture, Odisha vide order dated 30.09.2014. He further submitted that in the meeting held on 09.05.2012 under the Chairmanship of Chief Secretary, Odisha it was decided that in future no recruitment will be made in the cadre of Gardener and when Gardeners would retire or get promoted, the posts will be abolished. Moreover getting training for grafter does not mean to provide regular appointment by the Government. He also submitted that the applicants are not in the same footing with that of the opposite parties in W.P.(C) Nos.3445, 3527, 3528 and 3529 of 2007. The opposite parties therein were regularly appointed as Gardeners against the substantive vacancies with the concurrence of Finance Department and continued as such almost for two years before their termination from service. They have been reinstated in their service and posted as per the order of this Court. The Tribunal without considering the aforesaid fact has passed the impugned order, which need to be interfered with.

7. Per contra, Mr.J.K.Rath, learned Senior Advocate appearing for the applicants submitted that the posts of Gardener are still in existence and are lying vacant, as such there is no reason why the authorities are not considering the case of the applicants against such vacancies. He further submitted that the candidates, who have completed training in the year 1999 have already been appointed, therefore, the authorities should have considered the case of the applicants. He also submitted that the Tribunal has rightly passed the impugned order and the same need not be interfered with.

8. After hearing the rival contention of learned counsel for the parties and going through the materials available on record, it appears that in pursuance of the order dated 11.05.1999 passed by this Court in O.J.C. No.4665 of 1999 filed in the nature of Public Interest Litigation, an enquiry was conducted by the Deputy Secretary being authorized by the Secretary regarding the irregularity committed in appointment of Gardeners. It was found that 64 candidates were selected for Gardeners training and out of them six candidates were selected by the Director, Horticulture without following the proper procedure. The Director, Horticulture without proper notification selected candidates as Gardeners irregularly and imparted training in some unidentified farms under the Director of Horticulture outside the School of Horticulture at Khurda without approval of the Government. The Deputy Secretary also in the said enquiry informed the Director, Horticulture to take immediate steps to dispense with the service of six trainees, who were

selected without following the due procedure and the service of those six persons were terminated on the ground of irregular selection. Earlier this Court also in W.P.(C) Nos.3527, 3528, 3529 and 3445 of 2007 disposed of on 05.12.2009 observed the said fact after calling for the records of O.J.C. No.4665 of 1999. The Court considered the question whether the selection of the opposite parties for training was legal or not and recorded a finding that all the candidates selected for training had been trained in different farms instead of School of Horticulture at Khurda meant for such training without approval of the Government. Therefore, all such trainees, who had taken training outside the School stand on the same footing and a pick and choose method could not have been adopted by the Department for the purpose of compliance of the order of this Court in a Public Interest Litigation. However, the present applicants, being selected and sponsored under the instruction of Director of Horticulture of Odisha undergone Gardeners training in the School of Horticulture at Khurda in the year 1998-99 and certificates were issued in their favour on successful completion of their training. They were continuing on *ad hoc* basis before their names were recommended for training and on completion of such training they were posted as Gardeners.

It also reveals from the minutes of the meeting of the High Level Committee held on 09.05.2012 that Gardeners were not included as members of the cadre as per the resolution dated 07.03.2012 of the Agriculture Department realizing the urgency to upscale the extension activities the extension activities in the field. The post of Field Technicians and Grafters were merged as per said resolution and consequently 794 Group–C posts were redesigned as Horticulture Extension Worker (H.E.W). In the said resolution, it was decided that there was no necessity of posting of Gardeners Trainees, who were trained in different farms for participating in mass graft production programme and the grafting work may now be managed by the H.E.Ws. It was further decided that in future no recruitment will be made in the cadre of Gardner and when the Gardeners would retire or get promoted, the posts will be abolished. Finance Department have also agreed for creation of 258 posts of Horticulture Extension Worker in lieu of abolition of equal numbers of vacant posts of Gardener as decided in the meeting held on 09.05.2012. The Agriculture Department vide resolution dated 10.10.2012 included Horticulture Extension Workers and Attendants as Group-C & D posts under Odisha State Horticulture Service and made provision for promotion of existing Gardeners having qualification of Class-VII and above

to 50 % posts of Horticulture Extension Worker (Group-C) of the service. However, the said decision has not yet been acted upon or approved by the Government as reveals from the affidavit filed by the Deputy Director of Horticulture on 09.12.2017 pursuant to the direction of this Court on 07.11.2017. It is stated in the said affidavit that more than 100 posts of Gardeners are still lying vacant and the posts of Gardeners has not yet been abolished. It is further stated that concurrence of Finance Department is not required in view of the decision taken at the level of Chief Secretary on 20.04.2011 where officers of Finance Department have agreed to the decision. The Village Horticulture Workers subsequently changed as Horticulture Extension Workers will be created in lieu of 1525 posts of other categories (327 Field Technician + 467 Grafters + 731 Gardeners). The said decision was taken only to comply the direction of the Tribunal as well as this Court for appointment of Gardeners in large number of Court cases and in pursuance of the decision taken in the meeting held on 20.04.2011 not to recruit Gardeners in future. It is also stated that the Finance Department have agreed for creation of 258 posts of Horticulture Extension Workers in the scale of pay of Rs.5200-20200/- with Grade Pay of Rs.2000/- in lieu of abolition of equal number of vacant posts of Gardeners as decided in the meeting held on 09.05.2012. It reveals from the note sheet dated 15.09.2012 signed by the Principal Secretary to Government, Agriculture Department that a decision was taken in the meeting held on 09.05.2012 that against 258 posts of Gardeners, equal number of posts of H.E.W should be created as per the decision taken in the meeting held on 20.04.2011. This would be in addition to 794 posts concurred in by the Finance Department in the restructuring proposal.

From the above facts, it reveals that somehow the selection process was made irregularly by the petitioners and to patch up the said irregularity and to subterfuge the orders passed by the Court all these actions have been taken. The restructuring of the posts are taken for the development of the agricultural process in the State and Gardeners are being appointed so that they will develop better qualitative product for a green revolution in the State. However, the action of the opposite parties is only to restrict such agricultural development resultantly number of litigations are being filed in the Courts. Admittedly Gardener posts are still lying vacant and Government has taken a decision to upgrade such posts as Horticulture Extension Workers in lieu of abolition of equal number of vacant posts of Gardeners. The applicants have undergone training being selected and sponsored by the Government. They

have also successfully completed the training course. Since the Gardener posts are lying vacant there is no reason why the State should not consider the case of the applicants against such vacancies.

9. In view of the discussions made hereinabove, this Court is of the opinion that the Tribunal has recorded finding of facts on the basis of the materials available on records and passed a reasoned order. There is no error apparent on the face of the record so as to warrant interference in exercise of the jurisdiction under Article 227 of the Constitution of India. Accordingly, we are not inclined to interfere with the same. Since the applicants, as submitted by learned counsel for the parties, is less than the number of vacant posts available for the Gardeners, we direct the petitioners-State authorities to streamline the engagement of the applicants of the aforesaid Original Applications in the post of Gardeners and regularize their service in the interest of people of the State to get helping hand of trained Gardeners for a green revolution in the State. The entire exercise shall be completed as expeditiously as possible, preferably within a period of three months from today. Both the Writ Petitions are accordingly disposed of. The interim order dated 16.11.2015 passed by this Court in Misc. Case No.18294 of 2015 arising out of W.P.(C) No.19570 of 2015 stands vacated.

Writ Petitions disposed of.

2017 (II) ILR - CUT-1252

S.PANDA, J. & S.PUJAHARI, J.

CRLA NO. 490 OF 2008

HOSEN KHAN & ORS. .....Appellants

.Vrs.

STATE OF ORISSA .....Respondent

EVIDENCE ACT, 1872 – S.32

Dying declaration – Acceptability – It can only be accepted when it passed the test of credibility.

In this case, the deceased stated to have made the dying declaration before two groups of witnesses at different times – Since the witnesses, before whom the dying declaration was stated to have been made, are not consistent in their version and such witnesses are

not in good terms with the appellant and there is no corroboration to their evidence from any other source, the same does not pass the test of credibility and it would not be safe and legal to come to a conclusion as to the guilt of the appellants – Held, the impugned judgment of conviction and order of sentence are set aside.

(Paras 14,15,16)

Case Laws Referred to :-

1. AIR 1958 SC 22 : Khushal Rao -V- State of Bombay
2. (1980) 2 SCC 207 : Kusa & Ors. -V- State of Orissa
3. (2002) 6 SCC 710 : Laxman -V- State of Maharashtra
4. (2006)13 SCC130 : Ranjit Singh & Ors. -V- State of Punjab

For Appellants : Mr. Debasis Panda
Mr. Debasish Samal (Amicus Curiae)
For Respondent : Mr. S.S. Mohapatra, A.S.C

Date of hearing :12.09.2017
Date of judgment :12.09.2017

JUDGMENT

S.PUJAHARI, J.

The judgment of conviction and order of sentence passed by the learned Adhoc Addl. Sessions Judge, F.T.C., Khurda in S.T. Case No.61/126 of 2007, convicting the appellants under Sections 302/34 of the Indian Penal Code (hereinafter referred to as "the I.P.C") for murder of one Rakina Biwi (hereinfafter referred to as "the deceased") and sentencing each of them to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and, in default, to undergo rigorous imprisonment for five months each on that count, are under challenge in this CRLA.

2. The prosecution case before the trial court was that the deceased was given in marriage to one widower, namely, Rossan Khan (P.W.9), resident of village Bhimpada, Tangi Sahiunder Bolgarh P.S. in the district of Khurda. The first wife of Rossan Khan (P.W.9) was the sister of appellant no.3. Rossan Khan (P.W.9), however settled in an interior village under Dasapalla P.S. in the district of Nayagargh, as a village quack to eke out his living, leaving his wife in his native village in the house constructed by him. Wherein his elder brother appellant no.1, his wife appellant no.3 and their daughter appellant no.2, also reside. It is the case of the prosecution that taking the long absence of P.W.9 from home the home, the appellants had meted the deceased with cruelty to make her living impossible in the said

house, so that they can enjoy and grab the house property. For that purpose, the appellants also made an attempt to kill her by immolating her. But, when the people gathered there, the appellant no.1 gave out that the deceased accidentally caught fire and took her to District Headquarters Hospital, Nayagarh for treatment. On the next day, when some of her co-villagers i.e P.Ws.1, 2,4, 5 and 13 visited the hospital to see her condition, the deceased disclosed before them that she was immolated by the appellants. Thereafter, one of them i.e. P.W.2 reported the matter to the police at Bolgarh P.S. in writing vide Ext.1 and a case was registered under Section 307/34 of the I.P.C. But in the meanwhile the deceased had succumbed to the to the injuries in the hospital. Basing on such report, investigation was carried on and on conclusion of the investigation, the police found substance in the F.I.R. allegation and placed charge-sheet against the appellants under Sections 498A/ 302 /34 of the I.P.C. The case of the learned S.D.J.M., Khurda, after taking cognizance of the aforesaid offences.

3. As it appears, the case being place before the court of the learned Adhoc Addl. Sessions Judge (F.T.C.), Khurda for trial, charge was framed against the appellants for the said offences. The appellants having placed not guilty to the charge, prosecution examined as many as 16 witnesses and exhibited 14 documents, so also 4 material objects. The appellants having taken the plea of denial and false implication, examined a doctor of District Headquarters Hospital, Nayagarh who had treated the deceased, as D.W.1 to dispel the prosecution evidence of oral dying declaration said to have been made by the deceased before the witnesses that the appellants immolated her, to be worthy of credence. On conclusion of the trial, as it appears, the death of the deceased sustaining burn injury, having not been disputed and also there being ample evidence in this regard, the trial court returned the impugned judgment of conviction and order of sentence against the appellants basically placing reliance on the oral dying declaration made before the co-villagers such as P.Ws.1,2,4,5 and 13, while acquitting them of the charge under Sections 498A/34 of the I.P.C.

4. During the pendency of the CRLA, the appellant No.3, who is the wife of the appellant No.1, stated to have died and as such the case against her is abated, though no specific order in this regard was passed earlier.

5. In the absence of Mr. D.Panda, learned Advocate appearing for the appellants, Mr. D.Samal, learned member of the Bar being appointed as Amicus Curiae has argued extensively the matter, disputing the sustainability

of the conviction. Thereafter, Mr. D.Panda, learned Advocate appearing for the appellants appears and both of them submit that the impugned judgment of conviction is based on erroneous appreciation of the evidence on record and as such the same cannot be sustained. Reiterating their contention, it is submitted that no doubt, a conviction can be recorded solely on the basis of dying declaration, but the same must be worthy of credence. It is there further submission that the material available on record being indicated the fact that the deceased when admitted in the hospital, was not in a position to disclose anything about the occurrence, as she had sustained 100 percent burn injuries and her condition was serious as revealed from the medical evidence i.e. bed-head ticket Ext.6 and other relevant material on record in this case, it is quite unsafe to place reliance on the dying declaration stated to have been made before some person who are in inimical term with the appellants. The trial court, therefore, solely relying on the same could not have convicted the appellants. Hence, they submit, the impugned judgment of conviction and order of sentence are indefensible and liable to be set aside.

6. Per contra, defending the judgment of conviction and order of sentence, learned counsel for the State submits that the trial court making detailed scrutiny of the evidence on record, having accepted the dying declaration to be worthy of credence and there being no hard and fast rule that unless the doctor certified a person at the relevant time was capable of making dying declaration, such dying declaration cannot be relied upon, the contention advanced in this regard criticizing the impugned judgment of conviction of the trial court is without any substance. He further contends that since in this case, it is revealed from the version of P.W.s, 1,2,4,5 and 13 that the deceased had made a dying declaration indicating the face that she was set ablaze by the appellants and those witnesses have no visible animosity to falsely implicate the appellants, the judgment of conviction and order of sentence impugned. Need no interference in this appeal.

7. It is not dispute that in this case the deceased was admitted in the hospital sustaining burn injuries. The aforesaid is emerged from the evidence of the witnesses more particularly P.W.9, the husband of the deceased who was residing elsewhere, so also the doctor P.W. 10. It transpires from the evidence of P.W.15, The A.S.I. of ,police that on the death of the deceased while undergoing treatment, the matter was reported at Nayagrah P.S. by Dr. L.N. Bisoi pursuant to which U,D, Case was registered vide Case No. 2 of 2007 and he took up the enquiry and during that he sent the dead body of the deceased for post mortem examination vide dead body challan Ext. 14 Post

mortem examination was done by P.W. 14 Dr. Narmada Sahu, the Medical Officer, District Headquarters Hospital, Nayagarh as well as by Dr. Suresh Ch. Mishra and they found the burn injuries on the person of the deceased and the deceased died of burn injuries sustained, as revealed from the testimony of P.W. 14 in the regard stands corroborated by the post mortem report Ext. 12, a contemporaneous document prepared by them evidence the same, Nothing is there indicating the fact that the doctors had not bestowed required care and caution in conducting the postmortem examination. However, no eye witness version is available indicating the fact how the deceased sustained burn injuries which contributed to death of the deceased. But, the trial court as stated earlier placing reliance on the oral dying declaration said to have made by the deceased before P.Ws. 1, 2, 4, 5, 13 implicating the appellants to have immolated the deceased, held the appellants guilty of murder. Therefore, the evidence in this regard is only the oral dying declaration which has been criticized by the learned counsel for the appellants as well as learned Amicus Curiae, to be worthy of credence, but the State counsel has justified the conviction recorded on such oral dying declaration, in their respective contention as stated earlier.

8. Before appreciating the contention raised with regard to sustainability of the conviction based on an oral dying declaration said to have been made by the deceased while undergoing treatment in the hospital, it would be apposite to mention here that there is no impediment in law to record a conviction solely basing on the dying declaration including an oral dying declaration, notwithstanding absence of certification by the doctor about the fitness of the deceased to make such dying declaration, if the evidence adduced in this regard is found to be acceptable and reliable. No hard and fast rule is there indicating the fact that unless such dying declaration is corroborated by other evidence on record, the same cannot be made a foundation to record a conviction

9. The Apex Court in the case of ***Khushal Rao .vrs. State of Bombay,*** reported in AIR1958 SC 22, have held as follows :

> "It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis off conviction unless it is corroborated; each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; a dying

declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighting of evidence; a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control, that statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been at the earliest opportunity and was not the result of tutoring by interested parities." [Quoted from placitum]

"In order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity if the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, but from the fact the Court, in a given case, has come to the conclusion that particular dying declaration was not free from the infirmities"

[Quoted from placitum]

In the case of ***Kusa and Others vrs State of Orissa***, *reported in (1980) 2 SCC 207*, the Apex Court held as follows:

> "Although a dying declaration should' be carefully scrutinized but if after perusal of the same, the Court its satisfied that the dying declaration is true and is free from any effort to prompt the deceased to make a statement and is coherent and consistent, there is no legal impediment to founding a convict on such a dying impediment to founding a conviction on such a dying declaration even if there is no corroboration"
>
> [Quoted from placitum]

In the case of ***Laxman vrs St ate of Maharashtra***, *reported in (2002) 6 SCC 710,* a Constitution Bench of the Apex Court dealing with the evidence of dying declaration, have held as follows:

> "3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is inducted by the most powerful consideration to speak only the truth. Notwithstanding the same grate caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature is to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy itself whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral in writing and anyn adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite."

In the case of ***Ranjit singh and Ors. Vrs State of Punjab,*** reported in (2006) 13 130, the Apex Court have held, as follows:

> "13 … conviction can be recorded on the basis of a dying declaration alone, if the same is wholly reliable, but in the event there exists any suspicion as regards correctness or otherwise of the said dying declaration, the courts in arriving of the judgment of conviction shall looks for some corroborating evidence…"

10. Keeping in mind the aforesaid exposition of law, the evidence on record relating to dying relating declaration in this case has to be scrutinized to examine on record the sustainability of the conviction record. As it appears from the evidence on record that the prosecution had come out with a case in order to grab the house property which said to have been constructed by the husband of the deceased (P.W.9), the appellants stated to have meted the deceased with cruelty and ultimately immolated her. But a relation of the deceased examine as P.W.8 did not support or speak the same. The husbands of the deceased (P.W.9) also made no whisper on the same. None of the witnesses also made whisper on the same. However, presence of motive though lends assurance to the prosecution case, but its absence is not always fatal, if the case is established against the accused by reliable evidence on record.

11. It transpires from the evidence of P.W.2 who is the informant in this case and lodged F.I.R. Ext.1 that on 05.03.2007 in between 6 p.m. to 7 p.m., hearing unusual screaming / bawl from the house of the appellants where several other villagers had assembled, he made query to appellant No.1-Hosen Khan, who disclosed before them that while the deceased was sleeping inside her house, her mosquito net accidentally caught fire and consequently she sustained burn injuries. His evidence further reveals that almost simultaneously Fire Brigade staff arrived, the appellant no.1-Hosen Khan opened the door and Fire Brigade staff entered inside the house and they found the deceased with 100 percent burn injuries all over her body. Bolgarh police also arrived there and on the direction of the police, deceased was immediately taken to the hospital by the appellant nos. 1 and 3. It again transpires from his evidence that on the next day he alongwith Kamrun Khan (P.W.5), Ahimad Khan (P.W.12), Israil Mahammad (P.W.13) and Batas Khan (P.W.4) went to the hospital and when he asked the deceased, in the absence of the accused Hosen Khan, in slow voice, she told that all the three accused persons poured kerosene over her body and set fire as a result of

which her body was burnt. The evidence of P.W.2 also revealed that in his presence police seized one TIN DIBIRI (Lamp), one bottle containing some Kerosene, one half burnt polyester saree and one half burnt mosquito net from the house under seizure list (Ext.2) and identified such Material Objects marked as M.Os.I to IV. He has also proved his signature therein. In cross-examination, he stated that when he asked the deceased how she sustained the burn injuries, the deceased with much difficulty disclosed that all the appellants poured kerosene over her body and set her ablaze. P.Ws.4, 5 and 13 have similarly deposed that being asked by P.W.2 the deceased inculpated the appellants to have set her ablaze. But, P.W.12 did not support the prosecution case and made no whisper on the dying declaration. As it appears from the evidence of P.W.2, when he asked the deceased further as to why she did not shout or try to run away, the deceased disclosed that the accused persons gagged her mouth and that when she tried to come away, they caught hold of her hands. The evidence of other witnesses such as P.Ws,4, 5 and 13 is silent in this regard. It transpires from the evidence of P.W.13 that the deceased could not disclose anything at the first instance. But, when they disclosed their names, the deceased stated about the same. Furthermore, it transpires from the evidence of this witness that all these witnesses had discussed with the deceased for about half an hour in the hospital in the absence of any nurse or doctor there. According to P.W.2, in between 10 a.m. to 11 a.m. they reached at the hospital and the dying declaration was made. P.W.4 disclosed that they reached at the hospital at 7 a.m. P.W.5 did not say when they reached the hospital and dying declaration was made. P.W.13 deposed that they went to the hospital at 8 a.m. It also appears from the evidence of these witness except P.W.4 that the deceased sustained 100 per cent burn injuries on her body and her condition was precarious. P.W.2, a stranger to the family of the deceased and the appellants, had lodged the F.I.R., Ext. 1 on 06.03.2007 at 5.30 p.m. at Bolgrh P.S. after due deliberation with others in the village Masjid, as revealed from his evidence and by then the deceased had already died, as revealed from Ext.6.

12. Besides the aforesaid witnesses, P.W.1 also speaks about the dying declaration. But the P.W.1 is not named in the F.I.R. by the P.W.2 or any of the aforesaid witnesses to be present at the relevant point of time. This witness deposed that about nine months preceding that date at 5 p.m. he found the deceased standing in from of the house of appellant no.1-Hosen Khan while the door of that house was found locked from inside and deceased was not allowed entrance. On his query, the witness stated that the

deceased divulged before him that she was not allowed to enter into the house. His evidence further discloses that around 6.30 p.m. when enroute market he found a large gathering in front of that house where a person told him that the appellants set ablaze the deceased inside that house. Of course, he has not named those persons nor that person was examined as prosecution witness. However, the witness added that in his presence, the Fire Brigade staff arrived, broke open the door and rescued the deceased with burn all over her body. Immediately thereafter she was taken to the hospital. Incidentally, this witness was never named in the F.I.R. not was examined by the Investigating Officer (P.W.11) at the outset. This witness has also added that on the next day of occurrence he had been to the District Headquarters Hospital, Nayagrah where the deceased disclosed before him that he appellants poured kerosene over her body and lit fire, as a result of which she sustained such extensive burn injuries. The same was disclosed between 2 p.m. to 3 p.m. The same was just before the death of the deceased which was at about 4.10pm as revealed from Ext.6.

13. Evidence of the I.O. i.e. P.W. 11 falsified the evidence of this witness and other witnesses i.e. P.Ws. 2 & 5 with regard to the arrival of the police in the spot that only on the direction of the police, the victim was taken to the hospital, rather, the deceased was taken to the hospital for treatment by the appellant nos. 1 and 3 on their own soon after the occurrence. It is only after receipt of the report Ext.1, police came to know about the occurrence, registered the case and investigated the matter. The evidence of these witnesses that it only when fire bridge staff came, the appellant no.1 opened the door/breaking upon the door the fire was extinguished also appears to be false as P.W.3 never deposed about the same. Evidence of the fire bridge staff i.e. P.W.3 who immediately arrived there and entered into the house would go to show that by the time fire was extinguished and on his query, the deceased did not disclose anything before them the cause of fire. These witnesses i.e. P.Ws. 1,2,4,5 and 13 though remained present at the spot soon after the occurrence, but did not ask anything to the deceased how she sustained the burn injuries there. P.W.10 who happens to the treating physician deposed that the deceased when admitted was in confused state and she was not able to say anything about the burn injuries and she sustained 100 per cent burn injuries. Bed-head ticket Ext.6, inquest report Ext. 13, postmortem examination report Ext. 12 reveal that the deceased sustained 100 percent burn injuries there. From the evidence of doctor D.W.1 it also reveals that the deceased was in gasping condition, her pulse was not

palpable, B.P. was not recordable, her heart sound was irregular and 40 per minute. At the cost of repetition, the post mortem examination report reveals that the deceased was sustained severe burn injuries. This being the condition of the deceased, when she admitted in the hospital, the medical officer did not record any dying declaration. From the aforesaid, it appears that the deceased eas not in a position to speak anything soon after the burn till she was admitted in the hospital.

14. But, from the aforesaid, it appears that the deceased appears to have made a dying declaration before P.W.1 at one point of time and another before P.W.2,4,5 and 13. All the witnesses belong to Sunni community and the appellants belong to Ahamadia community and they where not in good term as revealed from the evidence of P.W.S 1,2,4,5, and 13. As revealed from the evidence of P.W.1 the F.I.R. was lodged after due deliberation in the village Masjid on the next day. It also appears that P.Ws. 2,4,5, and 13 are not consistent in their version as to when they reached at the hospital and when the dying declaration was mad. According to P.W.2, in between 10 a.m. to 11 a.m. they reached at the hospital and the dying declaration was made. But P.W. 4 disclosed that they reached at the hospital at 7 a.m. P.W.5 did not when they reached the hospital and dying declaration was made P.W. 13 deposed that they went to the hospital at 8.a.m Furthermore, this witness did not whisper about the deceased telling the P.W.2 that the accused persons gugged her mouth and when she trued to come away, they caught hold of her hands. If in their presence the deceased made the declaration implicating all the appellants, how could some of them forget to speak about this important declaration of the deceased on the query of P.W.2. P.W.1 again stated that at about 2 P.M. or 3 P.M. another dying declaration was mad i.e. just 1 to hour before her death. Furthermore, these witness admitted that they did not disclose anything before any doctor or medical staff and neither the doctor nor any staff was there near the deceased when the dying declaration was made. The aforesaid as stated earlier indicate that though all of them were present when the dying declaration was made, but no one had reported the matter to police at Nayagarh or on their immediate return, but the report was mad after due deliberation in the village Masjid. No corroborative evidence is also there indicating that these persons had ever visited the hospital and had conversation with the deceased. It is also quite unacceptable that these persons who are not in good term with the appellants belong to Ahamadia community could have visited the hospital for the purpose and if at all they had visited and any dying declaration was made in their presence, could not

have disclosed the same to the doctor or any other staff there. All those factors, especially the discrepancy and inconsistency in the version of the witnesses, coupled with the medical evidence as well as the evidence of the fire brigade officer, militate against the version of these witnesses that the deceased made a dying declaration before them implicating the appellants. Their version as such is not wholly dependable one. This being the nature of the evidence of the dying declaration, the trial court should have taken the same with a pinch of salt and should not have recorded a conviction basing on the same when there was absolutely no corroboration to the same from any source, more particularly the medical evidence which particularly the medical evidence which militate against the same.

15. In such premises, in our considered opinion, the aforesaid dying declaration stated to have been made by the deceased twiceat two different occations before two groups at different time, does not pass the test of credibility and, as such. It would not be legal to come to a conclusion as to the guilt of the appellants.

16. Accordingly, the criminal appeal is allowed. The impugned judgment of conviction dated 07.11.2008 and order of sentence dated 12.11.2008 passed by the learned Adohoc Additional Sessions Judge (F.T.C.), Khurda in Sessions Trial No.61/126 of 2007 convicting the appellants for commission of offence under Section 302 read with Section 34 of the Indian Penal Code and sentencing each of them to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/-, in default, to undergo rigorous imprisonment for five months, set aside. The appellants are acquitted of the said charge. Thus, the appellant no 2, namely, Sahana Begum who is on bail pursuant to the order of this Court dated 16.11.2009 stands discharged of her bail bond. Since the appellant no.1, namely, Hosen Khan is in jail custody, he be set at liberty forthwith, if he is not otherwise required to be incarcerated in any other case.

17. L.C.R. received be sent back forthwith along with a copy of this Judgment.

Appeal allowed.

2017 (II) ILR - CUT- 1264

S.C. PARIJA, J. & D. DASH, J.

W.P.(C) NO. 345 OF 2009

PITAMBAR PATRA ……..Petitioner

.Vrs.

REGISTRAR GENERAL,
HIGH COURT OF ORISSA, CUTTACK & ORS. ……..Opp. Parties

ODISHA SUPERIOR JUDICIAL SERVICE RULES, 1963 – RULE 15(3)

Promotion to the super time scale – Review Committee in its meeting Dt. 21.09.2005 considered the service record of the petitioner and found him to possess the potential for continued useful service beyond 58 years of age and the Full Court in its meeting Dt. 29.09.2005 resolved to extend his service upto 60 years – However on 04.11.2006 the transfer, posting and promotion committee while considering the case of the petitioner for promotion to the suppertime scale found him not suitable for promotion while extending such benefit to O.P. Nos. 3 & 4 and such recommendation was accepted by the Full Court on 05.11.2006 – Hence this writ petition.

No material that the petitioner was less meritorious than O.P. Nos. 3 & 4 – No adverse remark in the CCR of the petitioner – When the review committee found the petitioner suitable to render useful service beyond 58 years of age and Full Court resolved to extend such benefit, how, after one year the Transfer, Posting and Promotion Committee found him not suitable or had considerably deteriorated while extending such benefit to O.P. Nos. 3 & 4 – There was also no material before the Full Court while accepting the recommendation of the committee Dt. 04.11.2006 – Further the Court has not assigned any reason to that effect in order to ensure transparency and fairness in the decision – Held, denial of suppertime scale to the petitioner was improper, unjustified and arbitrary – Direction issued to the State (O.P.No.2) to grant suppertime scale to the petitioner with effect from the date his junior-O.P.No.3 was granted such benefit, with all consequential benefits as per rules regulating his service.

(Paras 14 to 20)

Case Laws Referred to :-

1. AIR 1988 SC 2060 : Vijay Kumar v. State of Maharashtra and others.
2. 2008 AIR SCW, 3486 : Dev Dutt v. Union of India & Ors.
3. AIR 2010 SC 1285 : The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Family & Ors.
4. AIR 1967 SC 1920 : Sant Ram Sharma v. State of Rajasthan.

5. (1973)2 SCC 836 : Union of India v. Mohan Lal Capoor and others
6. AIR 1988 SC 2565 : B.V.Sivaiah v. K.Addanki Babu & Ors.
7. (2006) 12 SCC 574 : Bhagwandas Tiwari & Ors. v. Dewas Shajapur Kshetriya Gramin Bank & Ors.
8. 90 (2000) CLT 495 (S.C.) : Ramesh Chandra Acharya v. Registrar, High Court of Orissa and another
9. (1980) 1 SCC 12 : Swami Saran Saksena v. State of U.P.
10. (2004) 5 SCC 573) : State of Rajasthan v. Sohan Lal & Ors.

For Petitioner : M/s.A.K.Mishra, Senior Advocate, D.K.Panda, G.Sinha, A,Mishra & S.R.Patra

For Opp. Party : Addl. Govt. Advocate

Date of Judgment: 23.8.2017

JUDGMENT

S.C.PARIJA, J.

The challenge in this writ petition is to the decision of the Full Court dated 05.11.2006, accepting the recommendation of the Transfer, Posting and Promotion Committee, for promotion of opposite party nos.3 and 4 to the Supertime Scale of the Orissa Superior Judicial Service (Senior Branch) and its subsequent decision dated 12.12.2007, extending similar benefits to opposite party nos.5 to 9, with a prayer to allow such benefit of promotion to the Supertime Scale to the petitioner from the date his junior, i.e. opposite party no.3 was promoted, with all consequential service benefits.

2. The brief facts of the case, as detailed in the writ petition is that the petitioner, who was a member of the Orissa Judicial Service, was promoted to the rank of the District Judge in Orissa Superior Judicial Service (Senior Branch) on 27.9.1995 and he joined his promotional post on 11.10.1995. His service in the cadre of the District Judge was confirmed on 09.11.2000 w.e.f. 01.4.1998. While the petitioner was working as the District Judge, he was allowed to officiate in the Selection Grade post in the Orissa Superior Judicial Service (Senior Branch) w.e.f. 08.5.2004 and was allowed to continue in the said post till he superannuated on 31.12.2007. Subsequently, as the petitioner was about to attain the age of 58 years on 31.12.2005, the Full Court took into consideration the service records of the petitioner and the recommendation of the Review Committee regarding his potential for continued useful service beyond 58 years of age and accordingly resolved that the benefit of extension of service upto 60 years be given to him. In

consequence of such decision of the Full Court, the petitioner continued in service till he attained the age of superannuation, i.e. 60 years on 31.12.2007.

3. Opposite party nos.3 and 4, who were juniors to the petitioner in service, were promoted to the rank of the District Judge in the Orissa Superior Judicial Service (Senior Branch) on 04.11.1996 and 22.11.1996 and they were confirmed in the said cadre w.e.f. 01.7.2000 and 22.11.1997 respectively.

4. While working in the Selection Grade post, the case of the petitioner along with opposite party nos.3 and 4 and four other officers were taken up for consideration by the Transfer, Posting and Promotion Committee, for promotion to the Supertime Scale of the Orissa Superior Judicial Service (Senior Branch). Considering their seniority and the service records, the Committee in its meeting dated 04.11.2006 was of the opinion that Sk.Jan Hossain (who being senior to the petitioner, has not been made a party to the writ petition) and Shri S.K.Pradhan (opposite party no.3) were more suitable for promotion to the Supertime Scale, while ignoring the case of the petitioner. The Committee also found Shri B.K.Nayak (opposite party no.4) to be more suitable for promotion to the said Supertime Scale on the "Next Below Rule" basis. The recommendations of the Committee were accepted by the Full Court in its meeting dated 15.11.2006. Accordingly, opposite party nos.3 and 4 were promoted to the Supertime Scale vide Government Notification dated 17.11.2006 and 31.1.2007, w.e.f. 15.11.2006 and 22.01.2007 respectively. Subsequently, the Full Court in its meeting held on 12.12.2007, granted similar promotions to opposite party nos.5 to 9 to the Supertime Scale from the said date, in relaxation of Rule 5 of the Orissa Superior Judicial Service Rules and Orissa Judicial Service Rules, 2007 and rejected the representation of the petitioner, as he was not found suitable.

5. Shri A.K.Mishra, learned senior counsel appearing for the petitioner submitted that there is no dispute that the provisions of Orissa Superior Judicial Service Rules, 1963 ("1963 Rules" for short) is applicable to the case of the present petitioner. It is submitted that Rule 15(3) of the 1963 Rules provided for appointment to the Supertime Scale to be made by selection on the basis of merit with due regard to seniority. It is submitted that the petitioner had a clean service record and there was no adverse entries in his CCR except for the entry of 'Average' for the year 1990-91, which was communicated to the petitioner and on which he had made a representation, which is still pending consideration. It is submitted that as there was no other

adverse entries in the CCR of the petitioner to the best of his knowledge and atleast no such adverse entries have ever been communicated to him, the same could not have been the basis for denying him promotion to the Supertime Scale. In this regard, he has relied upon the decisions of the apex Court in ***Vijay Kumar v. State of Maharashtra and others***, AIR 1988 SC 2060 and ***Dev Dutt v. Union of India & Ors.***, 2008 AIR SCW, 3486, wherein it has been held that uncommunicated CCR cannot be relied upon for the purpose of denial of promotion to a Government servant, when similar benefit is extended to his juniors.

6. It was further submitted that even otherwise, the CCR of the opposite party no.3 for the year 2004, 2005 and 2006 being not available and in comparison, when the petitioner's CCR entry for the year 2004 had been 'Average' and 'Good' for the other two years, i.e. for the years 2005 and 2006, it stands to no reason as to how the petitioner could be adjudged less meritorious in comparison to the opposite party no.3, who was junior to the petitioner in the cadre.

7. Learned counsel for the petitioner further submitted that as the Review Committee had considered the service records of the petitioner and found him to be possessing the potential for continued useful service beyond 58 years and the Full Court having accepted the same and allowed the benefit of extension of service of the petitioner upto 60 years vide its Resolution dated 29.9.2005, it is not understood as to how the Transfer, Posting and Promotion Committee in its meeting dated 04.11.2006 could find the petitioner not suitable for promotion to the Supertime Scale, which has been accepted by the Full Court in its meeting dated 15.11.2006. It was submitted that Rule 71 (a) of the Orissa Service Code provides for extension of service of Judicial Officers upto the age of 60 years, who are found to possess the potential for continued useful service, which is on the basis of their past record of service, character roll, quality of judgments and other relevant matters. It was submitted that such benefit of extension of service upto 60 years of age having been granted to the petitioner by the Full Court on 29.9.2005 on consideration of all relevant factors and there being no intervening circumstances, the Full Court was not justified in denying promotion to the petitioner to Supertime Scale barely one year thereafter, in its meeting dated 15.11.2006. Learned counsel for the petitioner further submitted that as the recommendation of the Transfer, Posting and Promotion Committee has not given any reasons for not finding the petitioner suitable for promotion to Supertime Scale and even the Full Court has accepted such

recommendation of the Committee without assigning any reason, the same cannot be sustained in law. It is submitted that all decisions whether administrative or judicial, must be supported by reasons recorded in it and in this regard he has relied upon the decision of the apex Court in ***The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Family & others***, AIR 2010 SC 1285.

8. It was accordingly submitted that as the petitioner has been denied promotion to the Supertime Scale without any valid and justifiable reasons, while extending similar benefits to opposite party nos.3 and 4, he is entitled to be granted the benefit of Supertime Scale with effect from the date the opposite party no.3 was promoted, with all consequential financial benefits.

9. Learned Addl. Government Advocate, appearing for the opposite party nos.1 and 2, with reference to the averments made in the counter affidavit submits that seniority is not the only criteria to be considered for promotion to the Supertime Scale. Merit is the determinative factor to be considered for the purpose, with seniority playing a secondary role. It is submitted that the Full Court in its meeting dated 15.11.2006, after considering the merit and seniority of the petitioner vis-à-vis other officers, resolved to promote opposite party nos.3 and 4 to the Supertime Scale, as they were found most suitable, as per the recommendation of the Transfer, Posting and Promotion Committee dated 04.11.2006. It is further submitted that similarly, the Full Court in its meeting held on 12.12.2007, resolved to promote opposite party nos.5 to 9 to the Supertime Scale, as they were found most suitable and the representation of the petitioner claiming such promotion to the Supertime Scale was rejected, as he was not found suitable. Though a feeble attempt has been made to support the impugned decision of the Full Court, learned Addl. Government Advocate has not been able to produce any material to show how the petitioner was found less suitable than opposite party nos.3 and 4 for promotion to the Supertime Scale. He also does not dispute the factual position that the CCR entries of opposite party no.3 were not available for the year 2004, 2005 and 2006, when the matter was being considered by the Committee or even the Full Court. It is candidly conceded by him that no reasons have been assigned by the Full Court for denying promotion to the petitioner to the Supertime Scale, while extending similar benefits to opposite party nos.3 and 4. However, he insists that on consideration of all relevant factors, including their respective seniority and merit, the Full Court has taken the decision in its meeting dated 15.11.2006 to

promote opposite party nos.3 and 4 to the Supertime Scale, as they were found more suitable.

10. Rule 15(3) of the 1963 Rules provides for promotion to the Supertime Scale by way of selection on the basis of merit with due regard to seniority. In other words, greater emphasis is to be laid on merit and ability with seniority playing a less significant role. Only when merits are roughly equal, seniority will be the determining factor or, if it is not fairly possible to make an assessment inter-se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale, as has been held by the apex Court in ***Sant Ram Sharma v. State of Rajasthan***, AIR 1967 SC 1920; ***Union of India v. Mohan Lal Capoor and others***, (1973)2 SCC 836; ***B.V.Sivaiah v. K.Addanki Babu & Ors***., AIR 1988 SC 2565 and ***Bhagwandas Tiwari & Ors. v. Dewas Shajapur Kshetriya Gramin Bank & Ors.*** (2006) 12 SCC 574.

11. In the instant case, no material has been produced before us to show that the petitioner was less meritorious than opposite party nos.3 and 4. No adverse remark in the CCR of the petitioner or any other relevant material has been placed before us, which can be said to have weighed in the mind of the Transfer, Posting and Promotion Committee, while holding that the petitioner was not suitable for promotion to the Supertime Scale. Therefore, it has to be said that no such material was available before the Full Court while accepting the recommendations made by the Committee.

12. It is not disputed that the petitioner was granted extension of service upto 60 years of age on consideration of his service records and on being found to possess the potential for continued useful service beyond the age of 58 years, as per the decision of the Full Court taken in its meeting dated 29.9.2005. The provisions for extension of service has been introduced under Rule 71(a) of the Orissa Service Code, which reads as under:-

> "71.(a): Except as otherwise provided in the other clauses of this rule the date of compulsory retirement of a Government servant, except a ministerial servant who was in Government service on the 31st March, 1939 and Class IV Government servant, is the date on which he or she attains the age of 58 years subject to the condition that a review shall be conducted in respect of the Government servant in the 55th year of age in order to determine whether he/she should be allowed to remain in service up to the date of completion of the age of 58 years or retired on completing the age of 55 years in public interest:

Provided……

(a-1). Notwithstanding anything contained in sub-rule (a) of rule 71, Judicial Officer belonging to State Judicial Services, who, in the opinion of the High Court of Orissa, have a potential for continued useful service, shall be retained in service up to the age of 60 years.

[Note-The potential for continued utility shall be assessed and evaluated by appropriate Committee of Judges of the High Court, constituted and headed by the Chief Justice and the valuation shall be made on the basis of the Officer's past record of service, Character Roll, quality of judgments and other relevant matters. The High Court should undertake and complete the exercise in case of an officer about to attain the age of 58 years well within time by following the procedure for compulsory retirement under the service rules applicable to him and give him the benefit of the extended superannuation age from 58 to 60 years only, if he is found fit and eligible to continue in service. In case he is not found fit and eligible, he shall be compulsorily retired on his attaining the age of 58 years. This exercise should be undertaken well in advance before an officer attains the age of 58 years.]

(b)…….

(c)……."

13. The apex Court in ***Ramesh Chandra Acharya v. Registrar, High Court of Orissa and another,*** 90 (2000) CLT 495 (S.C.), while referring to the Note under Rule 71(a) of the Orissa Service Code as quoted above, has observed that the benefit of such extension of service will be available to those Judicial Officers who, in the opinion of the High Court, have a potential for continued useful service. It is not intended as a windfall for the indolent, the infirm and those of doubtful integrity, reputation and utility. The potential for continued utility shall be assessed and evaluated by appropriate Committee of Judges of the High Court constituted and headed by the Chief Justice of the High Court and the evaluation shall be made on the basis of the Judicial Officers past record of service, character rolls, quality of judgments and other relevant matters, which may include over all assessment with regard to integrity, reputation and utility.

14. In the instant case, the Review Committee in its meeting held on 21.9.2005 considered the service records of the petitioner, who was due to attain the age of 58 years as on 31.12.2005 and found him to possess the potential for continued useful service beyond 58 years of age. Accordingly,

the Full Court in its meeting held on 29.9.2005 resolved that the benefit of extension of service upto 60 years of age be given to the petitioner. Barely one year thereafter, when the case of the petitioner came up for consideration for promotion to the Supertime Scale, the Transfer, Posting and Promotion Committee found the petitioner not suitable for promotion to Supertime Scale, while extending such benefit to the opposite party nos.3 and 4.

15. No material has been produced before us to show that in the intervening period, the performance of the petitioner has not been satisfactory or had considerably deteriorated, which had weighed in the mind of the Committee to deny promotion to the petitioner and recommend opposite party nos.3 and 4 for promotion to Supertime Scale, which has been accepted by the Full Court in its meeting dated 15.11.2006.

16. It is appropriate at this juncture to refer to the judgment of the apex Court in ***Swami Saran Saksena v. State of U.P.*** (1980) 1 SCC 12, where the Hon'ble Court while dealing with compulsory retirement, which was found to be in sharp contradiction to the recent service performance and record has observed as under:-

> "3. xxx xxx But on the materials before us we are unable to reconcile the apparent contradiction that although for the purpose of crossing the second efficiency bar the appellant was considered to have worked with distinct ability and with integrity beyond question yet within a few months thereafter he was found to unfit as to deserve compulsory retirement. The entries in between in the records pertaining to the appellant need to be examined and appraised in that context. There is no evidence to show that suddenly there was such deterioration in the quality of the appellant's work or integrity that he deserved to be compulsorily retired. For all these reasons, we are of the opinion that the order of compulsory retirement should be quashed. The appellant will be deemed to have continued in service on the date of the impugned order."

17. Coming to the necessity for assigning reasons in support of administrative or judicial orders, it is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of

judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration justice-delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind. (See-***State of Orissa v. Dhaniram Luhar***, AIR 2004 SC 1794 and ***State of Rajasthan v. Sohan Lal & Ors***.(2004) 5 SCC 573).

18. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum (See-***Raj Kishore Jha v. State of Bihar & Ors***, AIR 2003 SC 4664 and ***Vishnu Dev Sharma v. State of Uttar Pradesh & Ors***.(2008) 3 SCC 172.

19. Similar view has been expressed by the apex Court in ***The Secretary & Curator, Victoria Memorial Hall*** (supra), wherein, the Hon'ble Court while referring to its earlier decisions on the issue has observed as under:-

> "33. Thus, it is evident that the recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as to why his application has been rejected."

20. For the reasons as a forestated, we are of the considered view that the denial of Supertime Scale to the petitioner was improper, unjustified and arbitrary. We accordingly allow the writ petition and direct the State-opposite party no.2 to grant Supertime Scale to the petitioner with effect from the date his junior-opposite party no.3 was granted such benefit, with all consequential benefits as per rules regulating his service.

21. The writ petition is accordingly allowed. No costs.

Writ petition allowed.

2017 (II) ILR - CUT-1273

B.K. NAYAK, J. & DR. D.P. CHOUDHURY, J.

W.P.(C) NO. 7398 OF 2013

SUBHENDRA MOHANTY ……..Petitioner

.Vrs.

HIGH COURT OF ORISSA & ANR. ……Opp. Parties

(A) ODISHA SUPERIOR JUDICIAL SERVICE AND ODISHA JUDICIAL SERVICE RULES, 2007 – RULE-44

Premature or compulsory retirement – Old and prior adverse entries, minor in nature, for which the petitioner was cautioned and censured have been again utilized against him – Held, action being arbitrary is liable to be quashed.

In this case Full Court of the High Court on 07.03.2012 recommended the ACR of the petitioner for the year 2009 – However, just two months after i.e. on 11.05.2012 compulsory retirement order was passed on the recommendation of the Review Committee Dt. 03.05.2012 – No further or any other additional adverse remarks against the petitioner for which, at the first instance such recommendation of the High Court was not found favour with His Excellency the Governor of Odisha, who returned it for re-consideration – Held, the impugned decision to retire the petitioner compulsorily is arbitrary and unreasonable, hence quashed – However, since the petitioner has crossed the age of superannuation in May, 2017, there is no scope to direct for his re-instatement in service, so this Court directed that the petitioner be deemed to have continued in service from the date of his compulsory retirement till the date of his superannuation at the age of 60 years and he shall be given his salary at the time scale of pay for the post he was holding at the time of compulsory retirement alongwith retirement benefits. (Paras 22 to 28)

(B) SERVICE LAW – Compulsory retirement – Object is not to punish or penalize the Government Servant but to weed out the worthless who have lost their utility for the administration of justice – For effective administration of justice, honest, impartial and law knowing judicial officers are required – However, if an officer having knowledge in law is without integrity, he is a great danger for the smooth functioning of judiciary. (Para 19)

Case Laws Referred to :-

1. (1992) 2 SCC 299 : Baikuntha Nath Das v. Chief District Medical Officer.
2. AIR 1988 SC 1388 : Registrar, High Court of Madras v.R. Rajiah
3. (1994) Supp (3) SCC 424 : S. Ramachandra Raju v. State of Orissa
4. AIR 1970 SC 370 : Chandramauleswar Prasad v. Patna High Court.
5. AIR 1981 SC 70 : Baldev Rajchadha v. Union of India.
6. AIR 1984 SC 630 : J. D. Sribastav v. State of M. P.
7. AIR 1996 SC 3223 : Narasingh Patnaik v. State of Orissa.
8. (2010) 10 SCC 693 : Pyare Mohan Lal v. State of Jharkhand.
9. (2013) 10 SCC 551 : Rajasthan State Road Transport Corporation & Ors. v. Babulal Jangir.
10 . 2014 (2) OLR 381: Epari Vasudeva Rao v. State of Orissa & Anr.

For Petitioner : M/s. G.A.R.Dora, Sr. Adv. & Dr. J.K.Lenka

For Opp. Parties : Mr. Bibhu Prasad Tripathy, A.G.A.

Date of hearing : 08.12.2016
Date of judgment: 31.07.2017

JUDGMENT

B.K.NAYAK, J.

In this writ petition the petitioner challenges the order dated 13.03.2013 under Annexure-9 retiring him compulsorily from judicial service.

2. The petitioner was recruited as Probationary Munsif on the basis of written test and interview and joined as such on 20.12.1982. He successfully completed his probation and was confirmed in service with effect from 21.12.1985. The case of the petitioner is that while working as Munsif-S.D.J.M. at Udala, a theft of Malkhana properties worth rupees 50,000/- (Rupees Fifty Thousand) took place in August, 1989 and the petitioner reported the matter to the District Judge and lodged an F.I.R. On 13.09.1989 the petitioner was promoted to the cadre of Orissa Judicial Service Class-I (Junior) and was further promoted to the cadre of Civil Judge (Senior Division) by notification dated 28.09.1995. It is stated by the petitioner that in August, 2002 an explanation was called for from him for not making proper arrangement to guard the Court Malkhana at Udala for which the theft in August, 1989 allegedly took place. Petitioner submitted his representation (Annexure-1) stating that the burglary in the Malkhana occurred on a Sunday when he had been to village Dukura along with his staff to hold Lok Adalat,

and that there was only one watchman, who was on duty, and, therefore, there was no scope to make any alternative arrangement to guard the Malkhana. The explanation from the petitioner was called for apparently on the basis of a report (Annexure-2) dated 24.01.1998 of the District Judge, Mayurbhanj, Baripada in which it was indicated that a disciplinary proceeding had been initiated against the watchman for negligence in duty for which the theft in the Malkhana at Udala occurred but the watchman was exonerated and it was indicated that the petitioner, then S.D.J.M., Udala, did not give proper attention in making arrangement to guard the Court Malkhana.

3. On consideration of the explanation of the petitioner the High Court by letter dated 22.08.2003 (Annexure-3) observed that the petitioner ought not to have diverted the services of the Malkhana Guard to attend the Lok Adalat without making arrangement for watch and ward and the petitioner was cautioned not to repeat such action in future.

4. It is further averred by the petitioner that during his incumbency as Civil Judge (Senior Division) at Sambalpur, the Hon'ble Portfolio Judge (Administrative Judge) made a surprise visit of the station and on the basis of the inspection report a departmental proceeding was initiated against the petitioner. The charges in the proceeding were that on 26.07.2002 the petitioner came to Court fifteen minutes late; the petitioner was careless in disposing of civil cases in the month of June, 2002 and that, in T.S. No.96 of 2009 the petitioner took one month time to pass the decree, though the plaintiff Bank accepted one time settlement; and that the petitioner passed an interim order of injunction in arbitrary manner, which was set aside by the District Judge.

In his show-cause to the first charge, the petitioner explained that the pool car while picking up different Judicial Officers from their residences, one or two Officers were not ready on time and therefore all the officers who came by the pool car reached office fifteen minutes late. As regards the second charge, the petitioner explained that as per the prescribed yardstick, only two title suits were to be disposed of in a month and one of the two suits relating to the Bank, arguments could not be completed before the summer vacation and that the same was completed only on the reopening day and the judgment was pronounced on the very next day. The third charge was however dropped. A Senior Judicial Officer was appointed as Inquiring Officer, who on completion of inquiry gave the finding that the petitioner rendered adequate outturn in the month of June, 2002 and, therefore, he

cannot be said to be slow. However, the High Court on consideration of the inquiry report and the show-cause of the petitioner with regard to charges No.1 and 2, censured the petitioner which was communicated to him by the letter under Annexure-4.

5. It is also stated by the petitioner that while working as S.D.J.M., Nayagarh, in a criminal trial for conviction for offence of wrongful restraint, the petitioner by mistake passed sentence of one month rigorous imprisonment instead of simple imprisonment. It is stated that the inadvertent mistake could have been corrected by the higher forum, yet the Hon'ble High Court issued a warning to the petitioner. It is stated by the petitioner that apart from the aforesaid three incidents for which the petitioner was cautioned, censured and was issued with warning, which were themselves not justified, there was no other misconduct or misdemeanor on the part of the petitioner.

6. It was further stated that by notification dated 21.09.2005 the petitioner was promoted to the cadre of Orissa Superior Judicial Service (Junior Branch) and posted as Chief Judicial Magistrate, and further by notification dated 28.12.2006 (Annexere-5) the petitioner was promoted to the Cadre of Orissa Superior Judicial Service (Senior Branch) on adhoc basis and posted as Additional District Judge in the Fast Track Court at Jajpur. By notification dated 17.09.2007 (Annexure-6) the petitioner was appointed as Orissa Superior Judicial Service (Senior Branch) on officiating basis against regular vacancy in terms of Rule-9 of Orissa Superior Judicial Service Rules, 1963. These promotions were effected by the Government in consultation with the Hon'ble High Court as per the rules, which required that the High Court shall recommend for appointment to the Senior Branch of the Superior Judicial Service an officer of the Junior Branch, who in the opinion of the High Court is most suitable for the purpose. Thus, the petitioner had been promoted to the cadre of Orissa Superior Judicial Service (Senior Branch) by the Government on the recommendation of the Hon'ble High Court. It is stated that the High Court of Orissa thereafter decided to post the petitioner as the District Judge, Boudh while he was acting as Member, Second M.A.C.T., Berhampur, which is apparent from the notification dated 10.04.2012 under Annexure-8.

7. It is further stated that while the matter stood thus, in 2012 the Full Court of the High Court of Orissa recommended the Government for compulsory retirement of the petitioner. In November 2012 His Excellency

the Governor of Odisha returned back the file to the High Court for reconsideration of the recommendation as he was not satisfied with the grounds of compulsory retirement. In January 2013 the Full Court again sent the file to the Government reiterating its earlier decision and His Excellency the Governor vide his notification dated 13.03.2013 (Annexure-9) retired the petitioner from Government service compulsorily by giving him three months pay and allowances.

8. It is averred in the writ petition and also contended by the learned counsel for the petitioner that as per Rule-44 (2) of the OSJS and OJS Rules, 2007 (hereinafter referred to as '2007 Rules') whether any Officer of the service should be retired in public interest under Sub-Rule-(1) of Rule 44 shall be considered at least three times i.e. when he was about to attain the age of 50 years, 55 years and 58 years.

It is submitted that on completion of 50 years the services of the petitioner were reviewed by the High Court in 2009 and after taking into consideration his service records the petitioner was allowed to continue in service beyond 50 years of age and was found fit to be confirmed in the cadre of District Judge (OSJS Senior Branch) and was found capable and suitable for holding the post of District Judge. It is stated that when the entire service record of the petitioner was considered during his review at the age of 50 years and he was found fit and suitable to continue further beyond the age of 50 years and thereafter there is no other misconduct or adverse remark against him, for which he was found fit and suitable to be confirmed in the cadre of Superior Judicial Service (Senior Branch) and to hold the post of Principal District Judge, the decision and recommendation of the High Court in administrative side to give the petitioner compulsory retirement at the age of 55 years was wholly uncalled for. It was submitted that there was no additional adverse material against the character, conduct, integrity and performance of the petitioner except those which were available already during remote past and taken into consideration for review of his services at the age of 50 years, the very same materials could not be said to be sufficient for the purpose of recommending compulsory retirement of the petitioner at the age of 55 years.

9. A joint counter affidavit has been filed by the High Court and the State Government (Opposite Parties No.1 and 2). It is stated in the counter affidavit that with regard to the theft of properties worth rupees 50,000/- (Rupees Fifty Thousand) from the Court Malkhana at Udala, the District

Judge, Mayurbhanj conducted an inquiry and came to observe that no arrangement was made by the petitioner to guard the Malkhana as he had diverted the service of the watchman on that day. An explanation having been called for, the petitioner explained that the day burglary occurred in the Malkhana was a Sunday and he had gone to village Dukura along with his staff to hold Lok Adalat and that the only watchman not being on leave on that day, there was no scope for making alternative arrangement. It is stated that the District Judge having observed on the basis of his inquiry that the petitioner did not make alternative arrangement for guarding the Malkhana, the High Court was right in observing in Annexure-3 that the petitioner ought not to have diverted the services of the Malkhana guard, and, therefore, cautioned the petitioner not to repeat such action in future.

With regard to the disciplinary proceeding initiated against the petitioner during his incumbency as Civil Judge (Senior Division), Sambalpur, it is stated in the counter affidavit that the Inquiring Officer found that the petitioner was very slow, casual and careless in disposing of civil cases. It was further found by him that in the month of June, 2002 the petitioner had disposed of only two suits and in one of the suits though the plaintiff-Bank accepted the proposal of the defendant for one time settlement, the petitioner took one month time to pass the decree in the said suit, which amounts to failure to discharge his duties. It is denied that the petitioner rendered adequate out-turn in the month of June, 2002 as per the findings of the Inquiring Officer is not correct. Therefore, the order of censure is just and proper. It is also admitted that the petitioner was warned by the High Court for passing sentence of rigorous imprisonment for an offence for which the statute prescribed only simple imprisonment. It is urged that giving caution and passing orders of censure and warning for the aforesaid instances could not be said to be unjustified

10. It is also stated in the counter affidavit that though the petitioner was given promotion, taking into consideration his entire service record, his confidential character rolls in his personal files the Hon'ble High Court came to conclusion that the petitioner did not possess the standard of efficiency required to discharge the duties of his office and found him not suitable to be retained in service and recommended for his premature retirement in public interest. It is stated that for the various instances cited by the petitioner himself, it cannot be said that the petitioner had unblemished service record. Though no adverse entry was communicated to the petitioner, but the Court

observed that he was slow in disposal of cases and his yardstick was just sufficient and he was instructed to strive hard to achieve more targets and to maintain punctuality. The petitioner was rated "average" and the Court also directed that he should be kept under surveillance.

Therefore, it was contended, the recommendation of the High Court for premature retirement of the petitioner from service was made after taking into consideration the materials on record relating to the entire service career of the petitioner and, hence it cannot be said to be the out come of non-application of mind or it smacks of malafides. It is stated further that though at the first instance His Excellency the Governor of Odisha returned the file, the High Court on reconsideration reiterated their earlier decision after taking into consideration the observations of His Excellency vis-à-vis the entire service record of the petitioner. Therefore, no exception can be taken to the decision of premature retirement of the petitioner from service.

11. The petitioner has filed a rejoinder affidavit repeating the factual aspects with regard to his service career during which he was cautioned for being negligent in making arrangement for guarding the Court Malkhana and being censured in the disciplinary proceeding and being warned for imposing graver punishment for an offence for which statute prescribed lesser sentence. It is however, stated that apart from the aforesaid instances there was no other misconduct, misdemeanor or deficiency in performance of the petitioner as a Senior Judicial Officer, and that in spite of all those instances, which were not very serious, the petitioner was allowed to continue in service in the first review at the age of 50 years. No other defect, deficiency in his service career thereafter has been found or even reported and for the review at the age of 55 there was no adverse material against him except those which were already available and considered at the time of first review at the age of 50. Since the very same materials were not found sufficient justifying premature retirement of the petitioner at the age of 50, the same could not have been the basis for the conclusion that petitioner's continuance in service beyond 55 years of age was not in the public interest. It is also stated that the rating of the petitioner as "average" and observation that he should be kept under surveillance are arbitrary, baseless and motivated. It is stated that even the said remarks were available prior to completion of 50 years of age of the petitioner and were taken into consideration at the time of first review, and as such the same could not have been the basis for retiring the petitioner prematurely at the time of second review at the age of 55 years.

12. In course of his argument the learned counsel for the petitioner urged that the theft from the Malkhana at Udala took place in the year 1989 and long thirteen years thereafter explanation was called for from the petitioner and though he gave his explanation, he was only cautioned to be careful in future. It is stated that the so-called lapse on the part of the petitioner was not so grave since the Malkhana guard was already on duty on that day. It was also submitted that charges in the disciplinary proceeding in which petitioner was censured are also not very serious and they did not touch upon the integrity of the petitioner and that the imposition of punishment of rigorous imprisonment for an offence punishable for simple imprisonment was an inadvertent mistake on the part of the petitioner for which he was only warned. The incidents aforesaid were not so serious for which the petitioner was promoted to the cadre of District Judge and so also found fit and suitable during the first review at the age of 50, to continue in service beyond that age. It is urged that there being no additional adverse material against the petitioner after his first review, the very same materials which were available and considered during first review could not be said to be sufficient so as to justify premature retirement of the petitioner at the age of 55 years.

13. The learned Additional Government Advocate representing the Opposite Parties submitted that the petitioner had consistently bad service records for which he was cautioned, censured in a disciplinary proceeding and warned for imposing inappropriate sentence and that he was also rated "average" as per his C.C.R. and, therefore, taking into consideration his entire service record he was found un-suitable to continue in service in public interest beyond 55 years of age. It is submitted that the cumulative effect of the entire service records of the petitioner were taken into consideration in order to find out whether his further continuance in service was desirable. It was submitted that the mere giving of promotion at some stage to the petitioner cannot be said to have washed-off the adverse service records. It is,therefore, submitted that the premature retirement of the petitioner was legally justified and needs no interference. It was also submitted that the scope of judicial review in a case of compulsory retirement is very limited.

14. Rule 44 of the 2007 Rules provides for premature retirement of Officers of Orissa Judicial Service and Orissa Superior Judicial Service, which runs as under:-

> " **44.** Retirement in public interest- (1) Notwithstanding anything contained in these rules the Governor shall, in consultation with the

High Court, if he is of the opinion that is in the public interest so to do, have absolute right to retire any member of the service who has attained the age of fifty years, by giving him/her notice of not less than three months in writing or three months pay and allowances in lieu of such notice.

(2) Whether any officer of the service should be retired in public interest under Sub-rule (1) shall be considered at least three times, that is, when he is about to attain the age of fifty years, fifty five years and fifty eight years.

Provided that nothing in Sub-rule (2) shall be construed in public interest as preventing the Governor to retire a member of the service at any time after he/she attains the age of fifty years on the recommendation of High Court under Sub-rule (1).")

15. Giving premature retirement to a Judicial Officer on review of his services at the age of 50, 55 and 58 years ought to be in public interest. The whole purpose of review of the services is to remove "dead wood". The principles governing premature retirement or compulsory retirement before superannuation have been laid down by the Hon'ble Supreme Court in the case of **Baikuntha Nath Das v. Chief District Medical Officer; (1992) 2 SCC 299** to the following effect:-

" **34.** The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehavior.

(ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a Government servant compulsorily. The order is passed on the subjective satisfaction of the Government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. <u>While the High Court or this Court would not examine the matter as an appellate Court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary – in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.</u>

(iv) The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter – of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential record/character rolls, both favourable and adverse. If a Government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it un-communicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above."

16. Further in the case of **Registrar, High Court of Madras v. R. Rajiah, AIR 1988 SC 1388**, the Hon'ble Supreme Court held that though the High Court, in its administrative jurisdiction, has the power to recommend compulsory retirement of a member of the judicial service in accordance with the rules framed in that regard, it cannot act arbitrarily and there has to be material to come to a decision that the Officer has outlived his utility. It was also observed that in exercise of its power of control over the sub-ordinate judiciary, the High Court is under a constitutional obligation to guide and protect Judicial Officers from being harassed or annoyed by trifling complaints relating to judicial orders so that the Officers may discharge their duties honestly and independently.

17. In the case of **S. Ramachandra Raju v. State of Orissa; (1994) Supp (3) SCC 424** the Hon'ble Supreme Court held as follows:-

"Though the order of compulsory retirement is not a punishment and the government servant on being compulsorily retired is entitled to draw all retiral benefits, including pension, the Government must exercise its power in the public interest to effectuate the efficiency of service. The dead wood needs to be removed to augment efficiency. Integrity of public service needs to be maintained. The exercise of power of compulsory retirement must not be a haunt on public servant but act as a check and reasonable measure to ensure

> efficiency in service, and free from corruption and incompetence. The officer would go by reputation built around him. In appropriate case, there may not be sufficient evidence to take punitive act of removal from service. But his conduct and reputation is such that his continuance in service would be a menace in public service and injurious to public interest."

18. It is trite that while considering the case of compulsory retirement from service, all the materials available on record of the Officer pertaining to his service and ACRs should be taken into consideration. In the cases of **Chandramauleswar Prasad v. Patna High Court; AIR 1970 SC 370; Baldev Rajchadha v. Union of India; AIR 1981 SC 70 ; J. D. Sribastav v. State of M. P. ; AIR 1984 SC 630; and Narasingh Patnaik v. State of Orissa ; AIR 1996 SC 3223** it has been held by the Hon'ble Apex Court that the old adverse entries should not be taken into consideration and utilized against the Officer.

19. Time and again Superior Courts have emphasized that for effective administration of justice, honest, impartial and law knowing Judicial Officers are required. However, an Officer having knowledge in law but without integrity is a great danger to the smooth functioning in the judiciary. The object of compulsory retirement is not to punish or penalize the Government servant but to weed out the worthless who have lost their utility for the administration by the insensitive, un-intelligent or dubious conduct impeding the flow of administration or promoting stagnation.

20. With regard to the question whether after promotion of a Government servant to a higher rank earlier adverse entries/record would be wiped-off or the same can be taken into account while considering the case of the employee for giving him compulsory retirement, the Hon'ble Supreme Court in the case of **Pyare Mohan Lal v. State of Jharkhand (2010) 10 SCC 693** held as follows:

> " 24. In view of the above, the law can be summarized to state that in case there is a conflict between two or more judgments of this Court, the judgment of the larger Bench is to be followed. More so, the washed-off theory does not have universal application. It may have relevance while considering the case of Government servant for further promotion but not in a case where the employee is being assessed by the reviewing authority to determine whether he is fit to

be retained in service or requires to be given compulsory retirement, as the Committee is to assess his suitability taking into consideration his "entire service record."

Affirming the aforesaid proposition the Hon'ble Supreme Court in the case of **Rajasthan State Road Transport Corporation and others v. Babulal Jangir; (2013) 10 SCC 551** held as follows:

> "22. It clearly follows from the above that the clarification given by a two-Judge Bench judgment in *Badrinath* is not correct and the observations of this Court in *Gurdas Singh* to the effect that the adverse entries prior to the promotion or crossing of efficiency bar or picking up higher rank are not wiped-off and can be taken into account while considering the overall performance of the employee when it comes to the consideration of case of that employee for premature retirement.
>
> 23. The principle of law which is clarified and stands crystallized after the judgment in ***Pyare Mohan Lal v. State of Jharkhand*** is that after the promotion of an employee the adverse entries prior thereto would have no relevance and can be treated as wiped-off when the case of the government employee is to be considered for further promotion. However, this "washed-off theory" will have no application when the case of an employee is being assessed to determine whether he is fit to be retained in service or requires to be given compulsory retirement. The rationale given is that since such an assessment is based on "entire service record", there is no question of not taking into consideration the earlier old averse entries or record of the old period. We may hasten to add that while such a record can be taken into consideration, at the same time the service record of the immediate past period will have to be given due credence and weightage. For example, as against some very old adverse entries where the immediate past record shows exemplary performance, ignoring such a record of recent past and acting only on the basis of old adverse entries, to retire a person will be a clear example of arbitrary exercise of power. However, if old record pertains to integrity of a person then that may be sufficient to justify the order of premature retirement of the government servant."

21. We have perused the service records of the petitioner including his ACRs. The ACRs which are finally recorded by the High Court are as follows:

ACRs of the Year	Remarks
1984	Average
1985	Good
1986	Good
1987(I)	Very Good
1987(II)	Good
1988	Average
1989 (upto February,1989)	Average
1990 (from 25.09.1989)	Good
1991	Not recorded by the High Court
1992	Good
1993	Good
1994	Good
1995(I)	Efficient and hard working
1995(II)	Very Good
1996	Good
1997	Very Good
1998	Good
1999	Good
2000	Good
2001	Average
2002	Good
2003	Good
2004	Good
2005	Good
2006	Average
2007	Good
2008(I)	Average
2008(II)	Good
2009	Good

22. It transpires from the records that the ACR for the year 2009 was recorded by the Full Court of the High Court on 07.03.2012, that is just two months before the Review Committee of the High Court decided on 03.05.2012 recommending compulsory retirement of the petitioner, which was accepted by the Full Court on 11.05.2012. The ACRs of the petitioner for the year 2010 are in two parts, one from 01.01.2010 to 14.05.2010 and the other from 17.05.2010 to 31.12.2010 reported by the Reporting Officers. For the first part for the year 2010 the petitioner was assessed 'poor' by the Reporting Officer and for the second part of the year he was assessed 'good' by the Reporting Officer. For the first part he was in an administrative post where as for the second part of the year 2010 he was holding a judicial post, i.e., First Additional District and Sessions Judge with powers to try cases

under the S.C. & S.T. (P.A) Act, N.D.P.S. Act, Electricity Act and Motor Accident Claims Tribunal. With regard to integrity of the petitioner for the first part of 2010 the Reporting Officer reported doubtful integrity without mentioning any circumstance to form such opinion though the guidelines for recording ACRs mandate that instances, circumstances and informations about questionable integrity be indicated. For the second part, the Reporting Officer has mentioned "nothing adverse has been brought to my notice". Be that as it may, since the ACRs of the petitioner submitted by the Reporting Officers for the year 2010 have not been finally considered by the Full Court of the High Court, the same must be left out of consideration.

23. From the ACRs of the petitioner as seen above he has been rated 'good' and 'very good' consistently since 1990, except for the years 2001, 2006 and the first half of 2008 for which he was rated 'average'. For the years 2001, 2006 and first half of 2008 though overall assessment of the petitioner was average, so far as his integrity for the said period is considered, nothing adverse has been found.

24. Thus from the pleadings of the parties and from the service records of the petitioner it is apparent that for theft of property worth Rs.50,000/- (Rupees Fifty Thousand) from the Court Malkhana at Udala in the year 1989 an explanation was called for from the petitioner on the basis of the report of the District Judge, Mayurbhanj to the effect that the petitioner did not make alternative arrangement for guarding the Malkhana on the date of theft, for which the petitioner was simply cautioned in the year 2003. Similarly, in the departmental proceeding No.7 of 2002 initiated against the petitioner, out of the three charges the third charge was dropped and the first two charges appear to be not very grave for which, even though they were proved, the petitioner was only censured and the High Court thought it fit not to impose any major penalty. Similarly, during his incumbency as Sub-Divisional Judicial Magistrate, Nayagarh, the petitioner passed sentence in a criminal case of one month rigorous imprisonment instead of simple imprisonment as mandated by law for which he was issued with a warning. Apart from these three incidents in the remote past there are no other incident of any misconduct or misdemeanor touching upon the integrity, efficiency and performance of the petitioner as a Judicial Officer. The three incidents described above were taken into consideration by the Review Committee and the Full Court in November, 2008, while the service of the petitioner was being reviewed at the age of 50. The Review Committee then by its

Resolution dated 11.11.2008 allowed the petitioner to continue in service beyond the age of fifty years, while recommending for compulsory retirement of some other officers. The recommendation of the Review Committee was accepted by the Full Court by resolution dated 17.11.2008.

25. It transpires that without there being any subsequent or additional adverse material in the service record of the petitioner, the Review Committee while reviewing his service at the age of 55 years on 03.05.2012 recommended for his premature retirement in public interest and in the interest of better administration of justice on payment of three months salary and allowances in lieu of three months' notice, under Rule-44 of the OSJS and OJS Rules, 2007 and the said recommendation was accepted by the Full Court of the High Court by Resolution dated 11.05.2012. The recommendation of the High Court was not found favour with His Excellency the Governor of Odisha, who returned the recommendation for reconsideration and the Full Court by its subsequent Resolution reiterated its previous decision and accordingly the impugned order of compulsory retirement has been passed.

26. Even though adverse remarks/records of a Government employee prior to his promotion is not washed-off for the purpose of taking them into consideration while reviewing service of an employee to decide whether he should be continued in service or be given premature retirement, it does not appeal to conscience that the adverse remarks which have already been considered in a previous review of service and they were not found sufficient to retire the employee on review, the same adverse remarks/records, without any further or additional adverse remarks in the service records would be sufficient to prematurely retire the employee while reviewing his services at a subsequent stage, i.e., at the age of 55 years.

27. In this respect the decision of this Court in the case of ***Epari Vasudeva Rao v. State of Orissa and another; 2014 (2) OLR 381*** is worth noting. The services of the petitioner in that case had been reviewed at the age of 55 years and he was allowed to continue in service, despite he had some adverse remarks/records. On the basis of self-same adverse remarks he was given compulsory retirement while reviewing his service at the age of 58 years, without there being any subsequent or additional adverse remarks/service records, apart from promotions being given to petitioner therein in between. Therefore, this Court quashed the order of compulsory retirement and directed reinstatement of the said employee in service with back wages.

28. In the instant case the three instances of remote past for which the petitioner was cautioned, censured and warned were of very minor nature and the same were considered while reviewing the service of the petitioner at the age of 50 years and the Review Committee as well as the Full Court did not give him compulsory retirement at that stage and allowed him to continue in service, evidently considering the said incidents as not justifying giving of compulsory retirement. Thereafter the petitioner was promoted to the cadre of District Judge and even those incidents did not furnish ground for withholding promotion. As to conduct and performance, except for the years 2001, 2006 and the first half of 2008 when his overall rating was 'average', there was no allegation about his integrity. On the other hand, the rating of the petitioner as 'average' for the years 2001, 2006 and the first half of 2008 was also available to the Review Committee as well as to the Full Court of the High Court during the review of his service at the age of 50 years in November, 2008. These ratings and the three adverse remarks described earlier could not persuade the High Court to give compulsory retirement to the petitioner then. His ACR for other years was 'good' and 'very good'. Therefore, without there being any additional or further adverse remark/service record and having regard to the decision of this Court in the case of *Epari Vasudev Rao* (Supra) we are of the opinion that the Court's decision to retire the petitioner compulsorily is arbitrary and unreasonable and, therefore, the impugned order of compulsory retirement under Annexure-9 cannot be sustained. Accordingly we quash the said order.

The petitioner has crossed the age of superannuation, i.e., 60 years in May, 2017, and, therefore, there is no scope to direct his reinstatement in service. However, we direct that he must be deemed to have continued in service from the date of his compulsory retirement till the date of his superannuation at the age of 60 years and he shall be given his salary at the time scale of pay for the post he was holding at the time of compulsory retirement for the said period and retiral benefits accordingly. The writ petition is thus disposed of. The records received from the Registry be returned.

Writ petition disposed of.

2017 (II) ILR - CUT-1289

B.K. NAYAK, J. & DR. D.P. CHOUDHURY, J.

O.J.C. NO. 6601 OF 1995

INDRAMANI SAHU …….Petitioner

.Vrs.

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

SERVICE LAW– Compulsory retirement at the age of 50 years – Action challenged – Non consideration of the service record of the petitioner by the Review Committee for the entire years of service but took the decision basing on some adverse remark for a fraction of years – Moreover there was no disciplinary proceeding initiated against the petitioner and there was no allegation pending on the date of Review Committee meeting, to doubt his integrity and capability – So the recommended action of the High Court for compulsory retirement and the decision of the Government retiring the petitioner compulsorily is arbitrary.

Held, the impugned order of compulsory retirement of the petitioner is quashed – However, since the petitioner has already retired, he is deemed to have continued in service in the cadre of Senior Civil Judge (Sub-Judge) till the age of superannuation and the opposite parties are directed to extend him the consequential service benefits as well as retiral benefits in accordance with law. (Paras 29,30)

Case Laws Referred to :-

1. AIR 1981 SC 70 : Baldev Raj Chadha -V- Union of India & Ors.
2. (1992) 2 SCC 299 : Baikuntha Nath Das -V- Chief Dist. Medical Officer.
3. (2010) 10 SCC 693 : Pyare Mohan Lal -V- State of Jharkhand.
4. (2013) 10 SCC 551 : Rajasthan State Road Transport Corporation & Ors. -V- Babu Lal Jangir.

For Petitioner : M/s. Bijan Ray, B. Mohanty, C.Choudhury, D.R.Pattnaik, A.Mohanty, R.K. Biswal & Debasis Chhotray.

For Opp. Parties : Mr. Bibhu Prasad Tripathy (Addl. Govt. Adv.)

Date of hearing : 20.07.2017
Date of Judgment: 24.10.2017

JUDGMENT

DR. D.P. CHOUDHURY, J.

This writ application is assailed against the order of compulsory retirement passed by the opposite parties against the petitioner while the petitioner attained the age of 50 years.

FACTS

2. The adumbrated facts of the petitioner is that the petitioner was working as an Assistant in this Court from 21.4.1969 and while continuing as such he was selected for appointment as Munsif on probation in Class-II of the Orissa Judicial Service (hereinafter called "O.J.S.") on 21.8.1976.

3. While the petitioner was continuing as S.D.J.M., Chatrapur, the District Judge, Ganjam by his confidential letter communicated adverse remarks against the petitioner for the year 1980-1981 and the petitioner made representation to expunge the adverse remarks vide Annexure-3. Be it stated that the petitioner was promoted to Orissa Judicial Service, Class-I by the then Recruitment Rule as erstwhile Subordinate Judge, Deogarh in the undivided judgeship of Sambalpur vide order dated 28.2.1987. While serving in O.J.S., Class-I he had also served as Special Officer in the office of the Director, Public Prosecution and thereafter he was also appointed as Assistant Sessions Judge at Bhanjanagar having been conferred with such power by this Court.

4. Be it stated that after the posting at Bhanjanagar the petitioner was again transferred as Additional Civil Judge (Senior Division) and Registrar, Civil Courts, Keonjhar and while continuing as such in Keonjhar, he did not get a fair deal from the then learned District Judge, Keonjhar because the petitioner allegedly did not accede to his illegal and untenable demands.

5. It is stated that the petitioner was shortly thereafter transferred as Additional Civil Judge (Senior Division)-cum-Registrar, Civil Courts, Sambalpur with effect from 10.7.1995. There was no incapacity or inefficiency or any doubtful integrity on the part of the petitioner while he has served but suddenly on 19.8.1995 the petitioner was prematurely retired under purported exercise of power conferred under Clause (a) of Rule 71 of the Orissa Service Code (hereinafter called "the Code") at the instance of

opposite party No.1. The petitioner made representation against such illegal action of the opposite party No.1 but no action was taken on the representation. Be it stated that the reasons or grounds in exercise of power under Rule 71 (a) of the Code are not available against the petitioner because the order of compulsory retirement has conspicuously absence of with any reasons. Except the adverse entry communicated in 1980-81, no other entry has been communicated to the petitioner and since he has been promoted from Class-II to Class-I service, there is reason to believe that the action taken against the petitioner is biased, arbitrary and unreasonable. So, the petitioner filed the writ petition to quash the impugned order vide Annexure-6.

6. Opposite party No.2 filed the counter affidavit refuting the allegations made in the petition. It is stated that the adverse entry against the petitioner in 1980-1981 has not been expunged. The performance of the petitioner was not at all commendable because he required a lot of improvement in the judicial side as well as in the administrative side as observed by this Court from time to time. The overall performance of the petitioner during his entire service period was not up to satisfaction for which the observations of this Court were communicated to him.

7. It is further stated that merely because the petitioner was given promotion to the next higher grade, it did not mean that all the adverse remarks in his C.C.Rs were wiped out. The criteria for promotion is not depending on the criteria while considering the person for review of his service as it is settled in law that the deadwood should be removed for the interest of the institution by giving them compulsory retirement. It is the subjective satisfaction of the employer to allow the employee to continue in service subject to his performances put in the entire years of service he rendered. So, taking into consideration of his entire career and the ability of the petitioner with regard to his knowledge in law, integrity and responsibility, the Court decided to recommend for his compulsory retirement and His Excellency, the Governor after considering the materials accepted the recommendation for which the impugned order of premature retirement passed against the petitioner was legal and proper. It is stated that the ratio of the case law cited by the petitioner is not applicable to the facts and circumstances of the case.

SUBMISSIONS

8. Mr. Choudhury, learned Counsel for the petitioner submitted that the statutory Rule 71 (a) of the Code has not been followed in the present case by

the opposite parties while awarding compulsory retirement to the petitioner. He submitted that the G.A. Department notification dated 24.11.1987 regarding procedure for premature retirement as prescribed in pursuance of Rule 71 (a) of the Code has been seriously departed for which it cannot be said the compulsory retirement to the petitioner has been awarded in public interest.

9. Mr. Choudhury, learned counsel for the petitioner further submitted that while considering the case for premature retirement although it is desirable to make an overall assessment of the petitioner's entire service record, more value should be attached to the period immediately preceding the date of consideration of premature retirement. He submitted so by relying upon the decision reported in ***AIR 1995 SC 111*** and ***AIR 1998 SC 948***. In the case of the petitioner there is no evidence of doubtful integrity. Although the O.Ps. have taken a baseless solitary remark from the C.C.R. about the doubtful integrity, he submitted that the opposite parties should not have ignored the reputation the petitioner has occupied till the date of his compulsory retirement.

10. Mr. Choudhury further contended that for the adverse remark made in 1980 and 1981 the petitioner has made representation but same has not been disposed of till date but on the other hand he has been promoted to the post of Class-I in spite of such adverse remark for which it is presumed that such adverse remark has been expunged. Apart from this, the adverse entry used by opposite parties against the petitioner has not been communicated to the petitioner for which same cannot be used against him while awarding premature retirement. On the other hand, the principle of natural justice has been seriously violated in the case of the petitioner by not giving him an opportunity of hearing. So, he submitted to set aside the order of compulsory retirement and since the petitioner has already retired in the meantime, it is presumed that the petitioner is deemed to have been continued in service and the entire service benefits including the retiral benefits be accrued to the petitioner.

11. Mr. B.P. Tripathy, learned Additional Government Advocate submitted that the Court considered the entire service period of the petitioner as it is settled in law that while considering an employee for compulsory retirement, his entire service period should be considered. He further submitted that the service record of the petitioner is not good and he has been awarded adverse entries which are also taken into consideration while

reviewing his service career. According to him, Rule 71 (a) has been properly followed in this case because the petitioner has been awarded three months salary advance in lieu of three months notice and awarded compulsory retirement. Moreover, the promotion of the petitioner from O.J.S. Class-II to O.J.S. Class-I cannot be a criteria to expunge the adverse remarks and moreover, the representation of the petitioner to expunge the adverse remarks has been rejected. According to him, the washed-off theory may be applicable for the sake of promotion but same would not be applicable while reviewing the service of a person at the age of 50, 55 or 58 as it has already been well settled by catena of decisions. After going through the entire service record, the Court felt that the entire service career of the petitioner was not up to satisfaction and it being well settled in law that the dead-wood should be removed, the petitioner has been compulsorily retired in public interest.

12. Mr. Tripathy, learned Additional Government Advocate submitted that the performance of the petitioner was not commendable requiring lot of improvement in judicial side as well as in administrative side as observed by the Court from time to time and mere promotion is not enough to wash-off his adverse entry more particularly with regard to the remark of adverse integrity he has got in his service career. So, he supports the order of compulsory retirement.

13. Mr. Tripathy, learned Additional Government Advocate further submitted that the compulsory retirement under first proviso to Rule 71 (a) of the Code is neither punitive nor stigmatic but it is one of the facets of the doctrine of pleasure incorporated in Article 310 of the Constitution of India and since the action has been taken against the petitioner without any bias, mala fideness and arbitrariness, same suffer from no infirmity. Hence, the writ petition should be dismissed.

14. Main point for consideration:-

(i) Whether the petitioner is liable to be compulsorily retired from service?

DISCUSSION

15. Before going to the fact of the case, it is necessary to discuss on the points of law involved in this case. This is a case of compulsory retirement not awarded basing on any departmental enquiry as per Rule 13 of the Orissa Civil Services (Classification, Control and Appeal) Rules but it is a case

where action has been taken under Rule 71 (a) of the Orissa Service Code which is produced below for reference:-

> "71.(a) Except as otherwise provided in the other clauses of this rule the date of compulsory retirement of a Government servant, except a ministerial servant who was in Government service on the 31st March 1939 and Class IV Government servant, is the date on which he or she attains the age of 58 years subject to the condition that a review shall be conducted in respect of the Government servant in the 55th year of age in order to determine whether he/she should be allowed to remain in service up to the date of the completion of the age of 58 years or retired on completing the age of 55 years in public interest :
>
> Provided that a Government servant may retire from service any time after completing thirty years' qualifying service or on attaining the age of fifty years, by giving a notice in writing to the appropriate authority at least three months before the date on which he wishes to retire or by giving the said notice to the said authority before such shorter period as Government may allow in any case. It shall be open to the appropriate authority to withhold permission to a Government servant who seeks to retire under this rule, if he is under suspension or if enquiries against him are in progress. The appropriate authority may also require any officer to retire in public interest any time after he has completed thirty years' qualifying service or attained the age of fifty years, by giving a notice in writing to the Government servant at least three months before the date on which he is required to retire or by giving three months pay and allowances in lieu of such notice".

The aforesaid provision made it clear that a Government servant can be compulsorily retired for public interest although public interest has not been defined but same is discernible from Clause 7 of the notification issued by the State Government in General Admn. Deptt. No.30495-G.A., dated the 24th November, 1987 which is also reproduced below:-

> "7. It will not be in public interest to retain an employee in service if
>
> (a) he is clearly lacking in integrity, or
>
> (b) although his integrity is not in doubt, his physical or mental condition is such as to make him inefficient for further service, or
>
> (c) even though his work in a lower grade was satisfactory, he

(d) clearly lacks in the standard of efficiency required to discharge the duties of the post he presently holds".

16. In the instant case, the Court has to consider whether the petitioner has been awarded premature retirement by complying all the above legal provisions. It is not in dispute that the petitioner was appointed under erstwhile Orissa Judicial Service Rules and same has been replaced by present Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007. Rule 44 of the present Rule depicts that the service of a person would be reviewed at the age of 50, 55 and 58 but there is no bar to review the service of officer at any time after he attains the age of 50 years so as to weed out dead wood who are not necessary for the interest of the organization. As there is no similar provision in earlier Rule governing the condition of service of the Judicial Officers at that time, Rule 71 (a) was being pressed into service while reviewing the service of officers at the age of 50, 55 and 58.

17. Both the parties have placed catena of decisions to enlighten the Court as to under what circumstances the authority can take a decision for awarding premature retirement to a Government employee while he attains the above ages.

18. In the decision reported in ***Baldev Raj Chadha v. Union of India and others; AIR 1981 SC 70*** where Their Lordships when considering the case of compulsory retirement have observed at Para-8 in the following manner:

"8. This takes us to the meat of the matter, viz., whether the appellant was retired because and only because it was necessary in the public interest so to do. It is an affirmative action, not a negative disposition, a positive conclusion, not a neutral attitude. It is a terminal step to justify which the onus is on the Administration, not a matter where the victim must make out the contrary. Security of tenure is the condition of efficiency of service. The Administration, to be competent, must have servants who are not plagued by uncertainty about tomorrow. At the age of 50 when you have family responsibility and the sombre problems of one's own life's evening!, your experience, accomplishments and fullness of fitness become an asset to the Administration, if and only if you are not harried or worried by 'what will happen to me and my family?' 'Where will I go if cashiered?' How will I survive when I am too old to be newly employed and too young to be superannuated?' These considerations

become all the more important in departments where functional independence, fearless scrutiny, and freedom to expose evil or error in high places is the task. And the Ombudsmanic tasks of the office or audit vested in the C. & AG. and the entire army of monitors and minions under him are too strategic for the nation's financial health and discipline that immunity from subtle threats and oblique overawing is very much in public interest. So it is that we must emphatically state that under the guise of 'public interest' if unlimited discretion is regarded acceptable for making an order of premature retirement, it will be the surest menace to public interest and must fail for unreasonableness, arbitrariness and disguised dismissal. To constitutionalise the rule, we must so read it as to free it from the potential for the mischiefs we have just projected. The exercise of power must be bona fide and promote public interest. There is no demonstrable ground to infer mala fides here and the only infirmity alleged which deserves serious notice is as to whether the order has been made in public interest. When an order is challenged and its validity depends on its being supported by public interest the State must disclose the material so that the court may be satisfied that the order is not bad for want of any material whatever which, to a reasonable man reasonably instructed in the law, is sufficient to sustain the grounds of 'public interest' justifying forced retirement of the public servant. Judges cannot substitute their judgment for that of the Administrator but they are not absolved from the minimal review well-settled in administrative law and founded on constitutional obligations. The limitations on judicial power in this area are well-known and we are confined to an examination of the material merely to see whether a rational mind may conceivably be satisfied that the compulsory retirement of the officer concerned is necessary in public interest.

19. In ***Baikuntha Nath Das v. Chief District Medical Officer; (1992) 2 SCC 299***, where Their Lordships in para-8 observed as follows:

"8. It is evident that the latter half of the proviso which empowers the government to retire a government servant in public interest after he completes 30 years of qualifying service or after attaining the age of 50 years is in pari materia with the Fundamental Rule 56 (j).

xxx xxx xxx

34. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above."

20. In ***S. Ramachandra Raju v. State of Orissa; 1994 Supp. (3) SCC 424*** where Their Lordships at para-9 observed as follows:

"9. …… The entire service record or character rolls or confidential reports maintained would furnish the back drop material

for consideration by the Government or the Review Committee or the appropriate authority. On consideration of the totality of the facts and circumstances alone, the government should form the opinion that the government officer needs to be compulsorily retired from service. Therefore, the entire service record more particular the latest, would form the foundation for the opinion and furnish the base to exercise the power under the relevant rule to compulsorily retire a government officer. When an officer reaching the age of compulsory retirement, as was pointed out by this Court, he could neither seek alternative appointment nor meet the family burdens with the pension or other benefits he gets and thereby he would be subjected to great hardship and family would be greatly affected. Therefore before exercising the power, the competent appropriate authority must weigh pros and cons and balance the public interest as against the individual interest. On total evaluation of the entire record of service if the government or the governmental authority forms the opinion that in the public interest the officer needs to be retired compulsorily, the court may not interfere with the exercise of such bona fide exercise of power but the court has power and duty to exercise the power of judicial review not as a court of appeal but in its exercise of judicial review to consider whether the power has been properly exercised or is arbitrary or vitiated either by mala fide or actuated by extraneous consideration or arbitrary in retiring the government officer compulsorily from service".

21. In ***Pyare Mohan Lal v. State of Jharkhand; (2010) 10 SCC 693*** where Their Lordships expounded the theory of compulsory retirement in a very lucid manner. Their Lordships have taken note of most of the decisions including the decision of ***Baikuntha Nath Das*** (supra) and observed about the washed-off theory. In paragraphs 19, 20, 21, 22 and 24 of the above judgment Their Lordships observed as follows:-

"19. *In* ***State of Punjab Vs. Dewan Chuni Lal, AIR 1970 SC 2086***, a two-Judge Bench of this Court held that adverse entries regarding the dishonesty and inefficiency of the government employee in his ACRs have to be ignored if, subsequent to recording of the same, he had been allowed to cross the efficiency bar, as it would mean that while permitting him to cross the efficiency bar such entries had been considered and were not found of serious nature for the purpose of crossing the efficiency bar.

20. Similarly, a two-Judge Bench of this Court in ***Baidyanath Mahapatra Vs. State of Orissa, AIR 1989 SC 2218***, had taken a similar view on the issue observing that adverse entries awarded to the employee in the remote past lost significance in view of the fact that he had subsequently been promoted to the higher post, for the reason that while considering the case for promotion he had been found to possess eligibility and suitability and if such entry did not reflect deficiency in his work and conduct for the purpose of promotion, it would be difficult to comprehend how such an adverse entry could be pressed into service for retiring him compulsorily. When a government servant is promoted to higher post on the basis of *merit and selection*, adverse entries if any contained in his service record lose their significance and remain on record as part of past history. This view has been adopted by this Court in ***Baikuntha Nath Das, (1992) 2 SCC 299***.

21. However, a three-Judge Bench of this Court in ***State of Orissa V. Ram Chandra Das;(1996) 5 SCC 331*** had taken a different view as it had been held therein that such entries still remain part of the record for overall consideration to retire a government servant compulsorily. The object always is public interest. Therefore, such entries do not lose significance, even if the employee has subsequently been promoted. The Court held as under:(SCC pp.333-34, para-7)

"7. ……..*Merely because a promotion has been given even after adverse entries were made, cannot be a ground to note that compulsory retirement of the government servant could not be ordered*. The evidence does not become inadmissible or irrelevant as opined by the Tribunal. What would be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that selfsame material after promotion may not be taken into consideration only to deny him further promotion, if any. But that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the government servant in service after he attained the required length of service or qualified period of service for pension." (emphasis added)

This judgment has been approved and followed by this court in ***State of Gujarat V. Umedbhai M. Patel, AIR 2001 SC 1109***, emphasising that the "entire record" of the government servant is to be examined."

"22. In Vijay Kumar Jain, (2002) 3 SCC 641, this Court held that the vigour or sting of an entry does not get wiped out, particularly, while considering the case of employee for giving him compulsory retirement, as it requires the examination of the entire service records, including character rolls and confidential reports. `Vigour or sting of an adverse entry is not wiped out' merely it relates to the remote past. There may be a single adverse entry of integrity which may be sufficient to compulsorily retire the government servant.

24. In view of the above, the law can be summarised to state that in case there is a conflict between two or more judgments of this court, the judgment of the larger Bench is to be followed. More so, the washed off theory does not have universal application. It may have relevance while considering the case of government servant for further promotion but not in a case where the employee is being assessed by the Reviewing Authority to determine whether he is fit to be retained in service or requires to be given compulsory retirement, as the Committee is to assess his suitability taking into consideration his "entire service record".

22. The aforesaid decision is well followed in ***Rajasthan State Road Transport Corporation and others v. Babu Lal Jangir; (2013) 10 SCC 551***, where Their Lordships observed at para-24 in the following manner:

"24. …….. As per the law laid down in the aforesaid judgments, it is clear that entire service record is relevant for deciding as to whether the government servant needs to be eased out prematurely. Of course, at the same time, subsequent record is also relevant, and immediate past record, preceding the date on which decision is to be taken would be of more value, qualitatively. What is to be examined is the "overall performance" on the basis of "entire service record" to come to the conclusion as to whether the employee concerned has become a deadwood and it is in public interest to retire him compulsorily. The Authority must consider and examine the overall effect of the entries of the officer concerned and not an isolated entry, as it may well be in some cases that in spite of satisfactory

> performance, the Authority may desire to compulsorily retire an employee in public interest, as in the opinion of the said authority, the post has to be manned by a more efficient and dynamic person and if there is sufficient material on record to show that the employee "rendered himself a liability to the institution", there is no occasion for the Court to interfere in the exercise of its limited power of judicial review."

23. With due regard to the aforesaid decisions, it is trite in law that the adverse entries for promotion if not considered and promotion has been already made overcoming such adverse entry, that previous adverse entry is said to be washed-off for further promotion. But such washed-off theory will have no universal application when a person is considered to continue in service or not for the public interest. In that case the entire service record has to be taken into consideration whether past or recent have no any relevance. Even if the old adverse entry has been ignored while giving promotion, the same can be considered or assessed while the service of a Government servant is considered for compulsory retirement under Rule 71 (a) but due regard must have to be given in all respect particularly with respect to integrity without which allowing a public servant to continue in service is dangerous or menace to the society as well as hurdle for reposing confidence on the organization. It is needless to say that judiciary being the third column of the Constitution is the bedrock of development of the country and it should carry on tremendous faith of people at large at any cost. The integrity and the competency are both sides of a coin that every Judicial officer has to possess for continuance in service. At no stretch of imagination integrity or competency of a Judicial Officer can be compromised at any event. So, whole career has to be considered with subjective satisfaction by the Review Committee or the Full Court and by the Government.

24. Now adverting to the fact of the case, first of all it must be made clear that there is no disciplinary proceeding ever started against the petitioner. The allegation file is also gone through. While the petitioner was J.M.F.C., Koraput during the year 1981, there was an allegation against him about taking bribe but after enquiry same is found to be false and baseless, the matter was closed. Similarly another allegation from the Koraput Bar during 1983 was made against the petitioner and it was sent for confidential enquiry and on enquiry, the concerned District Judge reported that there was no basis to the allegation made against the petitioner. Hence, these allegations were closed having not being found any truth in it.

25. Now the ACRs of the petitioner should be considered to find out whether it is a fit case where rightly decision has been taken by the opposite parties to award him compulsory retirement.

(Considered by Court)

Year-1977		
4.	Knowledge of law and Judicial capacity	Good
5.	Is he industrious and has he coped effectually with heavy work?	Yes
6.	Remarks about his promptness in the disposal of cases	Prompt
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability	Good
9.	Remarks about reputation of integrity and impartiality	Nothing was heard against his integrity & impartiality
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Good

Year-1978 (By District Judge, Reviewing Officer)		
4.	Knowledge of law and Judicial capacity	Good
5.	Is he industrious and has he coped effectually with heavy work?	Yes
6.	Remarks about his promptness in the disposal of cases.	Quite prompt
7.	Remarks about supervision of the distribution of business among and his control over the Subordinate Courts and his administrative ability.	Good
9.	Remarks about reputation of integrity and impartiality.	Nothing was heard against his honesty & integrity.
12.	Net Result.(Outstanding, Very good, Good, Average, Poor)	Good

(Considered by Court)

Year-1979 (By District Judge, Reviewing Officer)		
4.	Knowledge of law and Judicial capacity	Good
5.	Is he industrious and has he coped effectually with heavy work?	Industrious. Coped effectually with heavy work.
6.	Remarks about his promptness in the disposal of cases.	Prompt
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Good
9.	Remarks about reputation of integrity and impartiality	Good
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Good

(Considered by Court)

Year-1980 (Part-I)		
4.	Knowledge of law and Judicial capacity	Good
5.	Is he industrious and has he coped effectually with heavy work?	Industrious and coped with heavy work effectually.
6.	Remarks about his promptness in the disposal of cases.	Prompt in disposal of cases.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Good
9.	Remarks about reputation of integrity and impartiality.	Good
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Good

Year-1980 (Part-II)		
4.	Knowledge of law and Judicial capacity.	Average
5.	Is he industrious and has he coped effectually with heavy work?	He does not appear to be industrious nor copes up with heavy work.
6.	Remarks about his promptness in the disposal of cases.	He is not prompt in disposal cases. Mainly old cases on his file are lying undisposed of.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Lacks control over his subordinates.
9.	Remarks about reputation of integrity and impartiality.	Nothing much has been heard against his reputation, integrity and impartiality.
12.	Net Result.(Outstanding, Very good, Good, Average, Poor)	Average

(Adverse entry communicated to the Officer after being considered by the Court).

Year-1980 (For the whole year by the District Judge)		
4.	Knowledge of law and Judicial capacity	Good
5.	Is he industrious and has he coped effectually with heavy work?	Industrious. Coped effectually with heavy work.
6.	Remarks about his promptness in the disposal of cases.	Prompt.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Average
9.	Remarks about reputation of integrity and impartiality	Satisfactory
10.	Behaviour towards members of the Bar and the public.	Does not appear to be cordial.
12.	Net Result.(Outstanding, Very good, Good, Average, Poor)	Average

(It is also considered and adverse at Sl. No.10 was communicated to the Officer by the Court).

	Year-1981 (Entire year)	
4.	Knowledge of law and Judicial capacity	Average
5.	Is he industrious and has he coped effectually with heavy work?	Has become industrious and coped effectually with heavy work.
6.	Remarks about his promptness in the disposal of cases.	He has become prompt in disposal of cases.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	He should exercise better control over his subordinates.
9.	Remarks about reputation of integrity and impartiality	Nothing adverse has been heard.
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Good

(Court considered & communicated adverse remarks at Sl. No.7 to the Officer)

	Year-1982	
4.	Knowledge of law and Judicial capacity.	Average
5.	Is he industrious and has he coped effectually with heavy work?	Yes
6.	Remarks about his promptness in the disposal of cases.	His disposal was above the yard stick.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	He exercised effective control over his office.
9.	Remarks about reputation of integrity and impartiality	Nothing adverse was heard.
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Good

(Considered by Court)

	Year-1983 (From 1.1.1983 to 10.6.1983)	
4.	Knowledge of law and Judicial capacity.	Average
5.	Is he industrious and has he coped effectually with heavy work?	Yes and he has coped up.
6.	Remarks about his promptness in the disposal of cases	Good
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Needs further improvement.
9.	Remarks about reputation of integrity and impartiality.	Good
12.	Net Result.(Outstanding, Very good, Good, Average, Poor)	Good

Year-1983 (From 20.6.1983 to 31.12.1983)		
4.	Knowledge of law and Judicial capacity.	Good
5.	Is he industrious and has he coped effectually with heavy work?	Industrious. Coped with heavy work effectually.
6.	Remarks about his promptness in the disposal of cases.	Prompt in disposal of cases.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Average – (He should improve in administrative ability). (Ignored by Court)
9.	Remarks about reputation of integrity and impartiality.	Good
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Very Good

(Considered by Court)

Year-1984		
4.	Knowledge of law and Judicial capacity.	Good
5.	Is he industrious and has he coped effectually with heavy work?	Industrious and coped with heavy work effectually.
6.	Remarks about his promptness in the disposal of cases.	Prompt in disposal of cases.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Good
9.	Remarks about reputation of integrity and impartiality.	Good
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Good

(Considered by Court)

Year-1985 (From 1.1.1985 to 7.6.1985)		
4.	Knowledge of law and judicial capacity.	Poor knowledge of law. Takes cognizance u/s.190(1)© Cr.P.C. without exercising judl. discretion and without giving opportunity to the accd. of being heard.
5.	Is he industrious and has be coped effectually with heavy work?	Industrious.
6.	Remarks about his promptness in the disposal of cases.	Average
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Not effective
9.	Remarks about reputation of integrity and impartiality	Doubtful
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Average

(Court considered as **"Poor"**)

Year-1985 (From 10.6.1985 to 31.12.1985)		
4.	Knowledge of law and Judicial capacity.	Satisfactory
5.	Is he industrious and has he coped effectually with heavy work?	Yes
6.	Remarks about his promptness in the disposal of cases	Good
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Satisfactory
9.	Remarks about reputation of integrity and impartiality.	Good (Reviewing Officer observed he is sincere and honest)
12.	Net Result.(Outstanding, Very good, Good, Average, Poor)	Good

(Considered by Court)

Year-1986		
4.	Knowledge of law and Judicial capacity.	Satisfactory
5.	Is he industrious and has he coped effectually with heavy work?	Yes
6.	Remarks about his promptness in the disposal of cases.	He is prompt in disposal of cases.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Satisfactory
9.	Remarks about reputation of integrity and impartiality.	Nothing is heard against his reputation and integrity. He is impartial.
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Good

(No ACR received for 1987) (Considered by Court)

Year-1988 and 1989 (From 7.3.1988 to 27.3.1989)		
4.	Knowledge of law and judicial capacity.	Sound in his knowledge of law on criminal side but needs improvement on the civil side. His judicial capacity is quite good.
5.	Is he industrious and has be coped effectually with heavy work?	Moderately industrious because his out-turn on criminal side for 1st and 2nd quarters, 1988 was below the prescribed yard stick. However, improvement was marked in his outturn during 3rd and 4th quarters.
6.	Remarks about his promptness in the disposal of cases.	Moderately prompt in disposal of cases.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Administrative ability was good.
9.	Remarks about reputation of integrity and impartiality	Unquestionable
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	An average officer.

(Considered by Court)

Year-1989 (From 10.4.1989 to 31.12.1989)		
4.	Knowledge of law and judicial capacity.	On Civil side poor. On Criminal side not up to the mark.
5.	Is he industrious and has he coped effectually with heavy work?	Not up to the mark.
6.	Remarks about his promptness in the disposal of cases.	Not up to the mark.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Ineffective
9.	Remarks about reputation of integrity and impartiality.	Nothing adverse heard
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	An Average Officer

(Court considered same)

Year-1990 (1.1.1990 to 16.8.1990)		
4.	Knowledge of law and judicial capacity.	Needs improvement
5.	Is he industrious and has he coped effectually with heavy work?	Yes
6.	Remarks about his promptness in the disposal of cases.	Fair
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Fair
9.	Remarks about reputation of integrity and impartiality.	A major section of the Bar has lost faith-unexpected result in some cases noticed.
11.	General reputation	Not good.
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Average

(Considered by Court)

Year-1990 (22.8.1990 to 31.12.1990)		
4.	Knowledge of law and judicial capacity.	Needs improvement.
5.	Is he industrious and has he coped effectually with heavy work?	Yes
6.	Remarks about his promptness in the disposal of cases.	He has not entrusted with any case work.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability	Average
9.	Remarks about reputation of integrity and impartiality.	Good
12.	Net Result.(Outstanding, Very good, Good, Average, Poor)	Average

(Considered by Court)

Year-1991		
4.	Knowledge of law and Judicial capacity.	He has not given any judicial work.
5.	Is he industrious and has he coped effectually with heavy work?	Yes
6.	Remarks about his promptness in the disposal of cases.	No judicial work is entrusted.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Good
9.	Remarks about reputation of integrity and impartiality.	Good
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Average

Year-1992		
4.	Knowledge of law and Judicial capacity.	He is well conversant with rules and regulations as Registrar.
5.	Is he industrious and has he coped effectually with heavy work?	Yes
6.	Remarks about his promptness in the disposal of cases.	Does not arise
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Very good
9.	Remarks about reputation of integrity and impartiality	Very good
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Very good

Year-1993		
4.	Knowledge of law and Judicial capacity.	He is well conversant with rules and regulations as Registrar.
5.	Is he industrious and has he coped effectually with heavy work?	Yes
6.	Remarks about his promptness in the disposal of cases.	Does not arise
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability	Good
9.	Remarks about reputation of integrity and impartiality.	Good
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Good

Year-1993 (Part-II)		
4.	Knowledge of law and Judicial capacity.	Good
5.	Is he industrious and has he coped effectually with heavy work?	Yes
6.	Remarks about his promptness in the disposal of cases.	He is prompt in disposal of cases.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	His control of office and subordinates is good.
9.	Remarks about reputation of integrity and impartiality.	He is impartial
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Good

Year-1994		
4.	Knowledge of law and Judicial capacity.	He has good knowledge in law.
5.	Is he industrious and has he coped effectually with heavy work?	He is a hard worker and coped with heavy work suitably.
6.	Remarks about his promptness in the disposal of cases.	He is very prompt in disposal of cases.
7.	Remarks about supervision of the distribution of business among and his control over the subordinate courts and his administrative ability.	Behaves properly with all
9.	Remarks about reputation of integrity and impartiality.	Good
12.	Net Result.(Outstanding, very good, Good, Average, Poor)	Good

(Court has not considered the ACR from 1991 to 1994)

26. From the conspectus of the facts relating to the CCRs of the aforesaid years, it appears that the petitioner has got adverse ACR in the second part of 1980 as given by the Chief Judicial Magistrate as Reporting Officer. But for whole of the year the District Judge who is the Reviewing Officer did not agree with the opinion of the Chief Judicial Magistrate and rated the Officer as average Officer. Similarly in 1981 for entire year he was considered as good officer except the remark that he should exercise control over subordinates. That apart, in the first part of the year 1985 though the Chief Judicial Magistrate and the District Judge gave him ACR as average Officer but against Column No.9 they made adverse remarks about his reputation and integrity as 'doubtful' and the Court also rated the Officer as 'Poor'. At the same time, in the second part of 1985, the Officer's reputation, integrity and impartiality became good as given by both Reporting and Reviewing Officer. Also the Reviewing Officer has opined that the Officer is "sincere and honest". Same view has also been accepted by the High Court being considered. When in the second part he has got integrity good and net remarks also good, the first part without having material supporting the opinion as "integrity doubtful" cannot be accepted. There is instruction issued by the High Court in G.R.C.O. (Civil) Vol.II that when an Officer would be given adverse remark as to his integrity and impartiality, the concerned Reporting Officer or the Reviewing Officer must explain the materials supporting such remark. Moreover, the Reporting or Reviewing Officer must call for explanation from such officer and explain whether it has got any basis. In this case no such material appears to have been communicated to the petitioner asking for his explanation so that adverse remark could be recorded. However, due to 'Good' remark against this reputation, integrity in the second part of 1985, the remark in the first part is not given due importance.

27. Now it appears in 1989, the petitioner got CCR recorded for the period from 10.4.1989 to 31.12.1989 where he has got adverse remarks in knowledge of law, Judicial capacity, his industriousness and promptness in disposal of cases, his control over the subordinate courts and his administrative ability. But so far reputation of integrity and impartiality is concerned, same has been certified by the Reporting and Reviewing authority. But at the same time for the period from 1.1.1990 to 16.8.1990, the petitioner has improved except the fact that he needs further improvement in the knowledge of law and judicial capacity. He has got overall rating as Average Officer. In the same year he has got reputation of integrity with very speculative remark from the Reviewing Officer that a major section of the Bar had lost faith because of unexpected result in some cases. The Reporting Officer has not annexed any document showing the number of cases where the bar members have alleged about unexpected result. Moreover, the unexpected result in the cases cannot be taken as any adverse remark as to integrity of the Officer without dealing on the issue as to whether the Officer has got an extraneous motive behind it or any extraneous obligation to pass such judgments. Therefore, such remark is not considered to be the adverse except an observation about his reputation. However, after going through the ACR from 22.8.1990 to 31.12.1990 it appears that he has good reputation, integrity and impartiality. Due to such good remark about his reputation and integrity in the second part of 1990, the first part adverse entry is considered leniently against the Officer. Not only this but also in the second part of 1990, there is no adverse remark except recording that his knowledge in law and judicial capacity needs further improvement. For the second half year of 1990 and for the year 1991 the petitioner was working as Registrar, Civil Court, Ganjam, which involves purely administrative work and the ACR indicated that petitioner was not entrusted judicial work. Hence, comment by the Reporting Officer that petitioner needs improvement in knowledge of law and judicial capacity was uncalled for, and for the same only to note him overall "Average", appears to be result of non-application of mind by the authorities, while in other respects he has been rated 'good'. Such type of 'average' remark when further improvement is required, assuming the same to be justified, cannot be considered as adverse so as to disqualify him for continuance in service. It may be noted here that the remark "Needs improvement" as given in ACR is a diabolical remark because the Reporting Officer while recording ACR should either give the remark 'Poor' or 'Average' or 'Good' etc. From the year 1992 to 1994, the Officer is found having no adverse remark. Rather he has been rated as Good Officer. The

Review Committee considered the Officer in 1995. The last four years of ACR from 1991 to 1994 appears to have not been put up before the Court for consideration before 1995. ACR of petitioner from 1991 to 1993 was put up on 18.1.1996 before the Standing Committee of the Court and same have been accepted but ACR for 1994 of petitioner has not been considered as yet. After calling upon record from the Registry the said facts became known to us. However, for last four years before review there is improvement of the Officer and same have not been considered by the Standing Committee of the Court before review was held as appears from record.

28. The extract of the Review Committee is reproduced below for reference:-

> "6. Shri Indramani Sahu has earned adverse comment with regard to his knowledge of law and judicial capacity in the year 1991 from the District Judge, Kalahandi. For the year 1990, the District Judge, Ganjam, made an adverse entry not only with regard to his knowledge of law and judicial capacity, but also about his reputation of integrity and impartiality even though he was rated as an average officer. For the year 1989 his knowledge of law and judicial capacity was rated as poor on civil side and not up to the mark on criminal side. He was found not to be industrious and about his promptness in disposal of cases it was rated that he is not up to the mark. In the year 1989, he had received the comment from the District Judge that he needs lot of improvement on the civil side. Taking an overall view of the performances of this officer, the Committee is of the opinion that he should be required to retire in public interest prematurely."

29. After going through same, it appears that the Review Committee has taken into consideration the report of 1991 with regard to knowledge of law and judicial capacity of petitioner but as noted above, the Officer has no such adverse remark in 1991. For the year 1989 the observation of the Review Committee that the knowledge of law and judicial capacity of the Officer on Civil side and Criminal side and promptness in disposal of cases are related to the second part of 1989 although he has got no adverse remark in these areas in the first part of 1989. Similarly in 1990 although the Review Committee has observed that the Officer has got bad reputation but again same relates to 1st part of 1990 but in the second part of 1990 he has got good reputation of integrity and impartiality. It appears that the Review Committee has not considered the ACR of the petitioner for whole of the year 1989 and

1990. As per procedural law, the ACR of an employee is to be read for the whole of the year but not in piecemeal. Apart from this, in view of decisions in ***Baikuntha Nath Das*** (supra) and ***Pyare Mohan Lal*** (supra) the Review Committee ought to have taken the ACR of the entire years of service when the petitioner has got improvement in the last four years and he has got no adverse integrity except the first part of 1985 and first part of 1990, which are not based on any documents to support the same as per procedural norms issued by the Court. It is reiterated that the Review Committee has not considered the entire years of service record of the petitioner but took the decision basing on some adverse remark for fraction of some years. Of course, it is for the Registry to place the material before the Review Committee so as to come to a conclusion. Apart from this, there is no disciplinary proceeding initiated against the petitioner. Also there was no allegation pending on the date of Review Committee meeting to doubt the integrity or the capability of the petitioner. In view of our observation above, we are of the view that the recommendation of the High Court for compulsory retirement of the Officer is not based on proper material and as such the decision of the State Government retiring the petitioner compulsorily is unlawful and arbitrary. The point is answered accordingly.

CONCLUSION

30. In the writ petition it has been prayed to quash the order of compulsory retirement as issued vide Annexure-6 with consequential benefits. As the order of the Opposite Party No.1 in retiring the petitioner compulsorily at the age of 50 years is unlawful and arbitrary, same should be quashed and the Court do so. In the meantime since the Officer has already attained the age of superannuation, the petitioner is deemed to have continued in service in the cadre of Senior Civil Judge (Sub-Judge) till the age of superannuation as per the Rule applicable to him and accordingly we direct the opposite parties to extend the consequential service benefit including financial benefit and retiral benefits to petitioner in accordance with law.The writ petition is disposed of accordingly. No costs.

Writ petition disposed of.

2017 (II) ILR - CUT-1313

DR. A.K. RATH, J.

SA NO. 291 OF 1994

GRAMA DEVATI, SATABHAUNI THAKURANI & ORS. .....Appellants

.Vrs.

RANGA BEWA & ORS. .....Respondents

(A) HINDU LAW – Ancient adoption – D.W.1 was a witness to giving and taking ceremony – Held, it won't be a case of ancient adoption. (Para 10)

(B) HINDU LAW – Adoption – When the alleged adoption took place, the age of the adoptive father was 29 years – Normally a person would not adopt, when he expects a son would be born to him – This is a strong circumstance to disbelieve adoption – Since adoption results in changing the course of succession, depriving wife and daughters of their rights, circumstances must be strictly considered to see that the adoption is free from all kind of suspicion. (Para 15)

(C) HINDU LAW – Adoption – Though adoption took place in the year 1933 a deed acknowledging such adoption was registered in the year, 1954 – Omission of the day and date in such document – Held, it being a vital omission, the deed of acknowledgment loses its significance. (Para 10)

(D) HINDU LAW – Pre-Act adoption – Adoption of sister's son is barred under Hindu Law unless a custom in support of such adoption is pleaded and proved – The above bar is there as the sister could not have been married to the brother and thus the brother cannot adopt the sister's son. (Paras 13,14)

(E) HINDU ADOPTIONS AND MAINTENANCE ACT, 1956 – S.16 r/w Section 114, Evidence Act, 1872

Presumption as to adoption – Deed of acknowledgment of adoption not signed by the adoptive son as well as both the person giving in adoption and the person taking in adoption – Since one of the essential condition was wanting, no presumption that there was an adoption – Further entry of the name of the adopted son in the voter's list is not sufficient to prove adoption, in the absence of evidence supporting "giving and taking." (Para 12)

Case Laws Referred to :-

1. 1974(1) CWR 403 : Bauri Dei & Ors. -V- Dasarathi Sahu & Ors.
2. Vol.III(1961) OJD196 : Agani Bewa -V- Bhaskar Mallik
3. AIR 1964 Orissa 117 : Balinki Padhano & Anr. -V- Gopakrishna Padhano & Ors.
4. AIR 1971 Orissa 211 : Priyanath Mohanty -V- Indumati Bewa
5. AIR 1978 Orissa 48 : Ranjit Sahu -V- Nilambar Sahu & Anr.
6. 77(1994) CLT 523 : Doctor Nahak -V- Bhika Nahak
7. AIR 1959 SC 504 : Kishori Lal -V- Chaltibai
8. AIR 1983 Ori.199 : Arakhita Swain -V- Kandhuni Swain

For Appellants : Mr. S.R. Pattnaik
For Respondents : Mr. Susanta Ku. Dash, Ms. Arunima Das

Date of hearing : 08.12. 2017
Date of judgment: 18.12. 2017

JUDGMENT

DR. A.K.RATH, J.

Defendant nos.1 to 6 are the appellants against a confirming judgment.

2. Fakir Charan Swain, predecessor-in-interest of respondents 1(a) to 1(h) as plaintiffs, instituted the suit for declaration of right, title and interest, confirmation of possession and in the alternative for recovery of possession, if he has been dispossessed during course of trial and permanent injunction. Case of the plaintiff was that the suit schedule land originally belonged to one Muli Swain. After his death, defendant nos.8, 9 and 10 were in possession of the suit land. They sold the suit land to the plaintiff by means of a registered sale deed dated 25.4.1979, vide Ext.1. Defendant nos.1 to 6 claimed to have purchased the suit land from the defendant no.7, who proclaimed to be the adopted son of Muli Swain. Defendant no.7 executed the sale deed by impersonating himself to be the adopted son of Muli Swain. Therefore, defendants 2 to 6 have no right, title and interest over the suit land. With this factual scenario, he instituted the suit seeking the reliefs mentioned supra.

3. Defendants 1 to 6 filed a joint written statement denying the assertions made in the plaint. It was pleaded that Muli Swain and his wife Badani adopted defendant no.7 when he was only two years old. Since the day of adoption, defendant no.7 was residing in the house of Muli Swain. In the school records and voters list, defendant no.7 has been described as son of

Muli Swain. Muli Swain also executed a registered deed acknowledging the adoption. Defendant nos.8 to 10 filed a joint written statement supporting the stand of the plaintiff.

4. Stemming on the pleadings of the parties, learned trial court struck eight issues. Parties led evidence, oral and documentary, to substantiate their cases. Learned trial court came to hold that Muli Swain had not adopted defendant no.7. The sale deed executed by defendant no.7 is inconsequential in nature. Defendant no.8 is the legally married wife of Muli Swain and defendant nos.9 and 10 are their sons. The sale deed Ext.1 was executed by defendant no.8 and defendant nos.9 and 10, who were minors. It is voidable at the option of the minors. Minors did not assail the sale deed. Held so, it decreed the suit. Unsuccessful defendants filed Title Appeal No.16 of 1987 in the court of the learned Civil Judge (Senior Division), Jagatsinghpur, which was eventually dismissed.

5. The second appeal was admitted on 30.10.1995 on the following substantial question of law.

"The appeal would be heard on the question of adoption."

6. Heard Mr. S.R. Pattnaik, learned counsel along with Mr. Imran Khan, learned counsel for the appellants and Mr. Sushant Kumar Dash along with Ms. Arunima Das, learned counsel for the respondents.

7. Mr.Pattnaik, learned counsel for the appellants submitted that Badani Dei was the first wife of Muli Swain. They had no issue. They adopted defendant no.7 in the year 1933 when he was two years. Defendant no.7 stayed in the house of Muli. After the death of Badani, Muli remarried to Chanchali-defendant no.8. Defendant nos.9 and 10 are the sons of Muli through second wife. To avoid future complicacy, Muli executed a deed acknowledging adoption in the year 1954, vide Ext.A. In the school leaving certificate, consolidation ROR and voter list, defendant no.7 has been described as son of Muli Swain. It is a case of ancient adoption. The factum of giving and taking ceremony was not necessary. The registered deed of adoption vide Ext.A coupled with school leaving certificate, voter list, consolidation ROR (not final) vide Exts.A,B,D,F and G would unerringly show that defendant no.7 is the adopted son of Muli Swain. Learned trial court misconstrued and misapplied the decision of this Court in the case of Bauri Dei and others v. Dasarathi Sahu and others, 1974 (1) CWR 403, wherein it was held that the creation of documents is not a substitute for

giving and taking, which must be proved independently de hors any document. The omission of the day or date of adoption is vital and the deed of acknowledgment of adoption loses its significance. In the instant case, the deed was executed on 14.4.1954 acknowledging the adoption. The acknowledgment of adoption has to be given full weight. The courts below committed grave error in disbelieving the materials available on record and held that giving and taking ceremony was not held. He relied on the decisions of this Court in the case of Agani Bewa v. Bhaskar Mallik, Vol.III (1961) OJD 196 and Balinki Padhano and another v. Gopakrishna Padhano and others, AIR 1964 Orissa 117 and Agani Bewa (supra).

8. Per contra Mr. Dash, learned counsel for the respondents submitted that in the deed of acknowledgment of adoption, vide Ext.A, the name of defendant no.7 has not been mentioned. No presumption under Sec.16 of the Hindu Adoption and Maintenance Act is available in respect of a pre-Act adoption. The deed acknowledging adoption must satisfy the requirements under law. The deed must be signed by both the person giving and the person taking the child in adoption. The same has not been done. Defendant no.7 being the sister's son of Muli, adoption is invalid. The evidence of giving and taking ceremony is scanty. Entry in the voter list is not sufficient to prove the adoption. Documents are not enough to hold that Arjuna was adopted by Muli, when he failed to prove giving and taking ceremony. Arjuna was not the adopted son of Muli. He has no right to alienate the suit property of Muli in favour of defendant nos.1 to 6. The same does not create any title in their favour. Chanchala is the legally married wife of Muli. Defendants 8 to 9 are the sons of Muli and Chanchala. For legal necessity, they sold the land to the plaintiff. Defendants 1 to 7 being the strangers, they cannot challenge the sale deed. Defendant nos.8 and 9 were minors at the time of execution of the sale deed. They are parties to the suit. Neither they challenged the sale deed nor filed any counter claim. He cited the decisions of this Court in the case of Priyanath Mohanty v. Indumati Bewa, AIR 1971 Orissa 211, Ranjit Sahu v. Nilambar Sahu and another, AIR 1978 Orissa 48, and Doctor Nahak v. Bhika Nahak, 77 (1994) CLT 523.

9. The apex court in the case of Kishori Lal v. Mt. Chaltibai , AIR 1959 SC 504, held that as an adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicion of fraud and so consistent and probable as to leave no occasion for doubting its truth.

10. It is not a case of ancient adoption. D.W.1 was a witness to the giving and taking ceremony. Defendant no.7 is the sister's son of Muli. The deed acknowledging adoption, vide Ext.A, reveals that when defendant no.7 was two years old, he was adopted. The day and date of adoption has not been mentioned. Ext.A was registered on 14.5.1954. Muli was 29 years when alleged adoption took place. As held by this Court in the case of Bauri Dei (supra), creation of documents is no substitute for the fact of giving and taking which must be proved independently de hors any document. Omission of the day or date of adoption is very vital and the deed of acknowledgment of adoption loses all its significances.

11. In Agani Bewa (supra), this Court held that where a deed is executed by a person stating that a valid adoption had already taken place, such an admission should be given its full weight, in the absence of evidence showing that the admission was untrue or was made by mistake or fraud or other vitiation circumstances and the fact of adoption as well as is validity must be taken to be established.

12. In Arakhita Swain vs. Kandhuni Swain, AIR 1983 Ori.199, this Court held that where the registered deed recording an adoption was not signed by the person giving the child in adoption, the presumption under Sec.16 as to there being an adoption in compliance with the provisions of the Act could not be raised as one of the essential condition was wanting.

13. In Priyanath (supra) this Court held that sister's son cannot be adopted, unless a custom in support of such adoption is pleaded and established. The bar in Hindu Law against adoption of a sister's son is on the basis that the sister could not have been married to the brother and thus the brother cannot adopt the sister's son. A fiction in law is created in the event of adoption for the adopted son's mother being the wife of the adoptive father. The principle of factum valet also does not apply in the case of adoption.

14. Defendant no.7 is the sister's son of Muli Swain. This is a pre-Act adoption. Article 477 of Mulla's Hindu Law (22nd edition) provides that the adopted son must not be a boy, whose mother the adoptive father could not have legally married, unless it is sanctioned by the custom. There is no pleading or evidence with regard to custom.

15. In Doctor Nahak (supra), this Court held that a person would not normally adopt when he expects a son would be born to him. This is a strong circumstance to disbelieve adoption.

16. Judging the case from any angle, this Court is of unhesitant opinion that defendant no.7 is not the adopted son of Muli Swain. Defendant no.7 is a stranger. Alienation by defendant no.7 in favour of defendants 1 to 6 cannot create any title in their favour. Defendants 1 to 6 are strangers. A stranger cannot challenge any transaction on legal necessity, unless he or she has interest in the property. Further, defendants 8 and 9 are parties to the suit. They have neither challenged the sale deed nor filed any counter claim. The substantial question of law is answered accordingly.

17. A priori, the appeal fails and is dismissed. There shall be no order as to costs.

Appeal dismissed.

2017 (II) ILR - CUT-1318

DR. A.K. RATH, J.

S.A. NO. 346 OF 1989

SATRUGHANA PARIDA & ORS. .....Appellants

.Vrs.

COLLECTOR, CUTTACK & ORS. .....Respondents

SPECIFIC RELIEF ACT, 1963 – S.38

Whether, a simply suit for permanent injuction without any declaratory relief is maintainable ? Held, No.

(Para 15)

Case Law Referred to :-

1. AIR 2008 SC 2033 : Anathula Sudhakar -V- P. Buchi Reddy (dead) by L.Rs. & Ors.

For Appellants : Mr. Ashutosh Mahanta
For Respondents: Mr. Swyambhu Mishra, A.S.C.

Date of Hearing : 04.09.2017
Date of Judgment: 04.09.2017

JUDGMENT

DR. A.K. RATH, J.

This is a plaintiffs' appeal against an affirming judgment in a suit for permanent injunction.

2. The suit schedule land consists of Ac.21.50 dec. appertaining to khata no.63, plot no.460 of mouza-Bahakuda, P.S.-Mahakalapada, Dist.-Cuttack.

3. The case of the plaintiffs is that the suit schedule land was under Anabadi khata of Ex-Zamindar, Burdhawan Estate. It was lying fallow and water logged. About 40 years back, the plaintiffs and their predecessors reclaimed the suit land, made it fit for cultivation, dug a tank for the purpose of irrigation and pisciculture and constructed a house over a portion of the same. They had planted various fruit bearing trees with the express and implied consent of the ex-landlord. They used to raise paddy crops over a major portion of the suit land. The coconut trees standing over the suit land are in their exclusive enjoyment. They are in possession of the land peacefully, continuously, without any interruption and to the knowledge of the defendants and as such acquired right of occupancy over the same. The ex-intermediary leased out the land in their favour on payment of salami and annual rent. They paid salami to the ex-landlord. On receipt of premium, he settled the lands in their favour. They were tenants under the ex-landlord. They continued to possess the suit land on payment of annual rent to the ex-landlord and obtained rent receipts. After vesting of estate, the ex-landlord submitted rent roll in their favour. Thereafter, they submitted applications before the Tahasildar, Kujanga to accept rent. But the same was not accepted. The specific case of the plaintiffs is that they are deemed tenants. The land had been illegally recorded in the name of the defendants. With this factual scenario, they instituted the suit seeking reliefs mentioned supra.

4. The defendant no.1 filed written statement denying the assertions made in the plaint. The defendant challenged the maintainability of the suit for non-service of notice under Sec.80 C.P.C. and non-identification of the suit land. The specific case of defendant no.1 is that the suit land is a Government land. The Soil Conservation Department had raised cashew plantation over the suit land. Thereafter, the same was transferred by the Tahasildar to the Orissa State Cashew Development Corporation in the year 1980. The later was in possession of the same.

5. On the interse pleadings of the parties, learned trial court struck seven issues. Both the parties led evidence, oral and documentary, to substantiate their respective cases. On a threadbare analysis of the evidence on record and pleadings, learned trial court came to hold that Kujanga estate vested in the State on 27.11.1952. The date of rent receipts, Ext.1, was originally 7.12.1952, but subsequently the date has been mentioned as 24.11.1952 in order to show that receipt had been granted before vesting. The plaintiffs had paid rent for the year 1953-54 after vesting. The intermediary had no right to accept any rent. The plaintiffs had failed to show that the rent was paid prior to vesting. They are not deemed tenants. It further held that the Soil Conservation Department had grown cashew plantation. Thereafter, the Orissa State Cashew Development Corporation, defendant no.4, is in possession of the land. Held so, it dismissed the suit. The plaintiffs appealed before the learned Subordinate Judge, Kendrapara which was eventually dismissed.

6. The second appeal was admitted on the following substantial question of law.

> "Whether possession of the plaintiff is unlawful in view of the provisions of Orissa Estates Abolition Act ?"

7. Heard Mr. Ashutosh Mahanta, learned counsel for the appellants and Mr. Swyambhu Mishra, learned Additional Standing Counsel for the respondent nos.1 and 2.

8. Mr. Mahanta, learned counsel for the appellants submits that the land belonged to ex-landlord of Kujanga. About 40 years back, the plaintiffs and their predecessors reclaimed the land, made it fit for cultivation and planted trees. They also used to raise paddy crops over the same. They paid rent to the ex-intermediary. They were tenants under the ex-landlord. After vesting of the estate, they are deemed tenants under Sec.8(1) of the Orissa Estates Abolition Act, 1951.

9. Per contra, Mr. Mishra, learned Additional Standing Counsel for the respondent nos.1 and 2 submits that the suit land originally belonged to ex-landlord. It vested in the State free from all encumbrances. The Soil Conservation Department planted cashew trees. Subsequently, the same was handed over to the Orissa State Cashew Development Corporation, defendant no.4. The defendant no.4 is in possession of the land. Both the courts concurrently held that the plaintiffs are not in possession.

10. The pleading is mutually destructive. The plaintiffs assert that they were in possession of the land peacefully, continuously, without any interruption and to the knowledge of the defendants and as such acquired right of occupancy over the same. It is further stated that after vesting of estate, they are in possession and as such they are deemed tenants under Sec.8(1) of the Orissa Estates Abolition Act. The plaintiffs further assert that they were in possession of the suit land for more than statutory period to the knowledge of the defendants and their predecessors, much prior to 1940 till now without any hindrance and as such acquired right in respect of the suit land.

11. The word 'raiyat' has been defined in Sec.5(2) of Orissa Tenancy Act. It means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants, or with the aid of partners, and includes also the successors-in-interest or persons who have acquired such a right. Sec.23(1) of the Act provides that every person who, for a period of twelve years whether wholly or partly before or after the commencement of this Act, has continuously held as a raiyat land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled raiyat of that village. Sec.24(1) postulates that every person who is a settled raiyat of a village within the meaning of Sec.23 of the Act shall have a right of occupancy in all land for the time being held by him as a raiyat in that village.

12. There is no pleading that the plaintiffs are settled raiyat of the village. Thus the assertion of the plaintiffs that they are occupancy raiyats has no legs to stand.

13. Not a single scrap of paper has been filed to show that the plaintiffs were tenants under the ex-intermediary and after vesting, they are in possession. No rent was paid to the ex-intermediary after vesting. Learned trial court on a threadbare analysis of evidence on record as well as pleading negatived the plea of the plaintiffs. In fact the plaintiffs are not sure of their right. Both the courts concurrently held that the plaintiffs are not in possession of the suit land. The title of the plaintiffs is cloud of suspicion.

14. In *Anathula Sudhakar vs. P. Buchi Reddy (Dead) by L.Rs. and others,* AIR 2008 SC 2033, the apex Court held thus:

" xxx xxx xxx

> 11.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.
>
> 11.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction."

15. Thus, the simply suit for permanent injunction without any declaratory relief is not maintainable.

16. The matter may be examined from another angle. The suit was instituted in the year 1981. The age of the plaintiff no.1 was 50 years, i.e., he was born in the year 1931. The age of the plaintiff no.2 was 40 years, i.e., he was born in the year 1941. The assertion of the plaintiffs is that about 40 years back of the institution of the suit, they were in possession of the suit land. If the same is believed, then the plaintiff no.1 was 10 years and the plaintiff no.2 was not born. The suit is thoroughly misconceived.

17. Resultantly, the appeal fails and is dismissed. There shall be no order as to costs.

Appeal dismissed.

2017 (II) ILR - CUT-1323

DR. A.K. RATH, J.

S.A. NOs. 16 OF 2000 & 15 OF 2000

NAINALU KRISHNA .....Appellant

.Vrs.

K.DEBRAJ @ K. DEBRAJ PATRA .....Respondent

HINDU SUCCESSION ACT, 1956 – S.15(1)(a)

Whether the word "Sons" in clause (a) of sub-section (1) of section 15 of the Hindu Succession Act, 1956 includes step-sons also ? – Held, No. (Para 16)

Case Law Relied on :-
1. AIR 1987 SC 1616 : Lachman Singh -V- Kirpa Singh & Ors.

Case Law Referred to :-
1. AIR 1988 SC 644 : Smt.Yamunabai Anantrao Adhav -V- Anantrao Shivram Adhav & Anr.

For Appellant :Mrs. Jyotsnamayee Sahoo

For Respondent :Mr. B.K.Mohanty

Date of Hearing :11.12.2017
Date of Judgment:22.12.2017

JUDGMENT

DR. A.K. RATH, J.

Since the common question of facts and law are involved in both the appeals, the same were heard together and are disposed of by this common judgment.

02. These appeals have been filed against the common judgment of the learned 1st Additional District Judge, Berhampur. The plaintiff-appellant instituted the suit for declaration.

03. The case of the plaintiff was that N. Narsamma was the daughter of N. Sarathi. She was serving as sweeper in Khallikote College, Berhampur. The plaintiff is the son of N. Chinneyya, brother of N. Narsamma. N. Narsamma was a spinster. She adopted the plaintiff at about 9 A.M on makar sankaranti day, when he was aged about 10 years old. There was giving and taking ceremony. The parents of the plaintiff physically handed over to him

to N. Narsamma, who accepted him as her adopted son in presence of the relatives. The plaintiff was also looking after Narsamma, when she was ill. Narsamma executed a deed of acknowledgement of adoption as a token of evidence of adoption of the plaintiff on 20.3.92 before the Notary Public. Narsamma died on 24.8.92. The plaintiff was entitled to her retiral benefits. He was entitled to a post under the rehabilitation scheme. It was further pleaded that the defendant, who is the grandson of K. Papamma, the elder sister of Narsamma, had made a false claim and wanted to take all the death benefits of Narsamma on the ground that her grandfather K. Simadri had married to Narsamma and he is the only legal heir to get such benefits. He had created certain documents like affidavit said to have been sworn by Narsamma before the Notary Public and had made a counter claim on the basis of those false affidavits. With this factual scenario, the plaintiff instituted the suit seeking the reliefs mentioned supra.

04. The defendant filed a written statement. The case of the defendant was that N. Sarathi had two sons and two daughters, namely, N. Sanyasi, N. Chinneyya, K. Papamma and N. Narsamma. K. Papamma. The elder daughter of N. Sarathi married to K. Simadri. The father of the defendant K. Krushnamurty was the only son of K. Papamma, the first wife of K. Simadri. His father, grandfather and grandmother K. Papamma are all dead. As K. Papamma was sick, K. Simadri married to N. Narsamma. After death of N. Narsamma, the defendant being her only legal heir was entitled to get the entire death benefits of her. But then the plaintiff, son of N. Chinneyya, by a fake document of adoption claimed the death benefits of Narsamma. Plaintiff is not the adopted son of N. Narsamma. He was all through rendering the services to his grandmother Narsamma, when she was ill. Narsamma died on 24.8.92. She had also sworn affidavits before the Executive Magistrate that she married to K. Simadri and as such, the defendant is the only legal heir and successor to her. She had nominated the defendant to get all the death benefits including her service benefits under the rehabilitation scheme.

05. Stemming on the pleadings of the parties, learned trial court struck eight issues. Parties led evidence. Learned trial court came to hold that the plaintiff is not the adopted son of N. Narsamma. He disbelieved the marriage of Narsamma with K. Simdari. Held so, it dismissed the suit. Feeling aggrieved, the plaintiff filed T.A. No.20/94 before the learned District Judge, Berhampur. The defendant also filed T.A. No.25/94. Both the appeals were transferred to the court of the learned 1st Additional District Judge,

Berhampur and renumbered as T.A. No.37/99 and T.A. No.38/99 respectively and heard analogously. Learned lower appellate court dismissed T.A. No.37/99. In T.A. No.38/99, it held that Narsamma married to K. Simadri during life time of his first wife, K. Papamma, for the second time. The marriage is void. No petition under Sec.11 of the Hindu Marriage Act, 1955 was filed to declare the marriage void. With regard to succession of the death and service benefits of Narsamma, it held that the plaintiff had created certain documents from 20.3.92 onwards initially creating a deed of acknowledgement of adoption getting the same sworn before the Notary Public. The rest of the documents were created thereafter. The defendant had proved Ext.A, the certified copy of the application dated 28.8.91 said to have been filed by Narsamma indicating therein that he will be entitled to get her death benefits. The transfer certificate, Ext.A/1, disclosed the name of the father of defendant as K. Krishnamurty. Ext.A/2 is an affidavit sworn by Narsamma before the Executive Magistrate intending to make the defendant as her nominee. It further held that though the marriage is void, but there is no decree declaring the same as void. Marriage is deemed to be in existence. Therefore, the defendant is entitled to succeed to the share of Narsamma under Sec.15(1)(b) of the Hindu Succession Act.

07. The second appeal was admitted on the substantial questions of law enumerated in ground nos.A, B and D of the memorandum of appeal. The same are:

> "(A) Whether the impugned judgments are perverse for non-consideration of the material on record more specifically Ext.2 ?
>
> (B) Whether the plaintiff has duly discharged the burden of proving his adoption ?
>
> (D) Whether the impugned finding of the learned courts below that the plaintiff is not entitled to get the service benefit of late Narsamma is perverse for non-consideration of Ext.4 ?"

08. Heard Mrs. Jyotsnamayee Sahoo on behalf of Mr. Manoj Kumar Misrha, learned Senior Advocate for the appellant and Mr. B.K. Mohanty, learned counsel for the respondent.

09. Mrs. Sahoo, learned counsel for the appellant submitted that plaintiff is the adopted son of Narsamma. There is ample evidence on record that the plaintiff is the son of Narsamma. The medical prescription, money receipt,

unregistered adoption deed and nomination form of N. Narsamma would show that plaintiff is the adopted son of Narsamma. The courts below committed a manifest illegality in non-suiting the plaintiff.

10. Per contra, Mr. Mohanty, learned counsel for the respondent submitted that since K. Papamma was ill, her husband, K. Simadri married to N. Narsamma, younger sister of K. Papamma. No petition was presented declaring the marriage is void. Learned lower appellate court has rightly holding that the defendant is entitled to the estate of Narsamma.

11. On a thorough scrutiny of evidence on record and pleadings, both the courts concurrently held that plaintiff is not the adopted son of N. Narsamma. The medical prescription, money receipt, nomination paper and unregistered adoption deed are not substitute of factum of giving and taking. The so-called adoption deed was made before the Notary Public. Rightly the courts below held that the plaintiff is not the adopted son.

12. The next question crops up as to whether the learned lower appellate court is justified in holding that the defendant is entitled to the estate of Narsamma, since there is no decree declaring the marriage void once it held that K. Simadri married to N. Narsamma for the second time during subsistence of the marriage.

13. In *Smt. Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and another,* AIR 1988 SC 644, the apex Court held:

> "xxx xxx xxx
>
> Clause (i) of S.5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. It was urged on behalf of the appellant that a marriage should not be treated as void because such a marriage was earlier recognised in law and custom. A reference was made to S.12 of the Act and it was said that in any event the marriage would be voidable. There is no merit in this contention. By reason of the overriding effect of the Act as mentioned in S.4, no aid can be taken of the earlier Hindu Law or any custom or usage as a part of that Law inconsistent with any provision of the Act. So far as S.12 is concerned, it is confined to other categories of marriage and is not applicable to one solemnised in violation of S.5(i) of the Act. Sub-

section (2) of S.12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by S.11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose. The provisions of S.16, which is quoted below, also throw light on this aspect:

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

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties of the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

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

Sub-section (1), by using the words underlined above clearly implies that a void marriage can be held to be so without a prior formal declaration by a court in a proceeding. While dealing with cases covered by S.12, sub- section (2) refers to a decree of nullity as an essential condition and sub-section (3) prominently brings out the basic difference in the character of void and voidable marriages as covered respectively by Ss. 11 and 12. It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. The marriage of the appellant must, therefore, be treated as null and void from its very inception."

14. The seminal question that hinges for consideration is as to whether the word 'son' in clause (a) of sub-sec.(1) of Sec.15 of Hindu Succession Act, 1956 takes within its sweep 'step son' also ?

15. Sec.15 of the Hindu Succession Act, 1956 provides general rules of succession in the case of female Hindus. It reads thus:

"**15. General Rules of succession in the case of female Hindus**.—

(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,--

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
(b) secondly, upon the heirs of the husband;
(c) thirdly, upon the mother and father;
(d) fourthly, upon the heirs of the father; and
(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section(1),--

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter), not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or

daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

16. Sec.15(1)(a) of the Hindu Succession Act, 1956 was the subject matter of interpretation in *Lachman Singh vs. Kirpa Singh and others,* AIR 1987 SC 1616. The apex Court held:

"4.The only question which is to be determined here is whether the expression 'sons' in clause (a) of S.15(1) of the Act includes step-sons also, i.e., sons of the husband of the deceased by another wife. In order to decide it, it is necessary to refer to some of the provisions of the Act. Section 3(j) of the Act defines 'related' as related by legitimate kinship but the proviso thereto states that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another and that any word expressing relationship or denoting 9 relative shall be construed accordingly. Section 6 and section 7 of the Act respectively deal with devolution of interest in co-parcenary property and devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru and illom. Sections 8 to 13 of the Act deal with rules of succession to the property of a male Hindu dying intestate. We are concerned in this case with the rules of succession to the property of a female Hindu dying intestate. Sections 15 and 16 of the Act are material for our purpose. Ordinarily laws of succession to property follow the natural inclinations of men and women. The list of heirs in section 15(1) of the Act is enumerated having regard to the current notions about propinquity or nearness of relationship. The words 'son' and 'step-son' are not defined in the Act. According to Collins English Dictionary a 'son' means a male offspring and 'step son' means a son of one's husband or wife by a former union. Under the Act a son of a female by her first marriage will not succeed to the estate of her 'second husband' on his dying intestate. In the case of a woman it is natural that a step son, that is, the son of her husband by his another wife is a step away from the son who has come out of her own womb. But under the Act a step-son of a female dying intestate is an heir and that is so because the family headed by a male is considered as a social unit. If a step-son does not fall within the scope of the expression 'sons' in clause (a) of section 15(1)of the Act, he is sure to fall under

clause (b) thereof being an heir of the husband. The word 'sons' in clause (a) of section 15(1) of the Act includes (i) sons born out of the womb of a female by the same husband or by different husbands including illegitimate sons too in view of section 3(j) of the Act and (ii) adopted sons who are deemed to be sons for purposes of inheritance. Children of any predeceased son or adopted son also fall within the meaning of the expression 'sons'. If Parliament had felt that the word 'sons' should include 'step-sons' also it would have said so in express terms. We should remember that under the Hindu law as it stood prior to the coming into force of the Act, a step-son, i.e., a son of the husband of a female by another wife did not simultaneously succeed to the stridhana of the female on her dying intestate. In that case the son born out of her womb had precedence over a step-son. Parliament would have made express provision in the Act if it intended that there should be such a radical departure from the past. We are of the view that the word 'sons' in clause (a) of section 15(1) of the Act does not include 'step-sons' and that step-sons fall in the category of the heirs of the husband referred to in clause (b) thereof."

xxx xxx xxx

6. ……The words 'sons and daughters ..... and the husband' in clause (a) of section 15(1) only mean 'sons and daughters ..... and the husband' of the deceased. They cannot be 'sons and daughters ..... and the husband' of any body else. All relatives named in the different clauses in sub-section (1) of section 15 of the Act are those who are related to the deceased in the manner specified therein. They are sons, daughters, husband, heirs of the husband, mother and father, heirs of the father and heirs of the mother of the deceased. The use of the words 'of the deceased' following 'son or daughter' in clauses (a) and (b) of sub-section (2) of section 15 of the Act makes no difference. The words 'son or daughter of the deceased (including the children of any predeceased son or daughter)' in clauses (a) and (b) of section 15(2) of the Act refer to the entire body of heirs failing under clause(a) of section 15(1) of the Act except the husband. What clauses (a) and (b) of sub-section (2) of section 15 of the Act do is that they make a distinction between devolution of the property inherited by a female Hindu dying intestate from her father or mother on the one hand and the property inherited by her from her husband

and from her father-in-law on the other. In the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter), in a case failing under clause (a) of section 15(2) of the Act the property devolves upon the heirs of the father of the deceased and in a case falling under clause(b) of section 15(2) of the Act the property devolves upon the heirs of the husband of the deceased."

xxx xxx xxx

Is it just and proper to construe that under clause (a) of section 15(1) of the Act her stepsons and step-daughters, i.e., children of the husband by another wife will be entitled to a share along with her own children when the Act does not expressly says so? We do not think that the view expressed by the High Court of Allahabad represents the true intent of the law. When once a property becomes the absolute property of a female Hindu it shall devolve first on her children (including children of the' predeceased son and daughter) as provided in section 15(1)(a) of the Act and then on other heirs subject only to the limited change introduced in section 15(2) of the Act. The step-sons or step-daughters will come in as heirs only under clause (b) of section 15(1) or under clause (b) of section 15(2) of the Act. We do not, therefore, agree with the reasons given by the Allahabad High Court in support of its decision. We disagree with this decision."

17. In the result, the judgment of the learned lower appellate court in T.A. No.37/99 is confirmed; and that of T.A. No.38/99 is set aside. Consequently, the suit is dismissed. The appeal is allowed to the extent indicated above. No costs.

Appeal allowed.

2017 (II) ILR - CUT-1332

DR. B.R. SARANGI, J.

O.J.C. NO. 15152 OF 2001

TATA REFRACTORIES EMPLOYEES CO-OPERATIVE SOCIETY LTD. ……..Petitioner

.Vrs.

ASST. PROVIDENT FUND COMMISSIONER(C)& ORS. …….Opp.Parties

EMPLOYEES PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952 – S. 16(1)(a)

Whether the E.P.F.& M.P. Act, 1952 shall not apply to the petitioner-Society and the society will not be liable to pay E.P.F. dues for its employees ?

As the petitioner-society is registered under the Co-operative Societies Act, employed less than 50 persons and is working without the aid of power, the Act, 1952 does not apply to it and as such the Society is not liable to pay the EPF dues for the employees engaged by it – Moreover, mere consumption of electricity for the purpose of light, fan and the refrigerator to chill cold drinks etc. do not indicate that the establishment runs with the aid of power – Held, the impugned order demanding payment of provident fund dues is quashed.

(Para 13)

Case Laws Referred to :-

1. 2009 (Sup.II)OLR-447 : Cuttack Development Authority -V- Regional Provident Fund Commissioner
2. 2012 (135) FLR 686 : Orissa State Co-operative Union Ltd. -V- Regional Provident Commissioner
3. (2005) 2 GLR 1592 : Mansa Nagrik Sahakari Bank Ltd. -V- Regional Provident Fund

For Petitioner : Mr. A.K.Parija, Sr. Adv., M/s.S.P.Sarangi, B.C.Mohanty, P.P.Mohanty & V.Mohapatra

For Opp.Parties : Mr. P.K.Parhi, Central Govt. Counsel

Date of hearing : 24.11.2017
Date of judgment : 08.12.2017

JUDGMENT

Dr. B.R. SARANGI,J.

Tata Refractories Employees Co-operative Society Limited situated at Belpahar in the district of Jharsuguda, has filed this application challenging

order dated 30.10.2001 passed by the Assistant Provident Fund Commissioner (C), Sub-Regional Office, Rourkela-opposite party no.1 under Section 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "EPF & MP Act, 1952") directing the petitioner to pay a sum of Rs.3,83,951/- as provident fund dues towards (i) the provident fund contribution, (ii) the family pension contribution/EPS' 95 contribution, (iii) the administrative charges, (iv) the employees deposit linked insurance contribution, (v) the employees deposit linked insurance administrative charges for the period from 11/97 to 9/2001, and a sum of Rs.83,198/- towards interest for the period up to 17.10.2001 @ 12% per annum under Section 7-Q of the Act.

2. The factual matrix of the case is that Tata Refractories Employees Co-operative Society Limited is a society registered under the Orissa Co-operative Societies Act, 1962. The petitioner society is engaged in sale and purchase of groceries, stationery, clothes, Liquefied Petroleum Gas (LPG), etc. The employees of M/s. Tata Refractories are the customers of the petitioner society. The petitioner society is registered under the Orissa Sales Tax Act, 1947, as well as the Central Sales Tax Act, 1960, and has engaged 21 persons to look after its day to day business. On 24.07.2001, the Assistant Provident Fund Commissioner-opposite party no.1 wrote a letter to the petitioner society stating that the petitioner society is covered under the purview of the EPF & MP Act, 1952 and is directed to deposit the provident fund dues. In response thereto, the petitioner society replied on 18.08.2001 stating inter alia that in view of the provisions contained under Section 16(1) of the EPF & MP Act, 1952, a co-operative society is not covered under the said Act, if it is employing less than fifty persons and is running without the aid of power. It was further stated that the petitioner society, having registered under the Orissa Co-operative Societies Act, 1962 and engaged 21 persons (which is less than 50 persons) and not operated any power driven equipment, is exempted from the provisions of the EPF & MP Act, 1952. On receipt of the same, opposite party no.1 issued summons on 31.08.2001 to the Secretary of the petitioner society under Section 7-A of the EPF & MP Act, 1952 requiring to appear in person or through an authorized representative on 24.09.2001 to adduce evidence and to produce the documents for conducting enquiry and determining the amount due from 11/97 onwards. In compliance of the same, the Secretary of the petitioner society appeared before opposite party no.1 on 24.09.2001, but could not be examined and the matter was adjourned to 04.10.2001. On that date, the matter was again adjourned to

17.10.2001, when the Secretary appeared before opposite party no.1 and reiterated the stands, as were taken in the reply. But opposite party no.1, without appreciating the stands taken by the petitioner and examining the fact in proper perspective, passed the impugned order dated 30.10.2001, hence this application.

3. Mr. V. Mohapatra, learned counsel appearing on behalf of Mr. S.P. Sarangi, learned counsel for the petitioner contended that in view of the provisions contained under Section 16(1)(a) of the EPF & MP Act, 1952, the petitioner society does not come within of purview of the said Act and, as such, opposite party no.1 has no jurisdiction to pass the order impugned, consequentially seeks for quashing of the same. In support of his contention he has relied upon the judgment in ***Cuttack Development Authority v. Regional Provident Fund Commissioner,*** 2009 (Supp.II) OLR-447 and ***Orissa State Co-operative Union Ltd. v. Regional Provident Fund Commissioner,*** 2012 (135) FLR 686.

4. Mr. P.K. Parhi, learned counsel for opposite party no.1, while justifying the impugned order, contended that the petitioner establishment is squarely covered under the provisions of the EPF & MP Act, 1952 and, as such, is liable to pay the demand raised. It is further contended that the petitioner society has installed refrigerators in canteen and in its retail outlets, such as medicine store and cold-drink shops, besides other electrical appliances/gadgets that are required to run such business establishment including fans and lights. As such, it can be safely construed that the establishment is running with the aid of power and, therefore, liable to pay the provident fund as per the provisions contained under EPF & MP Act, 1952. It is further contended that the order passed under Sections 7-A and 7-Q is appealable and, instead of doing so, the petitioner society should not have approached this Court invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. Therefore, the writ petition is liable to be dismissed in view of availability of alternative remedy. To substantiate his contention, he has relied upon the judgment in ***Mansa Nagrik Sahakari Bank Ltd. v. Regional Provident Fund,*** (2005) 2 GLR 1592.

5. Having heard Mr. V. Mohapatra, learned counsel for the petitioner and Mr. P.K. Parhi, learned counsel for opposite party no.1 and pleadings between the parties having been exchanged, with the consent of the learned

counsel for the parties, this petition is being disposed of finally at the stage of admission.

6. In view of the pleaded facts and rival submissions made by learned counsel for the parties, the piquant question that arises for consideration is whether the petitioner society comes within the purview of the provisions of EPF & MP Act, 1952 and if so whether it is entitled to pay the EPF dues for the employees engaged in the petitioner society.

7. For just and proper adjudication of the case, it is necessary to refer to the provisions of Section 16(1)(a) of the EPF & MP Act, 1952, which read thus:

> *"16.* ***Act to apply to certain establishments*** *– (1)* ***This Act shall not apply-*** *(a) to any establishment registered under the Co-operative Societies Act, 1912 (2 of 1912), under any other law for the time being in force in any State relating to co-operative societies, employing less than fifty persons and working without the aid of power"*

In order to appreciate the aforementioned provisions, it is also necessary to refer to clauses (b) and (c) of the said sub-section which exempt establishments set up by Central/State Government or under Acts of Parliament or State Legislature, provided the employees of such Government/statutory establishment are entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits. While Section 17 confers power on the appropriate Government to grant exemption to an establishment with or without conditions if the Rules for such contributions to the Provident Fund and the benefits in the nature of Provident Fund, Pension or Gratuity are not less favourable to employees of such establishments than the rates of provident fund/benefits provided under the Act, the only other establishment which is entitled to exemption as a matter of right under the provisions of the Act is an establishment which is a co-operative society employing less than 50 persons and working without the aid of power as provided in clause (a) of Section 16(1).

8. The analysis of the above provision clearly indicates (1) an establishment must be registered under the Co-operative Societies Act; (2) have employed less than 50 persons; and (3) working without the aid of power. If all these three conditions are satisfied on the materials available on record, then it is to be construed that the EPF & MP Act, 1952 will not be

applicable and, consequentially, the authority will have no jurisdiction to pass an order for payment of any provident fund amount as demanded by the impugned order in Annexure-5.

9. The fact, that the petitioner society has been registered under the Orissa Co-operative Societies Act, 1962 and that it has engaged less than 50 persons, is not disputed. But it is only to be seen whether the petitioner society works with or without the aid of power. As per the materials available on record, the petitioner society is engaged in the sale and purchase of groceries, stationery, clothes, LPG and the employees of M/s. Tata Refractories are its customers. The said society is also registered under the Orissa Sales Tax Act, 1947 and the Central Sales Tax Act, 1960. Merely because some refrigerators have been installed to chill the cold drinks, it cannot be construed that the petitioner society has been running with the aid of power.

10. In dictionary the word "aid" has been defined as to support, help or assist. So installation of refrigerator at a place, where sale and purchase of articles like grocery, stationery, clothes, LPG etc, are undertaken, cannot be said to be running with the aid of power. Opposite party no.1, in its impugned order, has come to a finding that use of electricity for light, fan and refrigerator comes within the meaning of expression "aid of power" and, therefore, the provisions of the EPF & MP Act, 1952 are applicable, for which the petitioner society is not exempted in view of the provisions under Section 16(1) (a) of the EPF & MP Act, 1952. Such finding of opposite party no.1 is erroneous and thoroughly misconceived, in view of the fact that mere consumption of electricity for the purpose of light, fan and refrigerator cannot be construed that the establishment runs with the aid of power.

The further contention raised that the establishment in question has engaged more than 20 employees and thus does not come under the purview of Section 16(1)(a) of the Act, is also cannot sustain in the eye of law in view of the fact that the Commissioner has lost sight of the fact that the establishment is a society registered under Orissa Co-operative Societies Act, 1962 and if it has engaged less than 50 persons then it is exempted under Section 16(1)(a) of the EPF & MP Act, 1952. In view of such position, the order so passed by opposite party no.1 is without jurisdiction. Therefore, this Court is of the view that the petitioner should not be relegated to alternate forum when the authority has no jurisdiction to pass the order impugned.

11. In **Orissa State Co-operative Union Ltd.** (supra), this Court taking into consideration the ratio decided in **Cuttack Development Authority** (supra) held that the petitioner-Orissa State Co-operative Union Ltd. is exempted from the application of the provisions of clause (b) of sub-section (1) of Section 16 of the EPF & MP Act, 1952.

12. So far as applicability of the Division Bench judgment in **Mansa Nagrik Sahakari Bank Ltd.** (supra) is concerned, it has been decided on its own facts and circumstances which are not akin to the case at hand and, as such, the same is not applicable to the present context.

13. In view of legal and factual discussions made above, this Court is of the considered view that the impugned order dated 30.10.2001 in Annexure-5 passed by the Asst. Provident Fund Commissioner under Section 7-A of the EPF & MP Act, 1952 cannot sustain in the eye of law being without jurisdiction. Furthermore, the provisions contained under Section 16(1)(a) of the EPF & MP Act, 1952 being squarely applicable to the petitioner society, it is exempted from payment of any provident fund dues. As a result therefore, the order so passed in Annexure-5 dated 30.10.2001 is liable to be quashed and is accordingly quashed.

14. The writ application is accordingly allowed. No order as to cost.

Writ application allowed.

2017 (II) ILR - CUT-1337

DR. B.R. SARANGI, J.

W.P.(C) NO. 5496 OF 2009

STATE OF ORISSA .....Petitioner

.Vrs.

QUAZI ALI AHMED .....Opp. Party

ODISHA FOREST ACT, 1972 – S. 56

Whether the learned Ad.hoc Addl. District Judge has got jurisdiction to modify the order of confiscation of the vehicle and substitute the same by imposing penalty ? Held, No.

Since section 56 of the Odisha Forest Act does not contemplate for imposition of fine in lieu of confiscation, the impugned order passed by the Ad.hoc. Addl. District Judge. Balasore is quashed and the order of confiscation Dt. 24.01.2008 passed by the Authorised Officer is restored. (Paras 6 to 14)

Case Laws Referred to :-

1. AIR 1990 SC 1747 : Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests.
2. AIR 1966 SC 1678 : Shyam Kishori Devi v. Patna Municipal Corpn.
3. (1984) 2 SCC 500 : A.R. Antulay v. Ramdas Sriniwas Nayak.
4. (1986) 4 SCC 746 : State of Kerala v. Mathai Verghese.
5. AIR 1992 SC 96 : Union of India v. Deoki Nandan Aggarwal.
6. AIR 2005 SC 294 : State of Jharkhand v. Govind Singh.
7. AIR 1936 PC 253 : Nazir Ahmad v. King Emperor.
8. AIR 1964 SC 358 : State of Uttar Pradesh v. Singhara Singh. Dhananjay
9. AIR 2001 SC 1512 : Reddy v. State of Karnataka
10. AIR 2008 SC 1921: Gujrat Urja Vikas Nigam Ltd. v. Essar Power Ltd. and Ram Deen.
11. (2009) 6 SCC 735 : Maurya v. State of U.P.

For Petitioner : Mr. P.K.Muduli, A.G.A.

For Opp. Party : M/s.S.K.Nayak-2, B.K.Rout, S.R.Ahemad & S.K.Nayak

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Date of Hearing : 18.10.2017
Date of Judgment : 27.10.2017

JUDGMENT

DR. B.R. SARANGI, J.

This is a writ petition filed by the State of Orissa through its functionary assailing the legality, propriety and correctness of the judgment dated 13.01.2009 passed by the learned Ad hoc Additional District Judge, Balasore in FAO No. 21/34 of 2008 modifying the order of confiscation dated 24.01.2008 passed by the Authorized Officer-cum-Divisional Forest Officer, Bhadrak Wildlife Division, Chandabali in O.R. Case No. 18-B of 2006-07.

2. The factual matrix of the case, in a nutshell, is that on receiving information from reliable source regarding transportation of teak logs in a mini truck, the Range Officer, Bhadrak (Wild Life) on 08.03.2007 proceeded

to Bagurai Chhak with Forester, Bhadrak and P. Sethi, Forest Guard, Bhandaripokhari and watched the movement. At about 11 P.M., a mini truck bearing registration no.OSB-5259 proceeding towards Bhadrak was detained and on search it was found to be loaded with 7 pieces of teak logs. On being asked, the driver of the vehicle could not produce any valid permit/transit pass in support of such transportation. As a result, the vehicle (mini truck) along with the timbers was seized and O.R. Case No.18-B of 2006-2007 was registered for violation of Rules-4, 12 and 14 of the Orissa Timber and Other Forest Produce Transit Rules, 1980. The seized forest produce was produced before the Authorized Officer-cum-Divisional Forest Officer, Bhadrak Wild Life Division, Chandbali for initiation of confiscation proceeding under Section 56 of Orissa Forest Act, 1972. Thereafter, the Authorized Officer, by following statutory formalities, proceeded with the enquiry and after going through the oral and documentary evidence available on record passed order dated 24.01.2008 confiscating the mini truck bearing registration No.OSB-5259 along with teak timber volume 27.00 Cft. to the Government. Against the said order of the Authorized Officer, the opposite party filed appeal before the learned Ad hoc Additional District Judge, Balasore, which was registered as FAO No.21/34 of 2008. The learned Ad hoc Additional District Judge, Balasore, by order dated 13.01.2009, while holding that the forest offence was committed, allowed the appeal in part and, while confirming the confiscation of the seized forest produce, modified the order of confiscation of the vehicle and substituted the same by imposing penalty of Rs.20,000/- (rupees twenty thousand) in default the opposite party would undergo simple imprisonment for three months. It was also directed that in case the penalty was paid and appeal was not preferred, the seized motor vehicle which has been confiscated under Section-56 of the Forest Act, would be released in favour of the opposite party.

3. Mr. P.K. Muduli, learned Additional Government Advocated contended that Section-56 of the Orissa Forest Act, 1972 does not contemplate for imposition of fine in lieu of confiscation. Consequentially, the direction given by the learned Ad hoc Additional District Judge, Balasore for imposition of penalty of Rs.20,000/- (rupees twenty thousand) in lieu of confiscation of vehicle and for release of the same is absolutely misconceived. More so, if Section-56 of the Orissa Forest Act, 1972 does not contemplate the provision for imposing penalty, the impugned order so passed by the learned Ad hoc Additional District Judge, Balasore in appeal is without jurisdiction and, as such, the same cannot sustain in the eye of law.

4. Although Mr. S.K. Nayak-2, learned counsel along with his associates entered appearance for the opposite party, none was present at the time of hearing. Even though the matter was initially passed over, on subsequent revised calls no one also appeared on behalf of the opposite party. Therefore, keeping in view that the matter relates to the year 2009, this Court disposed of the same finally on perusal of the records and upon hearing learned counsel for the petitioner.

5. On the basis of the factual matrix of the case, as indicated above, the Authorized Officer-cum-Divisional Forest Officer, Bhadrak Wildlife Division, Chandbali on 24.01.2008 passed the following order:

> *"That the mini truck bearig Regd. No.OSB-5259 along with teak timber volume to 27.00 cft. are confiscated to Govt. The seized produce be disposed off after the appeal period is over."*

Against the said order dated 24.01.2008, the opposite party preferred appeal before the learned Ad hoc Additional District Judge in FAO No.21/34 of 2008, which has been disposed of vide judgment and order dated 13.01.2009. The operative portion of the said order reads as under:

> *"7. Having considered in the manner mentioned above more so the unchallenged evidence of Forest officials, I am inclined to hold that the appellant's mini truck in question was used for commission of the Forest offence and he had failed to take sufficient and substantial precautionary measures against use of his vehicle for commission of such Forest offence. Therefore, he was liable for the commission of Forest offence and rightly the Authorised Officer so held in his impugned order.*
>
> *8. As regards confiscation, I consider the submission made from the side of the appellant that the appellant was poor, unemployed young man who for earning his livelihood, purchased the truck in question by incurring loan from Orissa State Financial corporation. The confiscation would adversely effect him and his family livelihood. Considering the value of the Forest produce being carried and magnitude of the adverse impact that would be made on the bread and butter of the appellant's family, I find when the Authorised Officer had discretion to impose penalty instead of confiscating the vehicle, it would be inconsistent with the existing facts and circumstances to substitute the order of confiscation by imposition of*

penalty to subserve the better and greater ends of justice. Hence it is ordered:-

O R D E R

The appeal is partly allowed confirming the confiscation of the seized Forest produce and modifying the order of confiscation of the vehicle and substituting the same by imposing penalty of Rs.20,000/- (Rupees twenty thousand) only on the appellant. In default of payment of Rs.20,000/-, he shall undergo simple imprisonment for three months, in case the penalty was paid and appeal was not preferred, in that case the seized motor vehicle is directed to be released in favour of the appellant."

6. In view of the aforesaid, it is to be examined whether the learned Ad hoc Additional District Judge, Balasore has got jurisdiction to modify the order of confiscation of the vehicle and substitute the same by imposing penalty.

7. For the above purpose, it is necessary, at the outset, to refer to the provisions of Section 56 of the Orissa Forest Act, 1972, which reads thus:

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

(2) Every officer seizing any property under this Section shall place on such property a mark indicating that the same has been so seized and shall, as soon as may be, except where the offender agrees in writing to get the offence compounded [under Section 72] [either produce the property seized before an officer not below the rank of an Assistant Conservator of Forests authorized by the State Government in this behalf by notification (hereinafter referred to as the authorized officer') or] make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made:

Provided that when the forest produce with respect to which such offence is believed to have been committed is the property of Government and the offender is unknown, it shall be sufficient if the

officer make, as soon as may be, a report of the circumstances to his official superior and the Divisional forest Officer.

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

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

(a) a notice in writing informing him of the grounds on which it is proposed to confiscate such property;
(b) an opportunity of making a representation in writing within such reasonable times as may be specified in the notice against the grounds for confiscation; and

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

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

(2-d) Any Forest Officer not below the rank of a Conservator of Forests empowered by the Government in this behalf by notification, may, within thirty days from the date of the order of confiscation by the authorized officer under Sub-section (2- a) either suo motu or on application, call for and examine the records of the case and may make such inquiry or cause such inquiry to be made and pass such order as he may think fit:

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

> *(2-e) Any person aggrieved by an order passed under Sub-section (2-a) or Subsection (2-d) may, within thirty days from the date of communication to him of such order, appeal to the District judge having Jurisdiction over the area in which the property has been seized, and the District Judge shall, after giving an opportunity to the parties to be heard, pass such order as he may think fit and the order of the District Judge so passed shall be final.*
>
> *(3) The property seized under this section shall be kept in the custody of a Forest Officer or with any third party, until the compensation for compounding the offence is paid or until an order of the Magistrate directing its disposal is received.*
>
> *Provided that the seized property shall not be released during pendency of the confiscation proceeding or trial even on the application of the owner of the property for such release."*

The above mentioned provision nowhere prescribes imposition of penalty in lieu of confiscation of the vehicle seized in connection with forest offence.

8. In ***Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests***, AIR 1990 SC 1747; ***Shyam Kishori Devi v. Patna Municipal Corpn***., AIR 1966 SC 1678; ***A.R. Antulay v. Ramdas Sriniwas Nayak***, (1984) 2 SCC 500 and subsequently in many other cases the apex Court held that the "language" is clear, the intention of the Legislature is to be gathered from the language used. What is to be borne in mind is as to what has been said in the statute as also what has not been said. A construction which requires, for its support, addition or substitution of words, has to be avoided, unless it is covered by the rule of exception, including that of necessity.

9. In ***State of Kerala v. Mathai Verghese***, (1986) 4 SCC 746; and ***Union of India v. Deoki Nandan Aggarwal***, AIR 1992 SC 96, the apex Court held that the court cannot reframe the legislation as it has no power to legislate.

10. In ***J.P. Bansal v. State of Rajasthan***, (2003) 5 SCC 134=AIR 2003 SC 1405, the apex Court held as follows:

> *"When the words of a Statute are clear, plain or unambiguous, i.e. they are reasonably susceptible to only one meaning, the Courts are bound to give effect to that meaning irrespective of consequences. The intention of the Legislature is primarily to be gathered from the language used which means that attention should be paid to what has been said as also to what has not been said."*

11. While dealing with pari materia of the provisions of Section 52(3) of the Indian Forest Act, 1927 in the case of ***State of Jharkhand v. Govind Singh***, AIR 2005 SC 294, the apex Court categorically held as follows:

> *"Reading into S.52(3) the power to direct release of vehicle alleged to be involved in confiscation, was not proper. It is further held that the finding by the High Court that though the power to levy fine in lieu of confiscation is not there under S.52(3), same has to be read into the statute to fully effectuate the legislative intent, it was a case of casus omissus, held, was against the settled principles relating to statutory interpretation. The legislative casus omissus cannot be supplied by judicial interpretative process."*

12. Applying the above principles to the present context, if Section 56 of the Orissa Forest Act does not contemplate for imposition of fine in lieu of confiscation, learned Ad hoc Additional District Judge, Balasore could not have modified the same contrary to the provisions of law.

13. The Privy Council in ***Nazir Ahmad v. King Emperor***, AIR 1936 PC 253 held as under:

> *"Where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."*

The same view holds good till date and the apex Court referred the said principles in a catena of decisions, namely, ***State of Uttar Pradesh v. Singhara Singh***, AIR 1964 SC 358; ***Dhananjay Reddy v. State of Karnataka***, AIR 2001 SC 1512; ***Gujrat Urja Vikas Nigam Ltd. v. Essar Power Ltd***, AIR 2008 SC 1921; and ***Ram Deen Maurya v. State of U.P.,*** (2009) 6 SCC 735.

14. For the reasons stated above, this Court is of the considered view that the order dated 13.01.2009 passed by learned Ad hoc Additional District Judge, Balasore cannot sustain in the eye of law and is liable to be quashed. Accordingly, the impugned order dated 13.01.2009 passed by learned Ad hoc Additional District Judge, Balasore is quashed and consequentially the order of confiscation dated 24.01.2008 passed by the Authorized Officer is restored.

15. The writ petition is accordingly allowed. No order as to cost.

Writ Petition allowed.

2017 (II) ILR - CUT-1345

BISWANATH RATH, J.

W.P.(C) NO. 2398 OF 2005

KANCHANMALA PANDA & ORS. .....Petitioners

.Vrs.

MEMBER, BOARD OF REVENUE & ORS. .....Opp. Parties

ODISHA LAND REFORMS ACT, 1960 – S. 37

Definition of "Family" – Land gifted in favour of married daughter at the time of her marriage on 06.05.1962 (Prior to the appointed date i.e. 26.09.1970) is to be excluded while computing the ceiling surplus land of the family of her father – Learned Member, Board of Revenue failed to appreciate it – Held, the impugned order passed by the learned Member, Board of Revenue is set aside. (Para 7)

Case Law Referred to :-

1. 1988 (II) OLR 410 : Smt.Anusuya Rath & Ors.-V- State of Orissa & Anr.

For Petitioners : M/s. S.K.Dash, S.Dash, S.K.Mishra, Miss A.Dhalasamanta, K.K.Das & S.Patra

For Opp. Party : Mr. A.K.Mishra, Addl. Govt. Adv.

Date of hearing : 04.12.2017
Date of Judgment : 12.12.2017

JUDGMENT

BISWANATH RATH, J.

Filing the writ petition the petitioners have assailed the impugned order vide Annexure-3 passed by the Member, Board of Revenue, Orissa, Cuttack in exercise of power under Section 59(2) of the Orissa Land Reforms Act, 1960 (for short "the Act").

2. Short background involved in the case is a draft statement prepared following the provisions of the Act showing Ac.81.02 decimals of land in village- Charbahal and Goudchhendia besides Ac.2.37 decimals of homestead and Munda Adi lands in the above two villages. The statement was published on 06.02.1975 showing 13.71 standard acres or Ac.51.02

decimals as surplus while 30 acres equivalent to 10 standard acres to be retained by the Landlord, predecessor-in-interest of this petitioner's family, Sri Radhakrishna Panda filed objection on 06.03.1975 stating, inter-alia, that three sons were married and separated, as such, were entitled to separate shares. On enquiry, it revealed that three sons of the landholder were married, major and were in separate cultivating possession of their respective lands prior to the appointed date (26.09.1970). It was further pleaded that at the relevant time total land came to Ac.139.91 decimals including 2 acres gifted to Charbahal school, Ac.54.57 decimals purchased in the name of sons, Ac.1.95 decimals received from his brother by way of partition and Ac.14.44 decimals of lands were gifted to the married daughter out of the shares of the sons after partition. O.L.R. Case No.173 of 1975 was registered. The Revenue Officer, opposite party no.3 on scrutiny of documents and based on local enquiry report, came to a conclusion that there is no ceiling surplus land and, accordingly, dropped the case by virtue of his order dated 02.11.1975. Opposite party no.2, the Collector moved the opposite party no.1 under Section 59(2) of the Act. As a consequence, O.L.R Revision No.69 of 1983 got dismissed directing to examine; (i) the age of the second and third sons mentioned to be 22 and 20 years in the objection petition filed on 06.03.1975 and they were not major on 26.09.1970; (ii) Revenue officer did not make any enquiry; (iii) there is a registered Sale Deed of 1972 where the age of second son is noted as 15 years. Therefore, the second and third son were minor on the appointed date; (iv) the objection of the landholder did not state that any son was married; (v) there was no documentary evidence of partition and gift to the daughter; (vi) any land given to the daughter cannot be excluded from the father's holding considering that there was no mention that the transfer was made before or after the appointed date; (vii) lands acquired in the name of the sons after the appointed date cannot be excluded as this has to be treated as a part of the properties of the landholder. Considering all these above the learned Member, Board of Revenue, Orissa, Cuttack vide Annexure-1 on disposal of the revision setting aside the order of the Revenue Officer, remanded the case for fresh enquiry. Based on the remand order, opposite party no.3 again disposed of O.L.R. Case No.173 of 1975 after holding a fresh enquiry and observing that the land gifted by the landowner to his daughter at the time of her marriage on 06.05.1962 prior to the appointed date has to be excluded with further observation that the family of Kanchanamala including self, one unmarried son and three married daughters entitled to retain 10 standard acres of land and she was holding less than 10 standard acres, family of Bimbadhar Panda consisting of 4 members

including self, wife and two sons is entitled to 10 standard acres and they were holding less than 10 standard acres. Family of Pramod Kumar Panda consisting of 4 members including himself, wife and two daughters holds less than 10 standard acres of land. Family of Aditya Kumar Panda consisting of 4 members including self, wife and two sons is also entitled to retain 10 standard acres of land and the balance 0.63 standard acres of land equivalent to Ac.1.89 decimals of Class-III lands vest with the Government as clearly borne from Annexure-2. Facts revealed, opposite party no.2 once again moved the Member, Board of Revenue, Orissa, Cuttack under Section 59(2) of the Act requiring revision of the order under Annexure-2. Based on the reference made by the Collector under Section 59(2) for initiation of a proceeding under Section 59(2) of the Act, OLR Case No.5 of 1999 was registered and decided by the learned Member, Board of Revenue. In the meantime, Radhakrushna Panda, the original landowner breathed his last on 25.06.1977. Thus, the matter was decided only hearing the L.Rs. of Radhakrushna Panda. By order dated 23.05.2003, the learned Member, Board of Revenue disposed of the case setting aside the order under Annexure-2 and again remanding the matter to the original authority for fresh disposal of O.L.R. Case No.173 of 1975.

3. Challenging the remand order, Shri Dash, learned counsel appearing for the petitioners contended that the land gifted in favour of the married daughter being taken place prior to the appointed date is to be excluded while making the computation of the ceiling surplus land and this fact having been concluded it was no more open to the opposite party no.3 to take a different view. Shri Dash, learned counsel also submitted that while remanding the case to the opposite party no.3 under Annexure-1, the opposite party no.1 not only directed the Revenue Officer to make an enquiry regarding the date of marriage of the married daughter involving the gift deed but also remanded the case for fresh enquiry and disposal of the matter in accordance with law and further taking into account the various issues involved therein. Thus, it becomes clear that the opposite party no.1 had not concluded any of the issues involving O.L.R Revision Case No.69 of 1983. It is under the circumstance, Shri Dash, learned counsel appearing for the petitioners submitted that the order of remand becomes bad and ought to be interfered with and set-aside. Taking reliance of the Full Bench decision of this Court in the case of ***Smt. Anusuya Rath and others vrs. State of Orissa and another,*** reported in 1988 (II) OLR 410, submitted that for the decision therein there was no occasion for the Member, Board of Revenue for directing to consider

the aspect of property held by a married daughter admittedly assigned to the appointed date and contended that this property should have been excluded requiring no further enquiry or adjudication of the matter.

4. Shri A.K. Mishra, learned Additional Government Advocate appearing for the opposite parties though did not raise any objection on the point of law being raised by the learned counsel appearing for the petitioners, but taking this Court to the decision of the learned Member, Board of Revenue, submitted that for the observations therein, there appears, there is no infirmity in the impugned order requiring any interference by this Court.

5. Considering the rival contentions of the parties and on perusal of the order involving the proceeding under Section 59(2) of the Act appearing at Annexure-3, this Court, on consideration of the fact material available, observes that the gifted land measuring Ac.14.14 decimals should not have clubbed with the total land of the ceiling holder while disposing of the case. It is only on the premises that such property cannot be excluded from the ceiling proceeding, the learned Member, Board of Revenue remanded the matter for fresh adjudication of the case by the Revenue Officer involved OLR Case No.173 of 1975. Finding that the sole grievance of the petitioner for exclusion of the property gifted in favour of the married daughter prior to the appointed date from the ceiling surplus land, this Court on whole examination of the matter, finds there is no dispute that the daughter had not only married prior to the appointed date, the marriage taking place on 06.05.1962, but the gift in favour of such married daughter had also been taken place at the time of her marriage definitely much prior to the appointed date. It appears, the marriage as well as the gift having taken place prior to the appointed date, said property was no more available to be considered while taking of the case of the ceiling surplus land of the family.

6. Taking into consideration of a Full Bench decision of this Court in the case of ***Smt. Anusuya Rath (supra),*** this Court taking a similar situation in paragraphs-14 and 16 of the said decision held as follows :-

> "14. The policy decision taken in the Chief Ministers' Conference, 1973, as indicated earlier, would also provide a clue for solving the problem as to what were the circumstances taken into consideration for defining 'family', namely, the rural set up in the region. Obviously, taking that as an indication to assist in solving the problem, I am inclined to come to the conclusion that the concept of 'family' which was artificially defined in the Statute has deliberately

omitted to speak anything regarding a married daughter. The definition as such does not, in my view, cause an obstruction or occasion any conflict for taking such a view. Even applying the principles underlying Article 14 of the Constitution, when the legislature specifically intended to exclude a major married son who had separated by partition before the appointed date, there would be no justification for not giving the same privilege or benefit to a married daughter who by virtue of her marriage stands at a more distant place than a separated son on partition from the joint family. A harmonious construction being the essence of the rule of interpretation, I would unhesitatingly hold that a daughter, who is already married by the appointed date, would not come under the definition of 'family'.

Once this view is taken, it must be held that both the decisions of this Court referred to earlier in paragraph-9 taking a contrary view do not lay down the correct law.

16. For the above reasons, the answer to the question posed above is given in favour of the petitioners, namely, that the properties of a daughter married prior to the appointed date cannot be aggregated with the property of the 'family' of the father."

7. For the decision of the Full Bench observing that property gifted in favour of a married daughter since held as a separate family cannot be included in the family property and, therefore, such property is no more available to be considered deciding a case of ceiling surplus land involving the original family. In these circumstances, this Court finds, there is no proper consideration of the case by the learned Member, Board of Revenue who had failed in appreciating the above legal aspect of the matter. As a result, this Court interfering in the impugned order of the learned Member, Board of Revenue vide Annexure-3 directs the ceiling surplus proceeding so far as the gift property involving the daughter gifted on the marriage of the daughter on 06.05.1962 much prior to the appointed date, i.e., 26.09.1970 will be treated to be a closed chapter and cannot be taken as a part of the ceiling surplus land

8. The writ petition succeeds with setting aside of the order under Annexure-3 and with the declaration hereinabove. In the circumstances, there shall be no order as to costs.

Writ petition allowed.

2017 (II) ILR - CUT-1350

BISWANATH RATH, J.

C.M.P. NO. 1167 OF 2017

UNITED BUILDERS .....Petitioner

.Vrs.

DIAMOND PLAZA PVT. LTD. ……..Opp. Party

CIVIL PROCEDURE CODE, 1908 – O-7, R-11

Whether consideration of an application under Order-7, Rule-11 C.P.C. can be deferred till determination of preliminary issue ?

Held, the trial Court has limited scope to the extent of considering such issue only taking into account the plaint averments and the averments available in the application under Order 7 Rule 11 C.P.C. and the Court need not wait till filing of the written statement and settlement of the issues. (Para 5)

For Petitioner : M/s. Banshidhar Baug

For Opp.Party : M/s S.K.Dash

Date of Order 13.11.2017

ORDER

BISWANATH RATH, J.

Heard Sri B.Baug, learned counsel for the petitioner and Sri S.K.Dash, learned counsel for the O.P.

2. The dispute involves non-consideration of an application under Order 7 Rule 11 of C.P.C. and deferment of said application on the premises of consideration of such application after determination of the preliminary issue under Order 14 Rule 1 is made.

3. Sri B.Baug, learned counsel for the petitioner, submitted that since the parameters of Order 7 Rule 11 of C.P.C. is to take a decision only looking to the plaint averments and the application made under Order 7 Rule 11 of C.P.C., there was no scope for the trial court to defer the hearing of the application under Order 7 Rule 11 of C.P.C. till the determination of the preliminary issue. It is under the circumstance, Sri Baug, learned counsel, submitted that the impugned order should be interfered with and set aside by giving suitable direction to the trial court.

4. Sri S.K.Dash, learned counsel for the O.P. on the other hand made a statement that the application under Order 7 Rule 11 of C.P.C. was almost heard and the matter was kept reserved for order but while passing the order, the trial court for its observation on the hearing of the parties was constrained to pass the impugned order. Taking this Court to the impugned order, Sri Dash submitted that even though the impugned order is not heavily couched disclosing the reason for deferment but form the observations, it appears, there is some reason in passing such order. Under the circumstance, Sri Dash requested this Court not to interfere with the impugned order and dismissing the C.M.P.

5. Considering the rival contentions of the parties and taking into consideration that the dispute involved herein as to whether consideration of an application under Order 7 Rule 11 of C.P.C. can be deferred till determination of preliminary issue, this Court looking to the provision contained in Order 7 Rule 11 of C.P.C. finds, the trial court taking up such matter has limited scope to the extent of considering such issue only taking into account the plaint averment and the averments available in the application under Order 7 Rule 11 of C.P.C., filing of written statement as well as settlement of the issues is immaterial at this stage.

6. For the observations made herein above, this Court finds, the impugned order is not sustainable and thus while remitting the matter back to the trial court for disposal of the application under Order 7 Rule 11 of C.P.C., this Court directs the trial court to confine the area of consideration only to the plaint averment and the application under Order 7 Rule 11 of C.P.C. are concerned. This Court also directs the trial court to take a decision on such application within a period of one month but however giving opportunity of hearing to both the parties. Both the parties are consequently directed to appear in the trial court on 22.11.2017.

7. The C.M.P. succeeds but to the extent indicated herein above.

Petition allowed.

2017 (II) ILR - CUT-1352

BISWANATH RATH, J.

W.P.(C) NO. 16102 OF 2005

PRASANNA KUMAR SWAIN ……..Petitioner

.Vrs.

DGP, C.R.P.F., NEW DELHI & ORS. ……..Opp.Parties

SERVICE LAW – Petitioner, a constable in CRPF – He was terminated from service for suppression of pendency of a criminal case in the verification form – Order confirmed by the appellate as well as Revisional authorities – Hence the writ petition.

Petitioner was selected for the job by following statutory provisions pending verification of character and antecedents – He is in the lowest rank of employment having no legal acumen to consider the consequences of such suppression – The criminal case is the outcome of a quarrel during panchayat election and did not involve allegation of any heinous offence or moral turpitude, and it was ended in acquittal – Held, the impugned orders are set aside – Direction issued to the employer to consider the case of the petitioner keeping in view his admitted suppression and impose lesser punishment with reinstatement in service. (Paras 8 to 11)

Case Law Relied on :-

1. (2016) 8 SCC 471 : Avtar Singh -V- Union of India & Ors.

For Petitioner : M/s. K.P. Mishra,S. Mohapatra, C. Mallick, T.P. Tripathy

For Opp.Parties : Mr. Anup Kumar Bose, A.S.G.

Date of hearing : 06.12. 2017

Date of Judgment : 19.12. 2017

JUDGMENT

BISWANATH RATH, J.

This writ petition has been filed challenging the impugned orders at Annexures-5, 6 and 8 involving dismissal of the petitioner and also seeking a direction to the opposite parties to reinstate the petitioner with all consequential service and monetary benefits.

2. Short background involved in the case is that the petitioner being qualified in the rigorous selection process, was appointed as a constable

under the administrative control of the Deputy Inspector General of Police, C.R.P.F., Bhubaneswar-opposite party no.3 w.e.f.19.5.2003. After his appointment, the petitioner was called upon by the opposite party no.3 to file a verification report indicating the character and conduct involving himself. Petitioner replied 'No' as against the column requiring as to whether any criminal case is pending against him or not. Finding that the petitioner has suppressed pendency of a criminal case against him, the petitioner was terminated from his service by the communication of the order dated 20.5.2004. Finding no indication of the reason of termination, the petitioner attempted to find-out the reason behind the termination and during such verification, the petitioner could able to know that there has been an allegation of suppression of a pendency of a crimination case involving him at the time of filling of necessary form. Following the C.R.P.F. Rules the petitioner preferred an appeal stating therein his innocency, but the appeal was rejected by the Inspector General of Police, E.S. Central Reserve Police Force, C.R.P.F., Kolkata-opposite party no.2. For the provisions contained therein for revision, the petitioner also preferred a revision against the appeal order dated 4.11.2004. It is alleged that the revision has been rejected mechanically.

3. Assailing the impugned order, Miss Mohapatra, learned counsel for the petitioner submitted that though a criminal case was pending at the time of filing the necessary form but for the vexatious nature of the case, the petitioner could not take the matter seriously. Learned counsel also contended that finding the F.I.R involves false allegations and the petitioner having been acquitted in the criminal case under no stretch of imagination, it can be construed, a suppression of pendency of a criminal case involving the petitioner on the date of requirement for furnishing of information had an impediment in the petitioner's getting an employment. Learned counsel also contended that for the harsh decision taking away the service of the petitioner at such age that too the termination of the petitioner taking place within a year of his joining service, there is a serious stigma attached to the petitioner's career to continue all through his life. Alleging that there has been no proper consideration of the case by the competent authority, the petitioner sought for intervention of this Court by way of this writ petition.

4. Taking this Court to some decisions of the Hon'ble Apex Court in an unreported decision in the case of ***Union of India & Ors.*** *versus* ***Sukhen Chandra Das*** *decided in Civil Appeal No.6110 of 2008* arising out of S.L.P.(C) No.23875 of 2005 and a reported decision in the case of ***Avtar***

Singh *versus* ***Union of India and others*** *as reported in* **(2016) 8 Supreme Court Cases 471** learned counsel for the petitioner submitted that for the support of the decision of the Hon'ble Apex Court to the case of the petitioner at hand, this Court should interfere with the impugned orders by setting aside the same.

5. In his opposition, learned Assistant Solicitor General for the Union of India and the other opposite parties taking this Court to the counter affidavit filed by the opposite parties contended that though there is no dispute in the selection of the petitioner as a constable bearing employment No.031497326 but following the terms and conditions of the appointment the petitioner was given posting on temporary basis subject to verification of his character and the antecedents by the District Magistrate of the District, the petitioner belongs. As a consequence, a communication was made to the District Magistrate, Puri for submission of the antecedents of the petitioner. In response to which, the District Magistrate, Puri in his confidential letter dated 12.3.2004 intimated the employer that the petitioner is an accused in Balanga P.S. Case No.14 dated 26.2.2003, in which, the charge-sheet has already been submitted against the petitioner and the matter was subjudice in the court of J.M.F.C, Puri at that relevant point of time. Finding that there is suppression of the material facts particularly involving the character and the antecedents of the employee, being fully supported with the response of the District Magistrate and following the provisions contained in Rule 5 of the Central Civil Service (Temporary Services) Rules 1965, a notice for termination of the petitioner from his services was issued vide notice no.P.VIII-8/2004-ESTT-II dated 20.5.2004. After expiry of the due period, the petitioner was terminated from his service. It is further stated that challenging the order of termination the petitioner approached this Court by filing W.P.(C) No.6120 of 2004 and the Hon'ble High Court while disposing the writ petition directed the opposite party no.2 to consider the representation of the petitioner if any, filed in accordance with law by taking a decision within the period stipulated therein. As a consequence, the petitioner filed an appeal. The case was forwarded to the competent authority for taking a decision following the provisions contained in Rule 5(2) (a) of the Central Civil Services (Temporary service) Rules, 1965. The appeal was considered and rejected being devoid of merit. Then the petitioner preferred revision. The revision was also rejected being devoid of merit. Taking this Court to the further submission of the opposite party in the counter affidavit, learned Assistant Solicitor General submitted that suppression of material facts

particularly keeping in view the discipline service, amounts to gross deficiency and negligence by an employee and there cannot be any sympathy shown involving such issue. This apart, since the petitioner was facing a criminal case and the matter was still subjudice, nothing prevented him at least in the disclosure of the criminal case. Such suppression in the discipline service are taken with all seriousness and as such, learned Assistant Solicitor General contended that even exoneration of the petitioner from criminal charges at subsequent stage is of no help to the petitioner.

It is under the circumstance, learned Assistant Solicitor General prays this Court for not interfering with the impugned orders.

6. Considering the rival contentions of the parties, this Court finds, admittedly the petitioner was a selected candidate and as such was appointed as a constable bearing employment No.031497326. There is no dispute that following the statutory provisions, the appointment has been made pending verification of the character and the antecedents of such employees in due course of time. There also remain no dispute as to the character and the antecedents of the petitioner, being verified, it has been ascertained that the petitioner had suppressed the pendency of a criminal case involving him. Further, keeping in view that the petitioner is in the lowest rank of employment, having no legal acumens or the consequences of such suppression and further since the petitioner has been acquitted from the criminal charges by virtue of dismissal of the criminal case pending against him, the question remains here to be decided is if the punishment of taking away the service of the petitioner under such circumstance is proper or not?

7. Considering the materials filed along with the writ petition, this Court finds, the petitioner was provided with an offer of appointment vide Annexure-1. The terms and conditions at clause 2 of the employment as available at Annexure-1 read as follows:

> "You are, therefore, hereby offered the post of Constable (GD) provisionally in CRPF on temporary basis subject to verification of character and Antecedents & District Magistrate of your District. The post is likely to continue indefinitely."

It also appears, as per the requirements in the terms and conditions and following the provisions contained in the Rule, the petitioner was also asked for furnishing information about his character and antecedents. There is no dispute that the petitioner marked 'No' as against such requirements, which otherwise indicates, the petitioner disclosed before the employer that

he has no criminal case pending against him. From the submission of the respective parties and for the materials available on record, this Court further finds, admittedly the petitioner was facing a criminal proceeding involving G.R. Case No.123/02 vide P.S. Case No.14/02 under Sections 436/506/34 of I.P.C. The F.I.R. was received by the Magistrate on 2.3.2002 and the G.R. Case was also registered on the file of the Assistant Sessions Judge, Nimapara. It is necessary to mention here that the petitioner got an offer of employment on 19th of May, 2003 and admittedly, by this time the criminal case involving the petitioner was pending. The G.R. Case was finally heard and dismissed acquitting the person from the offences under Sections 436/506/34 of I.P.C. by the judgment dated 17.6.2004. Therefore, there remains no doubt that there is a suppression of the information regarding pendency of a criminal case involving the petitioner. Now, the question remains here to be considered as to whether the criminal case since did not involve allegation involving moral turpitude and the criminal case since is an off suit of a quarrel during Panchayat Election and further for the criminal case having been ended with an order of acquittal, whether the harsh punishment of termination of the petitioner from service is permissible in the eye of law or not?

8. Rule 14, 15 & 16 of the Central Reserve Police Force Rules 1955 reads as follows:

> "14. **Verification** – (a) As soon as a man is enrolled, his character, antecedents, connections and age shall be verified in accordance with the procedure prescribed by the Central Government from time to time. The verification roll shall be sent to the District Magistrate or Deputy Commissioner of the District of which the recruit is a resident.
>
> (b) The verification roll shall be in CRP Form 25 and after verification shall be attached to the character and service roll of the member of the force concerned."
>
> The purpose of seeking the said information is to ascertain the character and antecedents of the candidate so as to assess his suitability for the post. Therefore, the candidate will have to answer the questions in these columns truthfully and fully and any misrepresentation or suppression or false statement therein, by itself would demonstrate a conduct or character unbefitting for a uniformed security service."
>
> "15. When an employee or a prospective employee declares in a verification form, answers to the queries relating to character and antecedents, the verification thereof lead to any of the following consequences:
>
> (a) If the declarant has answered the questions in the affirmative and furnished the details of any criminal case (wherein he was convicted or acquitted by giving benefit of doubt for want of evidence), the employer may refuse to offer him

employment (or if already employed on probation, discharge him from service), if he is found to be unfit having regard to the nature and gravity of the offence/crime in which he was involved.

(b) On the other hand, if the employer finds that the criminal case disclosed by the declarant related to offences which were technical, or of a nature that would not affect the declarant's fitness for employment, or where the declarant had been honorably acquitted and exonerated, the employer may ignore the fact that the declarant had been prosecuted in a criminal case and proceed to appoint him or continue him in employment.

(c) Where the declarant has answered the questions in the negative and on verification it is found that the answers were false, the employer may refuse to employ the declarant (or discharge him, if already employed), even if the declarant had been cleared of the charges or is acquitted. This is because when there is suppression or non-disclosure of material information bearing on his character, that itself becomes a reason for not employing the declarant.

(d) Where the attestation form or verification form does not contain proper or adequate queries requiring the declarant to disclose his involvement in any criminal proceedings, or where the candidate was unaware of initiation of criminal proceedings when he gave the declarations in the verification roll/attention form, then the candidate cannot be found fault with, for not furnishing the relevant information. But if the employer by other means (say police verification or complaints, etc.) learns about the involvement of the declarant, the employer can have recourse to courses (a) or (b) above."

16. Thus, an employee on probation can be discharged from service or a prospective employee may be refused employment:

(i) on the ground of unsatisfactory antecedents and character, disclosed from his conviction in a criminal case, or his involvement in a criminal offence (even if he was acquitted on technical grounds or by giving benefit of doubt) or other conduct (like copying in examination) or rustication or suspension or debarment from college, etc.; and

(ii) on the ground of suppression of material information or making false statement in reply to queries relating to prosecution or conviction for a criminal offence (even if he was ultimately acquitted in the criminal case).

This ground is distinct from the ground of previously antecedents and character, as it shows a current dubious conduct and absence of character at the time of making the declaration, thereby making him unsuitable for the post."

Reading of the above provisions leaves no doubt that the consequential action is desired in the case of any suppression and again depending on the gravity of the offence/crime in which one is involved and further, in the event, the employer finds that the criminal case disclosed by the declarant relating to offences, which were technical or a nature that would not affect the declarant's fitness for employment or whether the declarant had

been honorably acquitted and exonerated the employer may ignore the fact that the declarant's character had not been prosecuted in the criminal case and proceeded to appoint him or continue him in employment under the statutory provisions and further, in the event of any suppression or intimation of false information even if the declarant had cleared up the charges or he is acquitted, the employer may refuse to employ the declarant.

The word 'may' gives a discretion to the employer and for the clear provision contained in Sub-rule (b) of Rule 15 and further looking to the gravity of offence/crime in which, the petitioner was involved and further, as the criminal proceeding has been ended with an order of acquittal, this Court observes, for the nature of offence involved in the criminal proceeding even declaration of pendency of such criminal case would not have made any difference in the continuance of service of petitioner, the employer instead of terminating the employee from service, could have imposed a lesser punishment. Termination of service under this circumstance appears to be not only harsh but also disproportionate to the nature of allegation involved.

9. In deciding a case of similar nature, in the case of ***Avtar Singh*** *versus* ***Union of India and others*** as reported in **(2016) Supreme Court Cases 471** the Hon'ble Apex Court taking a series of judgments involving same issue in paragraph nos.3, 29 & 35 observed as follows:

> "3. It cannot be disputed that the whole idea of verification of character and antecedents is that the person suitable for the post in question is appointed. It is one of the important criteria which is necessary to be fulfilled before appointment is made. An incumbent should not have antecedents of such a nature which may adjudge him unsuitable for the post. Mere involvement in some petty kind of case would not render a person unsuitable for the job. Way back in the year 1983, **in *State of M.P.* v. *Ramashanker Raghuvanshi,*** where a teacher was employed in a municipal school which was taken over by the Government and who was absorbed in government service in 1972 subject to verification of antecedents and medical fitness. The termination order was passed on the basis of a report made by the Superintendent of Police to the effect that the respondent was not a fit person to be entertained in government service, as he had taken part in "RSS and Jan Sangh activities". There was no allegation of involvement in subversive activities. It was held that such activities were not likely to affect the integrity of individual's service. To hold otherwise would be to introduce "McCarthyism" into Indian which is not healthy to the philosophy of our Constitution. It was observed by this Court that most students and most young men who take part in political activities and if they do get involved in some form of agitation or the other, is it to be to their ever lasting discredit? Sometimes they feel strongly on injustice and resist. They are sometimes pushed into the forefront by elderly persons who lead and mislead them. Should all

> these young men be debarred from public employment? Is government service such a heaven that only angels should seek entry into it? This Court has laid down that the whole business of seeking police report about the political belief and association of the past political activities of a candidate for public employment is repugnant to the basic rights guaranteed by the Constitution.
>
> 29. The verification of antecedents is necessary to find out fitness of incumbent, in the process if a declarant is found to be a good moral character on due verification of antecedents, merely by suppression of involvement in trivial offence which was not pending on date of filling attestation form, whether he may be deprived of employment? There may be case of involving moral turpitude/serious offence in which employee has been acquitted but due to technical reasons or giving benefit of doubt. There may be situation when person has been convicted of an offence before filling verification form or case is pending and information regarding it has been suppressed, whether employer should wait till outcome of pending criminal case to take a decision or in case when action has been initiated there is already conclusion of criminal case resulting in conviction/acquittal as the case may be. The situation may arise for consideration of various aspects in a case where disclosure has been made truthfully of required information, then also authority is required to consider and verify fitness for appointment. Similarly in case of suppression also, if in the process of verification of information, certain information comes to notice then also employer is required to take a decision considering various aspects before holding incumbent as unfit. If on verification of antecedents a person is found fit at the same time authority has to consider effect of suppression of a fact that he was tried for trivial offence which does not render him unfit, what importance to be attached to such non-disclosure. Can there be single yardstick to deal with all kinds of cases?
>
> 35. Suppression of "material" information presupposes that what is suppressed that "matters" not every technical or trivial matter. The employer has to act on due consideration of rules/instructions, if any, in exercise of powers in order to cancel candidature or for terminating the services of employee. Though a person who has suppressed the material information cannot claim unfettered right for appointment or continuity in service but he has a right not to be dealt with arbitrarily and exercise of power has to be in reasonable manner with objectivity having due regard to facts of cases.

10. This Court has gone through the impugned orders. Taking into consideration the provisions contained in Rules 14 & 15 of the Rules (supra), the observation of this Court made hereinabove, the decision of the Hon'ble Apex Court in the above paragraphs, and for the acquittal of the petitioner and for noninvolvement of any offence touching moral turpitude/heinous offence, the order of termination was not warranted.

11. For all the above, this Court interfering with the impugned order vide Annexures-5, 6 & 8, sets aside the same but keeping in view the admitted

suppression by the petitioner, directs the employer to consider the case of the petitioner for imposition of lesser punishment with reinstatement in service. Decision as appropriate, be taken within a period of two weeks of the service of copy of this judgment by the petitioner on the competent authority.

12. The writ petition succeeds but with direction as indicated hereinabove. But however, there is no order as to cost.

Writ petition allowed.

2017 (II) ILR - CUT-1360

S. K. SAHOO, J.

CRLA NO. 271 OF 2015

AMAR @ AMARNATH NAIK ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Ss. 35, 25

Presumption as to "culpable mental state" of the accused – Burden is on him to prove it beyond reasonable doubt.

In this case, the appellant-accused had not only taken specific defence plea that the co-accused persons were forcibly carrying contraband ganja in his vehicle but also elicited answers from the prosecution witnesses that while they proceeded near the vehicle in question they noticed two persons jumped from the vehicle and the appellant was found in the driver's seat – The appellant had also proved his bonafide conduct by stopping the vehicle, without making an attempt to flee away despite sufficient opportunity – Further there is no material that the appellant had real knowledge of the contents in the bags – He was also not in exclusive or conscious possession of the contraband ganja found from the bags, rather he was compelled to carry the bags without being aware of its contents – Learned trial court convicted the appellant without properly appreciating the defence plea

– Held, the impugned judgment of conviction is not sustainable in law and the appellant is acquitted of the charge U.s. 20(b)(ii)(c) of the NDPS Act. (Paras 7,8,9)

Case Laws Referred to :-
1. (2015) 60 O.C.R. 91 : Sri Nasar Kumbhar -V- State of Odisha
2. AIR 2000 SC 821 : Abdul Rashid Ibrahim Mansuri -V- State of Gujarat

For Appellant : Mr. Sukanta Kumar Dalai
For Respondent : Mr. Priyabrata Tripathy, A.S.C

Date of Hearing : 30.11.2017
Date of Judgment: 30.11.2017

JUDGMENT

S. K. SAHOO, J.

The appellant Amar @ Amarnath Naik faced trial in the Court of learned Sessions Judge -cum- Judge, Special Court, Sambalpur in T.R. No.10 of 2010 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 29.04.2010 at about 5.25 a.m. near Birsa Munda Chowk, Ainthapali, he was found transporting 53 kgs. 950 grams of ganja which is of commercial quantity in contravention of the provisions of the N.D.P.S. Act.

The learned trial Court vide impugned judgment and order dated 17.04.2015 found the appellant guilty of the offence charged and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh), in default, to undergo rigorous imprisonment for one year.

2. The prosecution case, as per the first information report lodged by P.W.10 Alakananda Sahu, S.I. of Police, Ainthapali police station is that on 29.04.2010 at about 4.40 a.m., she along with other police officials came to Birsa Munda Chowk, Ainthapali for regulation of traffic and reached there at 4.50 a.m. and the traffic problem was cleared and at about 5.25 a.m., one Tata Sumo vehicle having no number plate on the front side came from Madanabati School side and on seeing the police, the driver of the Tata Sumo immediately turned to right side and stopped in front of Akash Tent house situated near Bisra Munda Chowk. As the activities of the driver of the vehicle caused suspicion, the police officials followed the vehicle and found

a person on the driver's seat and that person gave his identity by disclosing his name and address and he was the appellant of this case. The informant found the smell of ganja was coming out of the vehicle for which the appellant was asked to open the backdoor of the vehicle and it was found that there are four packets of fertilizers bags suspected to be containing ganja inside the back seat of the vehicle. One number plate of the vehicle i.e. OR 15 E 3680 was found there. P.W.10 immediately intimated the Inspector in charge of Ainthapali police station, Sambalpur and as per the instruction of the I.I.C., she guarded the vehicle. The I.I.C. arrived at the spot at 6.00 a.m. Two local independent witnesses were called to the spot and in their presence, P.W.10 explained to the appellant regarding the intention to search of the vehicle. Personal search of P.W.10 and other police officials were taken so also that of the other witnesses. On the query of P.W.10, the appellant expressed his willingness to be searched in presence of the gazetted officer. As the I.I.C. was the gazetted officer, the Tata Sumo vehicle was searched in his presence and four numbers of fertilizers bags containing ganja (fruiting and flowering) were detected. The appellant was asked to produce any licence or authority for possession or transportation of such ganja in a vehicle but he failed to produce the same. On interrogation, the appellant admitted that he along with another person namely Manu Patra of village Birbira and another unknown person were transporting the ganja to Sundargarh side but he did not disclose the exact place of procurement. The appellant further stated that on seeing the police party, Manu Patra and another ran away from the vehicle. P.W.10 asked the A.S.I. of police Suresh Chandra Sahu to call a weighman to come with weighing instrument and a tailor for stitching and sealing. The A.S.I. returned to the spot with two persons and they were Harisankar Badhei (P.W.3) and another namely Bhimsen Behera. The packets containing ganja were weighed in presence of the appellant and the witnesses and it was separately marked as 'A', 'B', 'C' and 'D'. The net weight of ganja from packet 'A' was found to be 16 kg. 50 grams excluding the weight of polythene packet, 16 kg. 800 grams from packet 'B', 12 kg. 50 grams from packet 'C' and 9 kg. 50 grams from packet 'D'. Samples of 50 grams was taken from each of the packets and it was divided into two equal samples each of 25 grams and it was kept in polythene envelop and sealed with the seal of P.W.10. The seizure lists were prepared and copies thereof were furnished to the appellant under proper acknowledgement. The weighing balance and measuring weights were also seized and it was given in the zima of the weighman P.W.3 Harisankar Badhei. The personal brass seal of P.W.10 was handed over to P.W.4 Surat

Rout. As commercial quantity of ganja was seized from the possession of the appellant and he could not produce any licence or authority, P.W.10 after coming to Ainthapalli police station along with the appellant and the seized articles presented the F.I.R. before the Inspector in charge on the same day.

P.W.14 Pranakrushna Rout was the Inspector in charge of Ainthapali police station who proceeded to the spot getting intimation from P.W.10 and he was present when the search and seizure was made by P.W.10. P.W.14 after registering the F.I.R. kept the seized contraband ganja in the police station Malkhana vide M.R. No.39 dated 29.04.2010, took up investigation of the case and during course of investigation, he examined the informant and other witnesses, visited the spot, prepared the spot map (Ext.16) and he submitted a detail report to his superior i.e. Superintendent of Police, Sambalpur on dated 29.04.2010 vide Ext.17. The station diary entry book of Budharaja outpost was seized. The appellant was forwarded to the Court on 30.04.2010 and a prayer was made before the learned Sessions Judge -cum-Special Judge, Sambalpur to send the sample ganja for chemical examination to R.F.S.L., Sambalpur and as per the direction of the Court, the sample ganja packets were sent to R.F.S.L., Sambalpur through S.D.J.M., Sambalpur for chemical examination. P.W.14 seized the station diary book of Ainthapali police station on production of the S.I. of police. He also seized the malkhana register and left the station diary book as well as in the malkhana register in the zima of S.I. of police Meghanath Kaibarta (P.W.11) by executing zimanama (Ext.13). The I.O. seized the original registration certificate of the vehicle being produced by the owner Tusarkanta Nayak (D.W.1) as per the seizure list Ext.18 and also seized the detailed report submitted to S.P., Sambalpur from the office of Superintendent of Police under seizure list Ext.9. The station diary book of Budharaja outpost was given in zima of P.W.6 and on 24.06.2010 as per the direction of S.P., Sambalpur, P.W.14 handed over the charge of investigation to S.I. Upendra Joshi who ultimately submitted charge sheet on 28.06.2010 under section 20(b) of the N.D.P.S. Act against the appellant showing the accused Munu @ Debendra Patra as an absconder.

3. In order to prove its case, the prosecution examined fourteen witnesses.

P.W.1 Tanuj Kumar Dash was the constable attached to Ainthapali police station and he stated about the search and seizure of contraband ganja from the vehicle and its weight being taken by the weighman.

P.W.2 Bipin Bihari Das was the A.S.I. of police attached to Ainthapali police station who is a witness to the seizure of command certificate vide Ext.3.

P.W.3 Harishankar Badhei, P.W.4 Suratha Rout and P.W.5 Dayanidhi Seth are the seizure witnesses but they did not support the prosecution case for which they were declared hostile.

P.W.6 Umakanta Sahu was the Havildar of Budharaja Town outpost and he also stated about the search and seizure of the contraband articles in the Tata Sumo vehicle and also about weighman taking the weight of the ganja which was found in four bags. He is a witness to the seizure of different articles.

P.W.7 Kailash Chandra Pradhan was the constable in the office of the Superintendent of Police and he stated about the seizure of a letter dated 29.04.2010 by the I.I.C. of Ainthapali police station under seizure list Ext.9

P.W.8 Narendra Kumar Mohapatra was the A.S.I. of police attached to the office of the Superintendent of Police, Sambalpur and he is also a witness to the seizure list Ext.9.

P.W.9 Prafulla Kumar Sethi was the constable attached to Budharaja out post and he states about the seizure of station diary book under seizure list Ext.7

P.W.10 Alakananda Sahu was the S.I. of police attached to Ainthapali police station who conducted search of the vehicle in question and recovered contraband ganja of commercial quantity. She is the informant in the case.

P.W.11 Meghanath Kaibarta was the A.S.I. of police, Ainthapali police station and he stated about the seizure of the station diary book as well as the malkhana register by the Inspector in charge of Ainthapali police station under seizure list Ext.12 and taking zima of such station diary as well as malkhana register under the zimanama Ext.13.

P.W.12 Deepak Kumar Mohanty was the constable who stated about the seizure of a report under seizure list Ext.9.

P.W.13 Jaladhar Bagh was the Gramarakhi in Dharuadihi police station who stated to have seen the appellant taking the family members of the owner in the vehicle.

P.W.14 Pranakrushna Rout was the Inspector in charge of Ainthapali police station who is the investigating officer of the case.

The prosecution exhibited twenty documents. Exts.1, 2, 3, 7, 9, 12 and 18 are the seizure lists, Ext.4/3 is the zimanama, Ext.5 is a money receipt, Ext.6/1 is the zimanama of the seal taken by P.W.4, Ext.8 is the true copy of the station diary entry dated 29.04.2010, Ext.10 is the written option offered by P.W.10 to the appellant, Ext.11 is the F.I.R., Exts.13 and 19 are the zimanama, Ext.14 is the true copy of the S.D.E. book, Ext.15 is the true copy of the malkhana register, Ext.16 is the spot map, Ext.17 is the detail report of P.W.14 and Ext.20 is the chemical examination report.

The prosecution also proved eight material objects. M.O.I is the sample packet of ganja marked A/2, M.O.II is the sample packet of ganja marked B/2, M.O.III is the sample packet of ganja marked C/2, M.O.IV is the sample packet of ganja marked D/2, M.O.V is the sealed packet of bulk ganja marked A, M.O.VI is the sealed packet of bulk ganja marked B, M.O.VII is the sealed packet of bulk ganja marked C and M.O.VIII is the sealed packet of bulk ganja marked D.

4. The defence plea of the appellant is that on the date of occurrence, the co-villager Manu Patra and another person obstructed his vehicle on the way and the co-accused Manu Patra on the point of a knife asked him to carry some packets in the vehicle and in spite of the non-inclination of the appellant, the co-accused Manu Patra and the other person forcibly kept the packets in the vehicle and threatened the appellant with dire consequence and both of them fled away when police tried to detain the vehicle.

One witness namely, Tusarkanta Naik who is the owner of the offending vehicle has been examined by D.W.1.

5. The learned trial Court after assessing the evidence on record has been pleased to hold that from the evidence adduced by the members of the team i.e. P.W.10 as well as the Investigating Officer P.W.14 that the number plate was recovered from the vehicle during the search, such fact clearly speaks out that the appellant was fully aware of the fact and also in order to evade the police arrest, deliberately detached the number plate and kept it inside the vehicle and thus the recovery of contraband substance from the vehicle in question along with the detached number plate hits section 54 of the N.D.P.S. Act. The learned trial Court further held that when all the official witnesses consistently corroborated each other on the factum of search, seizure and also sealing of the property in question, such evidence just cannot be thrown out

only because of non-production of the brass seal by P.W.4. It was further held that there is no discrepancy in the evidence of P.W.10 and P.W.14 and such evidence is found to be trustworthy and credible and the safe custody of the seized property has been amply proved. It was further held that on going through the evidence laid through the P.W.10 as well P.W.14, it clearly clarifies the position that the prosecution has left no stone unturned to implicate the accused with the alleged offence. Accordingly, the learned trial Court held that contraband ganja weighing 53 kgs. 950 grams was recovered from the exclusive conscious possession of the appellant which is more than commercial quantity and accordingly, the appellant was found guilty under section 20(b)(ii)(C) of the N.D.P.S. Act.

6 Mr. Susanta Kumar Dalai, learned counsel appearing for the appellant contended that in this case the seizure of contraband articles from the offending vehicle is not disputed and it is also not disputed that the appellant was found in the driver's seat. He contended that the defence plea that the co-accused persons were forcibly carrying the contraband articles in the vehicle has been proved by preponderance of probabilities not only by taking specific plea in that respect in the statement recorded under section 313 Cr.P.C. but also by eliciting relevant answers from the prosecution witnesses and by examining a defence witness. He further contended that the surrounding circumstances under which the vehicle was stopped and the conduct of the appellant at the relevant point of time strengthens the defence plea. It is further contended that was no culpable state of mind on the part of the appellant as required under section 35 of the N.D.P.S. Act and since the appellant was compelled to carry the packets without being aware of its contents, he should not have been convicted for transportation of commercial quantity of ganja and therefore, the impugned judgment and order of conviction should be set aside.

Mr. Priyabrata Tripathy, learned Addl. Standing counsel on the other hand submitted that apart from the disclosure of the appellant regarding his complicity in the crime as mentioned in the first information report, the conduct of the appellant in carrying the vehicle to another place shows his culpable state of mind. It is further contended that the prosecution by adducing the evidence of the official witnesses has clearly established the seizure of commercial quantity of ganja from the exclusive and conscious possession of the appellant and the evidence of D.W.1 who is the owner of the vehicle is not reliable and trustworthy and therefore, the defence plea that the appellant was compelled to carry the contraband articles on the point of

knife by two persons cannot be accepted and there is no infirmity and illegality in the impugned judgment and order of conviction and therefore, the same should be upheld.

7. Adverting to the contentions raised at the Bar, since the seizure of contraband ganja in four packets which are also of commercial quantity from the offending vehicle is not in dispute so also it is not disputed that the appellant was the driver of the offending vehicle, the question falls for determination is whether the appellant was in exclusive and conscious possession of such ganja and he was knowingly transporting the same or that he was compelled to carry the packets on the point of knife by the co-accused Manu Patra and another without knowing its contents which was detected by the police.

In the first information report, P.W.10 has not mentioned that any other person apart from the appellant was found in the vehicle or she saw them fleeing away from the vehicle. It is mentioned in the first information report that on interrogation of the appellant, he admitted that he along with another person namely Manu Patra village Birbira and another unknown person were transporting ganja to Sundargarh side and he did not disclose the exact place of procurement and that seeing the police, co-accused Manu Patra and another ran away from the vehicle.

In his evidence, P.W.10 has however stated that at about 4.40 a.m. on 29.04.2010 reaching at the spot to clear the traffic, they found a long line of the vehicles were jamming on the road and while clearing the vehicle, she noticed one four wheeler vehicle i.e. Tata Sumo bearing registration no. OR 15 E 3680 suspiciously turned out on the right and seeing that when they proceeded towards the vehicle, two persons jumping there from the vehicle ran away all on a sudden and the appellant was found in the driver's seat. In the cross-examination, P.W.10 has further stated that two persons who ran away from the vehicle were chased by them for about 100 to 200 meters of distance.

P.W.1 has also stated that two persons got down from the vehicle and ran away and they chased them but they managed to escape.

P.W.6 has stated that when they went near the vehicle, seeing them approaching, two persons got down from the vehicle and ran away and they chased the two persons but could not nab them. He has further stated they gave a chase to the absconding persons for about half a kilometer but could not nab them.

Therefore, even though in the first information report, the informant (P.W.10) has not stated to have seen two persons running away from the vehicle in question but in view of the evidence of the official witnesses during trial including that of the informant, it is crystal clear that two other persons were present in the offending vehicle apart from the appellant who fled away on seeing the police officials.

Regarding the conduct of the appellant at the spot which has got relevance with the defence plea, it is seen that in the F.I.R., P.W.10 has mentioned that they reached at Birsamunda Chhak, Ainthapalli for regulation of traffic at 4.50 a.m. and with much difficulty, the traffic problem was cleared and at about 5.25 a.m., one Tata Sumo came from Madanabati School side. Therefore, at the time of arrival of Tata sumo, as per the F.I.R., the traffic problem was no more there. P.W.6 has stated in his evidence that it took about 45 minutes to clear up the jam and in his report, he has mentioned that it took 10 to 15 minutes to clear up the traffic jam and the Tata Sumo vehicle came to the spot at about 5.20 a.m. and the traffic was clear at Birsa Munda Chhaka at that time. P.W.10 has stated that while clearing the traffic, about 25 minutes thereafter, the Tata Sumo vehicle came there and he has further stated that Birsa Munda chhaka is connected with roads from four directions.

Therefore, on a conjoint reading of the aforesaid evidence, it appears that by the time the Tata Sumo vehicle arrived at the spot, the traffic jam was clear.

P.W.1 has stated that the vehicle could have easily proceeded ahead on any road instead of stopping.

P.W.10 has stated that Aakash tent house is 50 meters away from Birsamunda Golei Chhak and they have not chased the Tata Sumo vehicle and the Tata Sumo vehicle stopped in front of the Akash tent house and by the time they reached there at Akash tent house, the said vehicle had already stopped. Therefore, it is evident that not only the traffic jam was clear at Bisra Munda Chhak at the relevant point of time but the petitioner who was in the driver's seat was in a position to take away the vehicle in any direction but he did not do that rather he stopped the vehicle near Akash tent house which is closer to the chhak and was himself present in the driver's seat till the arrival of the police officials though two other persons who were present in the vehicle fled away. It has come out from the evidence of P.W.10 that two persons who ran away from the vehicle were chased for about 100 to 200

meters of distance and P.W.6 has also stated that they gave a chase to the absconding persons for about half a kilometer. Therefore, in spite of availability of sufficient time on the part of the appellant to escape from the spot with the vehicle or to run away after leaving the vehicle, his conduct in stopping the vehicle and remaining seated in the driver's seat shows his bonafideness which disproves the culpable state of mind.

P.W.10 has stated that on being asked, the appellant replied that the ganja was transported by one Manu Patra of village Biribira along with another person whose identity he did not know.

P.W.14 has stated that seeing the police, two of the occupants of the vehicle namely one Munu Patra and another person got down and fled away.

Therefore, the defence plea of the appellant that co-villager Manu Patra and another got into the vehicle with some packets and they fled away on seeing the police is corroborated by the evidence of the official witnesses.

Section 25 of the N.D.P.S Act provides that whoever, being the owner or occupier or having the control or use of any house, room, enclosure, space, place, animal or conveyance, knowingly permits it to be used for the commission by any other person of an offence punishable under any provisions of the Act, shall be punishable with the punishment provided for that offence.

Thus the ingredients of section 25 of the N.D.P.S. Act appear to be as follows:

(i) The accused must be either the owner, or occupier or he must have the control or use of the house, room, enclosure, space, place, animal or conveyance;

(ii) He must have knowingly permitted such house, room etc. to be used for the commission by any other person of an offence punishable under any provision of N.D.P.S. Act.

Mere ownership of vehicle which was found to have been used for transporting material like Ganja in itself is not an offence. The words "knowingly permits" are significant. It is for the prosecution to establish that with the owner's knowledge, the vehicle was used for commission of an offence under the Act. However, once the prosecution establishes the ownership as well as grant of permission by the accused to use his house or

vehicle etc. by another person for commission of any offence under N.D.P.S. Act, the burden shifts to the accused and he has to give rebuttal evidence to disprove such aspects.

Section 35 of the N.D.P.S. Act deals with presumption of 'culpable mental state' and it provides that in any prosecution for an offence under N.D.P.S. Act which requires a 'culpable mental state' of the accused, the Court shall presume the existence of such mental state. The 'culpable mental state' includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. However, it is for the defence to prove that the accused had no such mental state with respect to the act charged as an offence in that prosecution. The accused is to prove that he was not in conscious possession of the contraband if it is proved by the prosecution that he was in possession thereof and he is also to prove that he had no such mental state with respect to the act charged as an offence (Ref:- **(2015) 60 Orissa Criminal Reports 91, Sri Nasar Kumbhar -Vrs.- State of Odisha**)

In the case of **Abdul Rashid Ibrahim Mansuri -Vrs.- State of Gujarat reported in A.I.R. 2000 Supreme Court 821**, it is held as follows:-

> "21. No doubt, when the appellant admitted that narcotic drug was recovered from the gunny bags stacked in the auto-rickshaw, the burden of proof is on him to prove that he had no knowledge about the fact that those gunny bags contained such a substance. The standard of such proof is delineated in sub-section (2) as "beyond a reasonable doubt. If the court, on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he had real knowledge of the nature of substance concealed in the gunny bags then the appellant is not entitled to acquittal. However, if the court entertains strong doubt regarding the accused's awareness about the nature of the substance in the gunny bags, it would be a miscarriage of criminal justice to convict him of the offence keeping such strong doubt dispelled. Even so, it is for the accused to dispel any doubt in that regard.
>
> 22. The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other

> evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence."

Law is well settled that the prosecution has prove its case beyond all reasonable doubt where as the accused can prove its defence by preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstance upon which the accused relies. Section 106 of the Evidence Act clearly enjoins that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Section 35(2) of the N.D.P.S. Act requires the accused to prove beyond a reasonable doubt that he had no culpable mental state with respect to the act charged. The general principle regarding the discharge of burden by preponderance of probability is not applicable. The burden can be discharged by an accused adducing cogent and reliable evidence which must appear to be believable or by bringing out answers from the prosecution witnesses or showing circumstances which might lead the Court to draw a different inference.

In the present case, not only the appellant has taken a specific defence plea but he has elicited answers from the prosecution witnesses through cross examination which supports his defence plea. The appellant has examined one witness who is none else than the owner of the vehicle and he has stated that when he came to know from the police station about the seizure of his vehicle that the driver (appellant) has been forwarded to the Circle Jail, Sambalpur, in order to ascertain under what circumstances the driver did not return along with the vehicle as per his instruction, he met the appellant in the jail where the appellant told him that on the way co-villager Manu Patra along with another came to him and on the point of knife, he was asked to carry some bags containing some articles. He was also asked to drive the vehicle to the place of their choice and accordingly, he drove the vehicle towards Ainthapalli Chhaka and at the sight of the police, he parked the vehicle at the side of the road but at the same time accused Manu Patra and another fled away from the spot.

Mr. Tripathy, learned counsel appearing for the State contended that the meeting of D.W.1 with the appellant in the Circle Jail, Sambalpur is a doubtful feature in as much as he has stated that he did not make any application to the Jail Authority to meet the appellant-driver and further stated that he did not remember the exact date when he had been to the Circle Jail to meet the appellant, however, he has stated that it was on the same day when the appellant was forwarded to Jail.

The case record indicates that the appellant was forwarded to the Court on 30.04.2010 and on the same day, he was remanded to the Circle Jail, Sambalpur. D.W.1 has stated that the appellant had taken his (D.W.1's) wife and mother-in-law to Badamal in his vehicle and he was told to return after dropping them and that he received the information from the police station three to four days after. Therefore, there is no such material discrepancy regarding the date on which the D.W.1 has stated to have met the appellant in jail. In ordinary course of nature, since D.W.1 was the owner of the vehicle and the vehicle was detained and the driver was arrested, it was expected of him to meet the driver in the jail to ascertain under what circumstances he was taken into custody. Therefore, there is no such improbability feature in the evidence of D.W.1 regarding his meeting with the appellant in the Circle Jail. The disclosure made by the appellant before the owner of the vehicle not only corroborates the defence plea but also to the statements of the official witnesses who have stated about the escape of two persons from the vehicle.

The learned trial Court has mentioned in its judgment that it is well evident from the evidence of P.W.10 as well as P.W.14 that a number plate was recovered from the vehicle during search and therefore, the learned trial Court jumped to the conclusion that the appellant was fully aware of the fact and also in order to evade the police arrest, deliberately detached the number plate and kept it inside the vehicle.

On perusal of the evidence of P.W.10 and P.W.14, none of them has stated about any detached number plate was found inside the vehicle. No such number plate was also seized from inside the vehicle. The evidence of P.W.10 indicates that they noticed a four wheeler vehicle i.e. Tata Sumo bearing registration no. OR 15 E 3680 was coming and it suspiciously turned out of the line. P.W.14 has also stated that about the detention of the Tata Sumo vehicle bearing registration no.OR 15 E 3680 by P.W.10. Therefore, though in the first information report, it is mentioned that there was no

number plate on the front side of the Tata Sumo vehicle but since the contents of the first information report is not the substantive piece of evidence and the informant himself as well as the Investigating Officer have not stated about such aspect of missing of number plate from the front side of the vehicle or detection of the number plate from inside the vehicle, I am of the view that the learned trial Court has committed error of record in holding that from the evidence of P.W.10 as well as P.W.14, it is well evident that the number plate was recovered from the vehicle during search. Therefore, the consequential presumption which the learned trial Court has drawn taking recourse to section 54 of the N.D.P.S. Act is also not sustainable.

8. On a careful analysis of the evidence on record, I am of the view that not only the appellant has taken a specific defence plea but he has also discharged the burden proof as required under section 35 of the N.D.P.S. Act by eliciting answers from the prosecution witnesses through cross-examination, by adducing defence evidence as well as by showing his bona fide conduct at the spot. The conduct of the appellant in stopping the vehicle, his non-attempt to flee away from the vehicle even though having sufficient opportunity for the same are the circumstances which lead to an inference that the defence plea is more probable and acceptable. There is no material to show that the appellant had real knowledge of the nature of the substance concealed in the bags which were found inside the vehicle or he was in exclusive or conscious possession of the contraband ganja found inside the bags rather it appears that he was compelled to carry the bags by two persons without being aware of its contents, one of whom is the co-villager Manu Patra and both the persons fled away on seeing the police officials leaving the appellant to suffer the destiny. Thus the materials on record create strong doubt regarding the awareness of the appellant about the nature of the substance concealed in the bags or that he knowingly permitted the contraband ganja to be transported in the vehicle. If a driver of a vehicle after exercising due diligence is unaware about the nature of substance carried by a passenger in his bag which was detected to be contraband articles subsequently or he was compelled to carry such bag under threat or fear of death and the driver facing trial satisfies the Court in that respect by adducing cogent evidence for which the Court entertains a strong doubt about the prosecution case, it would be a travesty of justice to convict the driver for transporting contraband articles.

The reasons assigned by the learned trial Court in convicting the appellants appears to be faulty and defective. The defence plea has not been

properly appreciated and error of record has been committed by the learned trial Court. Therefore, the impugned judgment and order of conviction of the appellant under section 20(b)(ii)(C) of the N.D.P.S. Act is not sustainable in the eye of law.

9. Accordingly, the Criminal Appeal is allowed. The appellant is acquitted of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act. The appellant who is in jail custody shall be set at liberty forthwith if his detention is not required in any other case.

Appeal allowed.

2017 (II) ILR - CUT- 1374

S. K. SAHOO, J.

MC NO. 142 OF 2016
(ARISING OUT OF CRLREV NO. 673 OF 2003)

R.BHAGIRATHI REDDY & ANR. .....Petitioners

.Vrs.

STATE OF ODISHA .....Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – Ss. 362, 482

Judgment passed in Criminal Revision – Whether such judgment can be altered or reviewed ? – Held, No.

In this case, the Revisional order of this Court was challenged in SLP before the Apex Court and the same was dismissed both on the ground of delay and on merit – There is no power of review with the Criminal Court after the judgment is signed – Even the High Court in exercise of its inherent power U/s. 482 Cr.P.C. has no authority or jurisdiction to alter or review the same – Further when it is the duty of the counsel to address the Court on all the grounds while arguing the revision petition, now it can not be said that the counsel appearing then for the petitioners, failed to argue the revision on merit after knowing that on the self same set of evidence the co-accused persons were acquitted – Held, the judgment pronounced by this Court is neither without jurisdiction nor in violation of the principles of natural justice – This Court after giving due opportunity of hearing to the

learned counsels for the petitioners and the state decided the revision petition and the SLP against such decision having been dismissed this Court, now, cannot entertain the application to review or modify its judgment on the principles of judicial discipline as well as on law.

Case Laws Referred to :-

1. (2000) 6 SCC 359 M.M. : Kunhayammed -Vrs.- State of Kerala.
2. (2000) 1 SCC 666 : Thomas -Vrs.- State of Kerala.
3. (2013) 11 SCC 489 : Jeetu@Jitendra -Vrs.- State of Chhattisgarh.
4. (2011) 14 SCC 770 : State of Punjab -Vrs.-Davinder Pal Singh Bhullar.
5. (2008) 15 SCC 133 : Rajoo -Vrs.- State of M.P.
6. AIR 2001 SC 43 : Hari Singh Mann -Vrs.- Harbhajan Singh Bajwa & Ors.
7. A.I.R. 2006 S.C. 3051 : Chhanni -Vrs.- State of U.P.
8. A.I.R. 1994 S.C. 1544 : Moti Lal -Vrs.- State of M.P.
9. A.I.R. 2001 S.C. 2145 : State of Kerala -Vrs.- M.M. Manikantan Nair.
10. (2000) 6 SCC 359 : Kunhayammed -Vrs.- State of Kerala.
11. (2011) 14 SCC 770 : State of Punjab -Vrs.- Davinder Pal Singh Bhullar
12. (2000) 1 SCC 666 : M.M. Thomas -Vrs.- State of Kerala.
13. A.I.R. 2001 S.C. 43 : Hari Singh Mann Vrs.Harbhajan Singh Bajwa & Ors.
14. A.I.R. 2006 S.C. 3051 : Chhanni -Vrs.- State of U.P.
15. A.I.R. 1994 S.C. 1544 : Moti Lal -Vrs.- State of M.P.
16. A.I.R. 2001 S.C. 2145 : State of Kerala -Vrs.- M.M. Manikantan Nair.
16. 1970 CLJ 378 : Chitawan and Ors. -Vrs.- Mahboob Ilahi
17. 1985 CLJ 23 : Deepak Thanwardas Balwani -Vrs.-State of Maharashtra and Anr.
18. A.I.R. 1987 Rajasthan 83 (F.B.) : Habu -Vrs.- State of Rajasthan
19. A.I.R. 1972 S.C. 1300: Swarth Mahto and Anr. –Vrs.- Dharmdeo Narain Singh.
20. A.I.R. 1981 S.C. 1156 : Makkapati Nagaswara Sastri -Vrs.- S.S. Satyanarayan.
21. (2009) 2 SCC 703 : Asit Kumar Kar -Vrs.- State of West Bengal and Ors.
22. A.I.R. 2011 S.C. 1232 : Vishnu Agarwal v. State of U.P. and Anr.

For Petitioners : Mr. Yasobanta Das, Sr. Adv.

For Opp. Party : Mr. Deepak Kumar, A.S.C.

Date of Order: 16.08.2017

JUDGMENT

S. K. SAHOO, J.

This Misc. Case has been filed by the petitioners R. Bhagirathi Reddy and Parsu Das to recall/modify the judgment and order of this Court

dated 18.10.2011 passed in Criminal Revision No.673 of 2003 and for acquitting the petitioners from conviction in view of the acquittal of the co-accused persons in Criminal Appeal No.33 of 2002 and Criminal Appeal No.90 of 2002.

This case arises out of Chatrapur P.S. Case No.290 of 1996, in which charge sheet was submitted against the petitioners and other co-accused persons namely N. Ganesh Reddy, Surendra Barik, Kumuda Pattnaik @ Maina, Gourahari Panda, Muna Polei, Surendra Behera and Bina Behera. While all of them were facing trial before the learned S.D.J.M., Chatrapur in G.R. Case No. 405 of 1996 for offences punishable under sections 452, 324, 326, 294, 341 read with section 34 of the Indian Penal Code, the petitioners absconded at the stage of accused statement for which the case was splitted up and judgment in respect of the co-accused persons was pronounced by the learned Trial Court on 19.02.1999 and they were convicted under sections 452, 324, 326, 341 read with section 34 of the Indian Penal Code though they were acquitted of the charge under section 294 read with section 34 of the Indian Penal Code. Thereafter on apprehension of the petitioners, the accused statements were recorded and judgment was pronounced by the learned Sub-Divisional Judicial Magistrate, Chatrapur in G.R. Case No.405 of 1996(A)/T.R. No.509 of 1997 on 06.05.2000 and the learned Trial Court though acquitted the petitioners of the charge under section 294 read with section 34 of the Indian Penal Code but found them guilty under sections 452, 324, 326, 341 read with section 34 of the Indian Penal Code and sentenced each of them to undergo S.I. for one month for the offence under sections 341/34 of the Indian Penal Code, R.I. for four months and to pay a fine of Rs.500/-, in default, to undergo S.I. for three months for the offence under sections 324/34 of the Indian Penal Code, R.I. for one year and to pay a fine of Rs.500/-, in default, to undergo S.I. for three months for the offence under sections 326/34 of the Indian Penal Code and R.I. for six months and to pay a fine of Rs.500/-, in default, to undergo S.I. for three months each for the offence under sections 452/34 of the Indian Penal Code and the substantive sentences were directed to run concurrently.

The petitioners preferred criminal appeal before the Court of Session which was heard by learned Second Additional Sessions Judge, Berhampur in Criminal Appeal No. 5 of 2001/Criminal Appeal No. 54 of 2000 GDC and the learned Appellate Court vide judgment and order dated 20.08.2003 set aside the order of conviction under sections 341/34 of the Indian Penal Code while confirming the order of conviction in respect of other offences and the

sentences passed thereunder by the learned Trial Court. The criminal appeals preferred by co-accused persons namely N. Ganesh Reddy, Muna Polei, and Bina Behera in Criminal Appeal No. 33 of 2002/ Criminal Appeal No. 38 of 1999 GDC and by co-accused Surendra Barik, Kumuda Pattnaik @ Maina and Gourahari Panda in Criminal Appeal No. 90 of 2002/ Criminal Appeal No. 48 of 1999 GDC were heard by learned Additional Sessions Judge, Chatrapur and those were allowed vide separate judgments and orders dated 06.12.2003 and the conviction order passed by the learned Trial Court was set aside.

The petitioners then preferred Criminal Revision No.673 of 2003 before this Court challenging the judgments and orders of conviction of the Courts below. This Court vide judgment and order dated 18.11.2011 while maintaining the order of conviction of the petitioners under sections 452, 324, 326 read with section 34 of the Indian Penal Code, modified the sentence and reduced it to four months subject to payment of fine of Rs.15,000/- (rupees fifteen thousand only) within a period of two months which was directed to be equally borne by both the petitioners and it was further directed that if the petitioners fail to deposit the said amount, the order of sentence shall revive.

The petitioners preferred special leave petition before the Hon'ble Supreme Court in SLP (Criminal) No. CRLMP 3088/2015 with an application for condonation of delay which was of 1114 days. The Hon'ble Supreme Court dismissed the SLP application as no proper explanation was given by the petitioners and further holding that even on merit, no ground to interfere with the impugned order in exercise of jurisdiction under Article 136 of the Constitution of India was found.

Mr. Yasobanta Das, learned Senior Advocate appearing for the petitioners strenuously and emphatically contended that at the time of hearing of the revision petition before this Court, the learned counsel then appearing for the petitioners submitted that he did not challenge the conviction of the petitioners on merit and confined his argument on the quantum of sentence only and accordingly, the sentence was reduced by this Court vide judgment and order dated 18.11.2011. It is contended that the petitioners came to know about the pronouncement of judgment for the first time on 16.04.2014. It is further contended that criminal appeals preferred by co-accused persons were allowed by learned Additional Sessions Judge, Chatrapur and the judgment and order of conviction passed by the learned Trial Court was set aside. The learned counsel contended that even though the evidence against the

petitioners and the co-accused persons are identical, without bringing the acquittal orders to the notice of this Court at the time of hearing of the revision petition and without placing the revision petition on merit, surprisingly the learned counsel appearing then for the petitioners contended that he did not challenge the conviction of the petitioners on merit. It is further contended that after knowing the result of the revision petition belatedly when warrants were issued against the petitioners, the petitioners approached the Hon'ble Supreme Court. It is contended that on the self same set of evidence when six co-accused persons have already been acquitted, the order of conviction of the petitioners is illegal and unjustified and therefore, the same should be set aside. It is further contended that even though the Hon'ble Supreme Court exercising the jurisdiction under Article 136 of the Constitution of India has dismissed the special leave petition on the ground of delay and also on merit but it is a non-speaking order and therefore, it would not come within the purview of declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution of India and therefore, there is no bar for this Court to recall/modify the earlier judgment and order dated 18.10.2011 and set aside the Trial Court judgment and order of conviction basing on the judgments of the co-accused persons passed in criminal appeals. The learned counsel for the petitioners placed reliance in the cases of **Kunhayammed -Vrs.- State of Kerala reported in (2000) 6 Supreme Court Cases 359, M.M. Thomas -Vrs.- State of Kerala reported in (2000) 1 Supreme Court Cases 666, Jeetu Alias Jitendra -Vrs.- State of Chhattisgarh reported in (2013) 11 Supreme Court Cases 489, State of Punjab -Vrs.- Davinder Pal Singh Bhullar reported in (2011) 14 Supreme Court Cases 770** and **Rajoo -Vrs.- State of M.P. reported in (2008) 15 Supreme Court Cases 133** and contended that grave injustice has been caused to the petitioners in view of the non-placement of acquittal orders passed in respect of six co-accused persons in criminal appeals before this Court by the arguing counsel at the time of hearing of the revision petition. It is further contended that unless this Court recalls/modifies its earlier order dated 18.10.2011 and acquit the petitioners of all the charges like the co-accused persons, there will be abuse of process and miscarriage of justice.

Mr. Deepak Kumar, learned Addl. Standing Counsel appearing for the State on the other hand contended that when the revision petition has already been disposed of by this Court and the Hon'ble Supreme Court has dismissed the special leave petition on the ground of delay as well as on merit, there is

no scope for this Court to recall/modify the judgment and order dated 18.10.2011 even invoking inherent power under section 482 of Cr.P.C. in view of the bar under section 362 of Cr.P.C. Learned counsel placed reliance in the cases of **Hari Singh Mann -Vrs.- Harbhajan Singh Bajwa and Ors. reported in A.I.R. 2001 S.C. 43**, **Chhanni -Vrs.- State of U.P. reported in A.I.R. 2006 S.C. 3051**, **Moti Lal -Vrs.- State of M.P. reported in A.I.R. 1994 S.C. 1544** and **State of Kerala -Vrs.- M.M. Manikantan Nair reported in A.I.R. 2001 S.C. 2145**.

First point:-

The first point that crops up for consideration is whether after dismissal of the special leave petition by the Hon'ble Supreme Court in exercising jurisdiction under Article 136 of the Constitution of India both on the ground of delay and also on merit, this Court can entertain a Misc. Case to recall/modify its earlier judgment which was challenged before the Hon'ble Supreme Court and take a contrary view. In the case of **Kunhayammed -Vrs.- State of Kerala reported in (2000) 6 Supreme Court Cases 359**, it is held as follows:-

> "18. In our opinion what has been stated by this Court applies also to a case where a special leave petition having been dismissed by a non-speaking order the applicant approaches the High Court by moving a petition for review. May be that the Supreme Court was not inclined to exercise its discretionary jurisdiction under Article 136 probably because it felt that it was open to the applicant to move the High Court itself. As nothing has been said specifically in the order dismissing the special leave petition one is left merely guessing. We do not think it would be just to deprive the aggrieved person of the statutory right of seeking relief in review jurisdiction of the High Court if a case for relief in that jurisdiction could be made out merely because a special leave petition under Article 136 of the Constitution had already stood rejected by the Supreme Court by a non-speaking order.
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> 27. A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e. it does not assign reasons for dismissing the

special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this Court being the apex court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The Court sometimes leaves the question (sic) open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down By the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of Article 141. This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court.

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34. The doctrine of merger and the right of review are concepts which are closely interlinked. If the judgment of the High Court has come up to this Court by way of a special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of this Court. In that event, it is not permissible to move the High Court by review because the judgment of the High Court has merged

with the judgment of this Court. But where the special leave petition is dismissed - there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it. It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review. But the High Court, if it exercises a power of review or deals with a review application on merits - in a case where the High Court's order had not merged with an order passed by this Court after grant of special leave - the High Court could not, in law, be said to be wrong in exercising statutory jurisdiction or power vested in it.

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40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no locus standi to file the petition, (iv) the conduct of the petitioner disentitling him to any indulgence by the Court, (iv) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the apex court of the country and so on. The expression often employed by this Court while disposing of such petitions are - "heard and dismissed", "dismissed", "dismissed as barred by time" and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the merit worthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say "dismissed on merits". Such an order may be passed even ex-parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 of the C.P.C. or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the

principles underlying or emerging from Order 47 Rule 1 of the C.P.C. act as guidelines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger.

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43. xxx xxx xxx xxx xxx

To sum up our conclusions are:

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(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of

merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution, the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties."

In the case of **State of Punjab -Vrs.- Davinder Pal Singh Bhullar reported in (2011) 14 Supreme Court Cases 770**, it is held as follows:-

"77. xxx xxx xxx xxx xxx

The issue as to whether the dismissal of the special leave petition by this Court in limine, i.e., by a non-speaking order would amount to affirmation or confirmation or approval of the order impugned before this Court, has been considered time and again. Thus, the issue is no more res integra.

> A large number of judicial pronouncements made by this Court leave no manner of doubt that the dismissal of the Special Leave Petition in limine does not mean that the reasoning of the judgment of the High Court against which the Special Leave Petition had been filed before this Court stands affirmed or the judgment and order impugned merges with such order of this Court on dismissal of the petition. It simply means that this Court did not consider the case worth examining for a reason, *which may be other than merit of the case*. An order rejecting the Special Leave Petition at the threshold without detailed reasons, therefore, does not constitute any declaration of law or a binding precedent."

The learned counsel for the petitioners placed further reliance in the case of **M.M. Thomas -Vrs.- State of Kerala reported in (2000) 1 Supreme Court Cases 666**, wherein it is held as follows:-

> "13. In this case we are not concerned with the power of review of the Forest Tribunal. It was High Court which reviewed its own judgment and so the question is whether the High Court has such power dehors Section 8C (2) of the Act. Power of review conferred on the Supreme Court under Article 135 of the Constitution is not specifically made applicable to the High Courts. Does it mean that the High Court has no power to correct its own orders, even if the High Court is satisfied that there is error apparent on the face of the record?
>
> 14. High Court as a Court of Record, as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. A Court of Record envelope all such powers whose acts and proceedings are to be enrolled in a perpetual, memorial and testimony. A Court of Record is undoubtedly a superior Court which is itself competent to determine the scope of its jurisdiction. The High Court, as a Court of Record, has a duty to itself to keep all its records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it. The High Court's power in that regards is plenary. In Naresh Sridhar v. State of Maharashtra, a nine Judge Bench of this Court has recognised the aforesaid superior status of the High Court as a Court of plenary jurisdiction being a Court of Record.

xxx xxx xxx xxx xxx

> 17. If suo power of correcting its own record is denied to the High Court, when it notices the apparent errors its consequence is that the superior status of the High Court will dwindle down. Therefore, it is only proper to think that the plenary powers of the High Court would include the power of review relating to errors apparent on the face of record."

While countering the decisions relied upon by the learned counsel for the petitioners, the learned counsel for the State placed reliance in the cases of **Hari Singh Mann -Vrs.- Harbhajan Singh Bajwa and Ors. reported in A.I.R. 2001 S.C. 43** and **Chhanni -Vrs.- State of U.P. reported in A.I.R. 2006 S.C. 3051**, wherein it is held that there is no power of review with the Criminal Court after judgment has been rendered. The High Court can alter or review its judgment before it is signed. When an order is passed, it cannot be reviewed. Section 362 Code of Criminal Procedure is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and is disentitled to entertain a fresh prayer for any relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment the order for disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. There is also no provision for modification of the judgment. In the case of **Moti Lal -Vrs.- State of M.P. reported in A.I.R. 1994 S.C. 1544** and **State of Kerala -Vrs.- M.M. Manikantan Nair reported in A.I.R. 2001 S.C. 2145**, it is held that the prohibition contained in section 362 Code of Criminal Procedure is absolute after the judgment is signed. Even the High Court in exercise of its inherent power under Section 482 Code of Criminal Procedure has no authority or jurisdiction to alter/review the same.

In the cases of **Chitawan and Ors. -Vrs.- Mahboob Ilahi reported in 1970 Criminal Law Journal 378**, **Deepak Thanwardas Balwani -Vrs.- State of Maharashtra and Anr. reported in 1985 Criminal Law Journal 23**, **Habu -Vrs.- State of Rajasthan reported in A.I.R. 1987 Rajasthan 83 (F.B.)**, **Swarth Mahto and Anr. –Vrs.- Dharmdeo Narain Singh reported in A.I.R. 1972 S.C. 1300**, **Makkapati Nagaswara Sastri -Vrs.- S.S. Satyanarayan reported in A.I.R. 1981 S.C. 1156**, **Asit Kumar Kar -Vrs.- State of West Bengal and Ors. reported in (2009) 2 Supreme Court Cases 703** and **Vishnu Agarwal v. State of U.P. and Anr. reported in A.I.R.**

2011 S.C. 1232, it is held that if a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of Court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of section 362 of the Code of Criminal Procedure would not operate. In such eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault.

In the case of **Smt. Sooraj Devi -Vrs.- Pyare Lal and Anr. reported in A.I.R. 1981 S.C. 736**, it is held that the prohibition in section 362 Code of Criminal Procedure against the Court altering or reviewing its judgment, is subject to what is 'otherwise provided by this Code or by any other law for the time being in force'. Those words, however, refer to those provisions only where the Court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the Court is not contemplated by the saving provision contained in section 362 of the Code of Criminal Procedure and, therefore, the attempt to invoke that power can be of no avail.

The decisions placed by the learned counsel for the petitioners are distinguishable in the context of the present facts of the case. Section 362 of Cr.P.C. clearly stipulates that once the criminal Court signs its judgment or final order disposing of a case; it shall not alter or review the same except to correct a clerical or arithmetical error. Even though there is no such things as the principle of constructive res judicata in a criminal case but there is no scope for any review of the judgment by a Court after it signs its judgment or final order disposing of the case either at the instance of any party or even suo motu by exercising its inherent power under section 482 of Cr.P.C. The power of recall is different than the power of altering or reviewing the judgment. A criminal revision petition, once admitted, cannot be dismissed for default but has to be adjudicated on merits. The Code of Criminal Procedure does not contemplate of making an order of dismissal of revision for default. Once the records of the Courts below are called for, the High Court can exercise its powers under section 401 read with section 397 of Cr.P.C. to examine the correctness, legality or propriety of the order,

recorded or passed irrespective of the fact whether the counsel for the petitioner is present or not at the time of call of the matter for final hearing. However, if on a petition filed by the petitioner, the Court is satisfied that due to some unavoidable reason, the learned counsel for the petitioner could not appear when the matter was taken up for hearing, it may recall the order passed in rare cases for the ends of justice and to prevent miscarriage of justice. As soon as the judgment or final order disposing of the case is signed, it becomes final and the Court is *functus officio*. The only remedy available to the aggrieved party is to challenge the order in the higher Court. Unlike the statutory provision under order XLVII of Code of Civil Procedure, there is no provision in the Cr.P.C. for review of the judgment or final order disposing of a case once it is signed.

It cannot be lost sight of that the Hon'ble Supreme Court has passed the following order:-

> "Heard learned counsel for the petitioners.
>
> No proper explanation has been given out by the petitioners to condone the delay of 1114 days in filing the SLP. The application for condonation of delay is accordingly dismissed.
>
> Even on merits, we find no ground to interfere with the impugned order in exercise of our jurisdiction under Article 136 of the Constitution of India.
>
> This special leave petition is accordingly dismissed on the ground of delay as also on merit."

Even though the order passed by the Hon'ble Supreme Court is a non-speaking one and no reasonings have been assigned thereon for dismissal of the special leave petition but it is clear that the Hon'ble Court not only considered the matter on the ground of delay but also on merit. Such order refusing special leave to appeal may not stand substituted in place of the judgment of this Court under challenge and may not attract the doctrine of merger and may not be a declaration of law by the Supreme Court under Article 141 of the Constitution of India but it is apparent that the Hon'ble Court was not inclined to exercise its discretion so as to allow the petitioners to file an appeal. After dismissal of the special leave petition, when there is no statutory right of review available for the petitioners under Cr.P.C., this Court cannot assume such a jurisdiction to decide the case on merits when there is no apparent error noticed in the earlier judgment.

Therefore, the contentions raised by the learned counsel for the petitioners that after dismissal of the special leave petition by the Hon'ble Supreme Court, this Court can entertain a Misc. Case to recall/modify/review its earlier judgment, are not acceptable on the principle of judicial discipline as well as on law.

Second point:-

The learned counsel for the petitioners while canvassing his second point contended that even if the counsel for the petitioners in order to cut short the matter did not challenge the conviction on merit but nonetheless it was obligatory on the part of this Court to decide the revision on merits and not to accept the concession and proceed to deal with the sentence aspect only. He placed reliance in the case of **Jeetu Alias Jitendra -Vrs.- State of Chhattisgarh reported in (2013) 11 Supreme Court Cases 489** wherein Hon'ble Justice Dipak Misra speaking for the Bench, observed as follows:-

> "21. Tested on the touchstone of the aforesaid legal principles, it is luminescent that the High Court has not made any effort to satisfy its conscience and accepted the concession given by the counsel in a routine manner. At this juncture, we are obliged to state that when a convicted person prefers an appeal, he has the legitimate expectation to be dealt with by the Courts in accordance with law. He has intrinsic faith in the criminal justice dispensation system and it is the sacred duty of the adjudicatory system to remain alive to the said faith. That apart, he has embedded trust in his counsel that he shall put forth his case to the best of his ability assailing the conviction and to do full justice to the case. That apart, a counsel is expected to assist the Courts in reaching a correct conclusion. Therefore, it is the obligation of the Court to decide the appeal on merits and not accept the concession and proceed to deal with the sentence, for the said mode and method defeats the fundamental purpose of the justice delivery system. We are compelled to note here that we have come across many cases where the High Courts, after recording the non-challenge to the conviction, have proceeded to dwell upon the proportionality of the quantum of sentence. We may clearly state that the same being impermissible in law should not be taken resort to. It should be borne in mind that a convict who has been imposed substantive sentence is deprived of his liberty, the stem of life that should not ordinarily be stenosed, and hence, it is the duty of the

Court to see that the cause of justice is subserved with serenity in accordance with the established principles of law."

The ratio laid down in the case of **Jeetu Alias Jitendra** (supra) is not applicable to a revision petition inasmuch as the revisional Court is not bound to address on the merits of the case even though the learned counsel for the petitioner submits that he does not want to address any arguments on merits but only on the quantum of sentence. The counsel for the petitioner is the best person to decide as to whether to address the Court on merits along with sentence aspect or only on the quantum of sentence. After going through the brief at the time of preparation for argument, if the counsel for the petitioner is convinced that there is nothing on merits to argue and the lower Courts judgments on conviction aspect do not suffer from any infirmity, he might think it proper not to address the Court on merits of the revision petition as it would be a sheer wastage of valuable time of the Court which would ultimately yield no result and in such eventuality, he would be quite justified in making the submission that he does not want to address the Court on merits. If the counsel for the petitioner so decides and makes a submission not to address on merits, the revisional Court is not bound to go into merits of the case. However, in spite of such submission made by the counsel for the petitioner not to address the Court on merits, in view of the discretionary power conferred on the High Court while exercising powers of revision under section 401 of Cr.P.C. to exercise the power conferred on a Court of appeal by section 386 of Cr.P.C., in appropriate cases, the revisional Court can go into the merits for testing the correctness, legality or propriety of any finding recorded by the Court below. There is some restriction as to the manner in which the power in revision as opposed to that in appeal is to be used. Revision is not right of litigant. Exercise of revisional power by the High Court under section 397 read with section 401 of Cr.P.C. is to call for the records of any inferior criminal Court and to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court and to pass appropriate orders. Revisional power of the High Court is purely discretionary and should be exercised only in rare cases to prevent miscarriage of justice when there is glaring defect in the procedure on the point of law resulting in the failure of justice.

Therefore, the contentions raised by the learned counsel for the petitioners that in spite of the concession made the counsel not to challenge the conviction of the petitioners on merits, this Court should have decided the

revision petition on merits apart from dealing with the sentence aspect, cannot be accepted.

Third point:-

The learned counsel for the petitioners raised his third point and contended that law is well settled that where on the evaluation of a case, this Court reaches the conclusion that no conviction of any accused is possible, the benefit of doubt must also be extended to the co-accused similarly situated though he has not challenged the order of conviction by way of an appeal, in other words, it becomes the duty of the High Court to extend the benefit of acquittal in the appeals also to a non-appealing similarly situated accused. (Ref:- **Bijoy Singh -Vrs.- State of Bihar reported in 2002 Criminal Law Journal 2623**, **Raja Ram -Vrs.- State of M.P. reported in (1994) 2 Supreme Court Reporter 114**, **Dandu Lakshmi Reddy -Vrs.- State of A.P. reported in 1999 Criminal Law Journal 4287**, **Anil Rai - Vrs.- State of Bihar reported in A.I.R. 2001 S.C. 3173**, **Suresh Chaudhary etc. -Vrs.- State of Bihar reported in 2003 Criminal Law Journal 1717** and **Rajoo -Vrs.- State of M.P. reported in (2008) 15 Supreme Court Cases 133**).

Even though there is no dispute over the proposition of law advanced by the learned counsel for the petitioners but when the acquittal judgments in respect of the co-accused persons passed in criminal appeals were not placed at the time of hearing of the revision petition and it is not known as to whether such judgments were placed before the Hon'ble Supreme Court in the special leave petition or not, there is no scope for this Court to assess the evidence against the petitioners vis-à-vis the evidence against the co-accused persons already acquitted in this Misc. Case so as to give benefit of acquittal to the petitioners. A counsel for the petitioner while arguing a revision petition can address the Court on all the grounds taken in the petition or on some specific grounds leaving the other grounds. If after considering the grounds argued, the revisional Court passes a judgment or final order, it cannot be reviewed or modified or even recalled on the ground that inadvertently the counsel for the petitioner could not address the Court on some other relevant grounds. If such things are permitted then there would be no end to it and even after the judgment or final order is passed, the petitioner will come up with petition after petition to recall and rehear the revision petition on some left out grounds and thereby making mockery of the very purpose underlying the provision contemplated under section 362 of Cr.P.C.

The judgment pronounced by this Court on 18.10.2011 is neither without jurisdiction nor in violation of principles of natural justice. This Court after giving due opportunity of hearing to the learned counsels for the petitioners and the State decided the revision petition and the special leave petition against such decision has been dismissed and therefore, entertaining this Misc. Case and allowing the prayer for recall/modification and thereby reviewing the judgment and passing an order of acquittal of the petitioners would be against the statutory provision under section 362 of the Cr.P.C. which is impermissible even invoking the inherent power under section 482 of Cr.P.C. Therefore, the Misc. Case being devoid of merit, stands dismissed.

Application dismissed.

2017 (II) ILR - CUT-1391

S. K. SAHOO, J.

JCRLA NO. 56 OF 2014

BIRSING MUNDA ……..Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

PENAL CODE, 1860 – Ss.376, 354

Rape – Conviction by the trial court U/s. 376 I.P.C. challenged – Appreciation of evidence – Evidence of P.W.12 shows that when he noticed the appellant dragging the victim, he intervened and caught hold of the appellant in one hand and rescued the victim in another hand, so the evidence of the victim that she was subjected to forcible sexual intercourse is doubtful and not sustainable in law – Since the conduct of the appellant in dragging the victim has been corroborated by P.W.8 and P.W.12 it makes out an offence of outraging the modesty of a woman punishable U/s. 354 I.P.C – Though charge U/s. 354 I.P.C. has not been framed but since charge has been framed for a higher offence U/s. 376 I.P.C., this court is of the view that the appellant would not be prejudiced if he is convicted U/s. 354 I.P.C.

Held, the appellant is acquitted of the charge U/s. 376(1) I.P.C., instead he is convicted U/s. 354 I.P.C. and sentenced to undergo R.I. for a period of six months. (Paras 8,9)

For Appellant : Mr. Radharaman Das Nayak
For Respondent : Mr. Chita Ranjan Swain, A.S.C.

Date of Hearing :16.09.2017
Date of Judgment:16.09.2017

JUDGMENT

S. K. SAHOO, J.

The appellant Birsing Munda faced trial in the Court of the learned Asst. Sessions Judge, Jajpur Road in C.T. Case No.275 of 2013 / C.T. Case No.67 of 2013 for the offences punishable under sections 341/376/506 of the Indian Penal Code for wrongfully restraining the victim on 28.02.2013 at about 2.00 p.m. while she was returning home after taking bath and taking her forcibly inside the orchard situated near Damasala Nala of village Ghagiasahi under Kaliapani police station and committing rape on the victim and also criminally intimidating her.

The learned Trial Court vide impugned judgment and order dated 09.07.2014 though acquitted the appellant of the charge under section 506 of the Indian Penal Code but found him guilty under sections 341/376(1) of the Indian Penal Code and sentenced him to undergo S.I. for one month for the offence under section 341 of the Indian Penal Code and further sentenced him to undergo R.I. for a period of seven years and to pay a fine of Rs.2000/- (rupees two thousand), in default, to undergo imprisonment for two months more for the offence under section 376 (1) of the Indian Penal Code and the substantive terms of imprisonment were directed to run consecutively.

2. The prosecution case, as per the First Information Report lodged by the victim girl is that on 28.02.2008 afternoon at 2.00 p.m., she had been to Damsala Nala near her village Ghagiasahi for bathing and after taking bath, while she was returning home, on the way the appellant wrongfully restrained her and forcibly lifted her to a nearby orchard and committed rape on her.

On return to her house, the victim disclosed about the occurrence to her uncle and aunt in absence of her parents and thereafter they came to Kaliapani police station and reported the matter in writing.

3. On the basis of such FIR lodged before the Inspector–in-charge, Kaliapani Police Station, Kaliapani P.S. Case No.14 of 2013 was registered on 28.2.2013 for the offence under section 376 of the Indian Penal Code against the appellant.

P.W.14 Bishnu Charan Panda, S.I. police was directed to take up investigation of the case. During course of investigation, P.W.14 examined the informant as well as other witnesses and seized the wearing apparels of the victim. He also arrested the appellant and seized his wearing apparels in presence of the witnesses. He examined the seizure witnesses and visited the spot and sent the victim and the appellant for their medical examination and opinion through police escort party. The appellant was forwarded to Court on 02.03.2013. He also seized the exhibits collected by the Medical Officer, C.H.C., Sukinda in presence of the witnesses and on his prayer, the seized exhibits were sent for chemical examination by the Magistrate. He received the medical examination reports of the victim and the appellant and after completion of investigation; he submitted chargesheet against the appellant on 09.05.2013 under sections 341/376/506 of the Indian Penal Code.

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

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

P.W.1 is the victim who is also the informant in the case.

P.W.2 Runi Murmu is the aunt of the informant who stated that on her return from work, the victim told her about the commission of rape on her by the appellant.

P.W.3 Nagina Soren is the uncle of the informant who also stated that the victim told him about the commission of rape on her by the appellant.

P.W.4 Satrughana Mohanta did not support the prosecution case for which he was declared hostile.

P.W.5 Budhuram Baskey stated about the seizure of wearing apparels of the victim under seizure list Ext.2.

P.W.6 Siris Kumar Soren is the uncle of the victim by relation and in his presence the police seized the wearing apparels of the victim.

P.W.7 Binod Murmu is the uncle of the victim who stated about the disclosure made by the victim regarding commission of rape on her by the appellant.

P.W.8 Jugal Patra stated to have seen the appellant dragging the victim on the date of occurrence.

P.W.9 Rama Chandra Tudu stated to have signed on a paper Ext.3.

P.W.10 Krushna Chandra Naik was the constable working in Kaliapani Police station and he stated about the seizure of some medical papers and medical outdoor ticket in his presence by police.

P.W.11 Tripathy Murmu is the paternal uncle of the informant and he stated about the disclosure made by the victim regarding commission of rape on her by the appellant.

P.W.12 Sukura Mahanta stated to have rescued the victim girl when the appellant was dragging her.

P.W.13 Pungi Tudu is an uncle of the victim who stated about the disclosure made by the victim regarding commission of rape on her by the appellant.

P.W.14 Bishnu Charan Panda is the Investigating Officer in the case.

P.W.15 Dasaratha Moharana was the constable attached to Kaliapani police station who stated about the seizure of some documents.

P.W.16 Guru Charan Marandi is the scribe of the F.I.R.

P.W.17 Dr. Chaintanya Marandi is the Medical Officer, CHC, Sukinda who examined the appellant on police requisition and proved the report.

The prosecution exhibited eleven documents. Ext.1 is the written F.I.R., Exts.2, 3, 4 and 5 are the seizure lists, Ext.6 is the requisition for chemical examination by the I.O., Ext.7 is the forwarding report of the

exhibits, Ext.8 is the spot map, Exts.9 and 10 are the command certificates and Ext.11 is the medical examination report of the appellant.

6. The defence plea of the appellant is one of denial.

7. Mr. Radharaman Das Nayak, learned counsel for the appellant submitted that the impugned judgment and order of conviction of the appellant is not sustainable in the eye of law inasmuch as the doctor who has conducted the medical examination of the victim has not been examined on account of his death and the medical examination report has also not been proved even if the same is available on record. It is contended that the manner in which the victim has narrated the incident is falsified by such report as the doctor has mentioned that there is no sign and symptom of recent sexual intercourse even though the victim was examined on the very next day of the occurrence. He further submitted that the possibility of the appellant insisting the deceased to marry him and dragging her for such purpose as per their custom "JHINKA BAHA" and for that reason foisting a case of rape by the victim cannot be ruled out and therefore, benefit doubt should be extended in favour of the appellant.

Mr. Chitta Ranjan Swain, learned Addl. Standing Counsel, on the other hand, submitted that the victim's evidence is very clear, cogent and categorical that the appellant forcibly dragged her to the nearby jungle and committed rape and then insisted to marry her which is called "JHINKA BAHA" in their tradition. The learned counsel further submitted that the presence of the appellant in the company of the victim has been stated by P.W.8 and P.W.12 and therefore, the learned Trial Court has not committed any illegality in convicting the appellant for the commission of rape and wrongful restraint.

8. The learned trial Court has observed in his judgment that the Medical Officer Dr. Satya Sadhan Das who had examined the victim (P.W.1) could not be examined due to his death during trial. The Investigating Officer (P.W.14) has categorically stated that on 13.03.2013, he received the medical examination report of the victim. The report should have been marked as exhibit but unfortunately the same has not been done. It is always necessary that such medical examination should be done by two doctors, if they are available in the hospital so that in case of death of one or transfer to any distance place or for his non-availability, the other doctor can prove the same and there would be no delay during trial for the examination of the doctor.

However, since the report of the doctor is available on record, in the interest of justice, I perused the same and found that the doctor has mentioned that from the examination of the clothing, no clue regarding alleged sexual intercourse could be found and there was no sign or symptom of recent sexual intercourse. The doctor has noticed one abrasion on the upper lip and has opined such injury to be simple in nature and the duration of such injury was about 24 hours. It cannot be lost sight of the fact that the incident in question alleged to have taken place on 28.02.2013 and the victim was medically examined on the very next day i.e. on 01.03.2013. The evidence of the victim indicates that the appellant took her from the spot by dragging for one hour to the jungle and she has further stated that the spot of rape and the way where she was picked up by the appellant was around half kilometer distance. If for such a distance, the victim was dragged against her will and thereafter rape was committed forcibly on her inside the jungle, ordinarily injury would have been expected on the private parts as well as on the other parts of the body of the victim but the medical examination report is silent on the same. P.W.12 has stated that when he noticed the appellant dragging the victim, he intervened and caught hold of the appellant in one hand and rescued the victim in another hand and when the appellant told him that he wanted to marry the victim by the process of dragging her which is the custom, he told the appellant to accompany with him and the victim to the village but the appellant escaped from his custody. It appears that while the dragging was on, P.W.12 intervened and rescued the victim and therefore, I am of the view that the evidence of the victim that she was subjected to forcible sexual intercourse is doubtful. Accordingly, the conviction of the appellant under section 376(1) of the Indian Penal Code is not sustainable in the eye of law.

The conduct of the appellant in dragging the victim which has been corroborated by P.W.8 and P.W.12 however makes out an offence of outraging the modesty of a woman which is punishable under section 354 of the Indian Penal Code. Even though charge under section 354 of the Indian Penal Code has not been framed but since charge has been framed under a higher offence under section 376 of the Indian Penal Code, I am of the humble view that there would no prejudice to the appellant in convicting him under section 354 of the Indian Penal Code.

9. Therefore, the appellant is acquitted of the charge under section 376(1) of the Indian Penal Code, instead he is found guilty under section 354

Indian Penal Code and sentenced to undergo R.I. for a period of six months. His order of conviction under section 341 of the Indian Penal Code and sentence passed thereunder by the learned Trial Court stands confirmed.

It is stated by the learned counsel for the appellant that the appellant is in custody since 02.03.2013 and he was not granted bail either during trial or during pendency of the appeal. Therefore, it appears that he has already undergone the sentence which is imposed under both the offences i.e. under sections 341 and 354 of the Indian Penal Code and as such, taking into account the sentence already undergone, he be set at liberty forthwith if his detention is not otherwise required in any other case. Accordingly, the Jail Criminal Appeal is allowed in part.

Appeal allowed in part.

2017 (II) ILR - CUT-1397

S. K. SAHOO, J.

BLAPL NO. 7106 OF 2016

SURENDRANATH MISHRA .....Petitioner

.Vrs.

STATE OF ODISHA .....Opp.Party

AND

BLAPL NO. 7107 OF 2016

TRILOCHANA MISHRA .....Petitioner

.Vrs.

STATE OF ODISHA .....Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S. 439

Bail – Offence U/ss. 420, 423, 467, 468, 471, 406, 506, 120-B & 34 I.P.C. – Earlier petition rejected with liberty to apply after completion of investigation – Though final chargesheet submitted in this case, several other cases are pending – Conduct and criminal proclivity of the petitioners are such that even remaining inside the jail they are

attempting through their henchmen to tamper with the evidence and to fabricate documents and in the event they will be released they will directly influence the witnesses – Since, witnesses are the eyes and ears of justice, they can not depose freely due to threat – As the apprehension of the prosecution is reasonable and in order to have a fair trail of the case the bail application of the petitioners are rejected.

(Paras 6, 7)

For Petitioners : Mr. Ashok Mohanty, Sr. Adv.
For Opp. Party : Mr. Janmejaya Katikia, A.G.A.

Date of Argument: 20.07.2017
Date of judgment : 31.07.2017

JUDGMENT

S.K.SAHOO, J.

The petitioner Surendranath Mishra in BLAPL NO. 7106 Of 2016 is the father of the petitioner Trilochana Mishra in BLAPL No. 7107 Of 2016. The petitioners earlier approached this Court for bail in BLAPL No. 7367 of 2015 and BLAPL NO. 7060 of 2015 respectively which were heard analogously and dismissed by a common order dated 25.05.2016. The petitioners moved the Hon'ble Supreme Court against the said order for bail vide S.L.P. (Crl.) Nos. 4540 of 2016 and 4541 of 2016 which were also dismissed vide order dated 20.06.2016 giving liberty to the petitioners to apply for bail at a later stage after completion of investigation with further observation that the same shall be considered without being influenced by the observations made in the impugned order.

2. There is no dispute that the First Information Report was lodged in this case by one Mochiram Sahoo on 03.09.2015 before Inspector in Charge, Chatrapur Police Station, on the basis of which Chatrapur P.S. Case No.119 of 2015 dated 03.09.2015 was registered under sections 420, 423, 467, 468, 471, 506, 120-B read with section 34 of the Indian Penal Code and the Inspector in charge himself took up investigation of the case. The Crime Branch assumed full control over investigation of the case as per the CID CB Office Order No.152/CID dated 04.09.2015 and the case was re-registered as CID, CB, Odisha, Cuttack P.S. Case No.28 of 2015 on dated 04.09.2015 for offences punishable under sections 420, 423, 467, 468, 471, 506, 120-B read with section 34 of the Indian Penal Code and the petitioners were taken on remand in this case on 24.09.2015 and charge sheet was submitted on 20.01.2016 against the petitioners under sections 420, 423, 467, 468, 471,

406, 506, 120-B read with 34 of Indian Penal Code and further investigation was kept open under section 173(8) of Cr.P.C. for arrest of the absconding accused and to ascertain complicity of other persons, if any, collection of other evidence and to recover more proceeds of crime.

3. The bail applications of the petitioners were earlier rejected by this Court, inter alia, on the ground that there were prima facie materials regarding the involvement of the petitioners in the commission of crime and also considering the nature and gravity of the accusation, the criminal proclivity of the petitioners, chance of tampering with the evidence particularly when the investigation was under progress and many important facets of the case were to be unearthed.

In the meantime, after completion of investigation, final chargesheet was submitted against the petitioners under sections 420, 423, 467, 468, 471, 406, 506, 120-B read with 34 of Indian Penal Code on 30.12.2016.

4. As per the final chargesheet, the petitioners hatched out a criminal conspiracy to cheat the informant Mochiram Sahu to garb his valuable land and accordingly, they managed to record it in the name of the Trust by preparing forged sale deed on 12.04.2013. The petitioners managed to prepare the deed as a sale deed in place of a gift deed falsely mentioning payment of Rs.26,84,570/- to the informant (seller) as consideration amount. Thus the petitioners prepared a false registered deed and mutated the said land using the false document as genuine. The Trust did not contribute anything towards the purchase or acquisition of land for branch Ashram and the disciples of Chatrapur and Berhampur area also did not arrange fund for the land. It is falsely mentioned in the deed that consideration amount of Rs.26,84,570/- has been paid to Mochiram Sahu earlier in the village in presence of deed witnesses, i.e., Binayak Sahu (the son of the informant) and G. Jawaharlal. On examination, these witnesses stated that they have no knowledge about payment of the consideration amount. The petitioners made Sri Binayak Sahu (son of the informant Mochiram Sahu) as a witness in the deed knowing full well that Binayak Sahu was mentally unsound and unfit to stand as a witness. It is further mentioned in the final chargesheet that the petitioners misappropriated Rs.33,05,997/- of Shree Shree Shree Mahapurusha Achyutananda Trust by making false declaration in income tax returns of the year 2013-14 that it was the contribution of the Trust for purchase of land at branches. The bank statements of the informant Mochiram Sahu do not show the deposit of consideration money. The bank

accounts of the Trust or the petitioners do not disclose withdrawal of such amount for payment of consideration amount to the informant, as falsely claimed by the petitioners. It is further mentioned in the final chargesheet that from the statements of witnesses and medical reports and prescriptions, it is evident that Binayak Sahu, the son of the informant Mochiram Sahu was mentally infirm and has not recovered contrary to the promise/assurance made by petitioner Surendranath Mishra. The petitioners fraudulently collected huge money and valuables from thousands of people by cheating by using so-called palm leaf POTHI of Mahapurusha Achyutananda. During investigation, cash amounting to Rs.29,93,910/-, gold ornaments weighing 533.240 grams and silver ornaments weighing 1984.98 grams were seized from the possession of the petitioners along with palm leaf POTHI used for cheating. It is further mentioned in the final chargesheet that total amount of Rs.2,78,71,473/- was found deposited in different banks in 92 accounts in respect of the Trust and petitioner Surendranath Mishra and his family members. An amount of Rs.21,54,516/- was found deposited in 36 policies and three fixed deposits in LIC., Rs.35,28,300/- was found deposited in H.D.F.C. Standard Life Insurance, Rs.1,97,000/- in H.D.F.C. Mutual Fund and Rs.1,14,000/- in Birla Sun Life Mutual Fund. It is further mentioned in the final chargesheet that around 88 acres of land at different places were recorded in the names of Trust, the petitioners and their family members and there was reason to believe that those properties were the proceeds of crime. It is further mentioned in the final chargesheet that the petitioner Surendranath Mishra was the founder Trustee of Shree Shree Shree Mahapurusha Achyutananda Trust and the petitioner Trilochan Mishra was holding the office of Chairman-cum-Managing Trustee and all the activities of Trahi Achyuta Ashram and of Trust were managed by the petitioners. Trahi Achyuta Ashram was evaluated by a team of Assistant Engineer of R & B Department and the value of built up structure of the Ashram is Rs.20,44,43,000/-. It is further mentioned in the final chargesheet that the petitioners had no source of income and could not account for those movable and immovable properties and there was reason to believe that most of those properties were acquired illegally by cheating the public including the informant of the case with an intention to misappropriate for personal gains. It is further mentioned in the chargesheet that the Joint Director, Enforcement Directorate, Bhubaneswar registered a case under section 3 of the Prevention of Money Laundering Act, 2002 against the petitioners and others and prima facie evidence under sections 120-B/420/423/467/468/471/406/506/34 of the Indian Penal Code was found against the petitioners.

5. Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioners contended that the offences are triable by Magistrate and final chargesheet has been submitted and there is no chance of absconding of the petitioners who are in custody in connection with this case since 24.09.2015 and therefore, the bail application may be favourably considered.

Mr. Janmejaya Katikia, learned Addl. Government Advocate on the other hand contended that the petitioner Surendranath Mishra challenged the entire criminal proceeding in G.R. Case No.258 of 2015 pending in the Court of learned S.D.J.M., Chatrapur before this Court in CRLMC No.2344 of 2016 which was dismissed vide order dated 18.01.2017. He further submitted that the petitioners filed CRLMC No.1272 of 2016 and 1271 of 2016 along with others challenging the order passed by the learned S.D.J.M., Chatrapur in G.R. Case No.258 of 2015 for release of their different bank and postal accounts, which were frozen by the C.I.D. C.B., Cuttack which were also dismissed vide judgment and order dated 19.05.2017. It is further contended that the petitioner Surendranath Mishra is a very influential person who may bias and intimidate witnesses and tamper with the evidence, if released on bail and in fact the petitioners have started tampering with the evidence of the informant even remaining inside jail custody. He further submitted that there are number of cases pending against the petitioners i.e., Balipatna P.S. Case No.187 dated 30.08.2015 under sections 341/341/323/294/506/34 of I.P.C. read with section 3(1)(x) of SC & ST (PA) Act, Balipatna P.S. Case No.189 dated 31.08.2015 under sections 294/506/120-B/420/509/34 of I.P.C., Balipatna P.S. Case No.190 dated 31.08.2015 under sections 341/342/294/506/34 of I.P.C., Balipatna P.S. Case No.191 dated 31.08.2015 under section 25 of Arms Act and 34 of I.P.C., Balipatna P.S. Case No.196 dated 01.09.2015 under sections 365/506/34 of I.P.C., Chatrapur P.S. CaseNo.119 dated 03.09.2015 under sections 420/423/467/468/471/506/120-B/34 of I.P.C., Balipatna P.S. Case No.219 dated 01.10.2015 under sections 342/347/323/466/467/468/294/506/420/34 of I.P.C. read with section 25 and 27 of Arms Act and therefore, in view of the criminal proclivity of the petitioners and absence of any change in the circumstances except submission of final chargesheet, there is nothing to reconsider the successive bail applications of the petitioners and accordingly, the bail applications should be rejected.

6. Bentham said, "Witnesses are the eyes and ears of justice". When the witnesses are not able to depose in the Court of law freely and correctly due to threat/intimidation/inducement by various means by use of muscle and

money power by the accused, it shakes public confidence in the criminal justice delivery system. Therefore, at the time of grant of bail, apart from considering the nature and gravity of the accusation, it is also to be seen whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with the evidence.

During hearing of these bail applications, an affidavit was filed on behalf of the petitioners by one Biranchi Narayan Mishra, another son of petitioner Surendranath Mishra on 07.03.2017 and in the said affidavit, it is mentioned as follows:-

> "2. That during the pendency of the aforesaid bail applications, the informant Mochiram Sahu has amicably settled the matter for which he has filed an application under section 320 of Cr.P.C. before the learned Court of S.D.J.M., Chatrapur in G.R. Case No.258 of 2015 arising out of Chatrapur P.S. Case No.119 of 2015 converted to C.D.C.I.B. P.S. Case No.28 of 2015 under sections 420/423/467/468/471/506/120-B and 34 of IPC. A copy of the petition u/s. 320 of Cr.P.C. is annexed herewith and marked as **Annexure-7**.
>
> 3. That, the informant has filed an application before the learned Civil Judge (Sr. Div.), Chatrapur in C.S. No.15 of 2016 praying for production of Defendant No.1 i.e., Trilochan Mishra to sign and execute the compromise petition as the Jail Authority of Special Jail, Jharpada, Bhubaneswar where present petitioners are residing, are not cooperating to either execute special power of attorney or not allowing the petitioners to sign the compromise petition. A copy of the application filed by the informant before the Court of Civil Judge (Sr. Div.), Chatrapur is annexed herewith and marked as **Annexure-8**."

The copy of the affidavit was served on the learned counsel for State and when the matter was taken up for orders on 12.05.2017, the learned counsel for the petitioners relied upon the affidavit filed on behalf of the petitioners. When the learned counsel for the State was asked about the compromise between the parties, he submitted that he had not obtained any instruction in that respect. This Court on the prayer of the learned counsel for the petitioners permitted to implead the informant as opposite party no.2 and issued notice to him. The matter was again taken up on 30.06.2017 for orders

and the informant Mochiram Sahu was present in Court on that day. The Investigating Officer was also present. When the compromise petition filed before the learned S.D.J.M., Chatrapur in G.R. Case No.258 of 2015 as well as petition filed by the plaintiff (informant) before the Civil Judge (Senior Division), Chatrapur in C.S. No.15 of 2016 which were annexed to the affidavit filed on behalf of the petitioners were confronted to the informant, he made pre-varicating statements relating to the contents of such documents and accordingly, on the prayer of the learned counsel for the State, the learned S.D.J.M., Chatrapur was directed to record the 164 Cr.P.C. statement of the informant to ascertain the genuineness and truthfulness of the contents of the compromise petition filed before his Court as well as the petition which was filed before the learned Civil Judge (Senior Division), Chatrapur in Civil Suit No.15 of 2016. The Investigating Officer was directed to produce the 164 Cr.P.C. statement of the informant on the next date. Subsequently the learned counsel for the State produced the certified copy of the 164 Cr.P.C. statement of the informant. On perusal of such statement, it is found that the same was recorded by the learned S.D.J.M., Chatrapur on 04.07.2017 in which the informant has stated that in order to return his lands, Dharani Jena, Subhakanta Jena, Biranchi Mishra and Rajendra Sahu who are the active members of Trahi Achyuta Ashram took his signatures and submitted the same in the Court. He further stated that subsequently he came to know that they have adopted fraudulent means and misguided him by way of filing a compromise petition in order to obtain bail order for Sura Baba and the other accused. He further stated that even though the signatures appearing in the documents belonged to him but he was not aware about the contents of the documents and that by cheating him, the compromise petition has been filed without his knowledge. He further stated that he was also unaware about the contents of the compromise petition which was filed before the learned Civil Judge (Sr. Div.), Chatrapur in C.S. No.15 of 2016 and without his knowledge, such petition has been filed. He further stated that there was no compromise between him and the accused persons and there was no amicable settlement and he wants to prosecute the case.

7. Adverting to the contentions raised by the learned counsels for the respective parties and the lis pendens development and from the entire episode narrated above, it is crystal clear that even though the petitioners are inside jail custody, attempts are being made by their henchmen to tamper with the evidence, fabricating documents and filing false affidavit in Court to pave way for the bail of the petitioners. The reasonable apprehension of the

prosecution that the entire episode has been stage managed at the instance of petitioner Surendranath Mishra cannot be ruled out. The petitioner Surendranath Mishra has thousands of followers as per the prosecution report and when remaining inside jail custody, attempts are being made by the petitioners to throttle the neck of justice by adopting unfair method, granting of bail to the petitioners in such circumstances would be just like giving death knell to the prosecution case. It cannot be lost sight of the fact that the petitioners have criminal proclivity and they have played with the religious feelings and sentiments of innocent persons in the name of bringing divine blessings for them. Therefore, without being influenced by the observations made in the earlier rejection order but on going through the materials on record as per final charge sheet as well as the conduct of the petitioners in tampering with the evidence, I am of the humble view that in order to have a free and fair trial of the case and to uphold the majesty of the law, grant of bail to the petitioners would not be conducive in the interests of justice. Accordingly, the bail applications filed by the petitioners Surendranath Mishra and Trilochan Mishra sans merit and hence stand rejected.

Applications rejected.

2017 (II) ILR - CUT-1404

K. R. MOHAPATRA, J.

W.P.(C) NO. 20638 OF 2017

PURNA CHANDRA PAL .....Petitioner

.Vrs.

AJAY KUMAR PATRA & ORS. .....Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-6, R.17 r/w Sec. 44-B, Odisha Panchayat Samiti Act

Amendment of election petition – Whether Amendment can be entertained after expiry of the period of limitation provided for filing of an election petition ? Held, Yes – Even new ground of challenge can be

introduced by way of amendment after the statutory period of filing of an election petition upon showing sufficient cause.

In this case, the election petitioner had only sought for correction of typographical errors, change of names of the children etc. which will neither be a new ground nor it will bring any material change to the election petition – Held, the amendment is not barred by limitation. (Paras 8, 9)

Case Laws Referred to :-

1. 2005 (II) OLR 628 : Dibakara Patra -V- Jatadhari Mishra & Ors.
2. 2013 (Supp-II)OLR 825 : Makardhwaja Mohanty -V- Dharmabira Kanungo
3. AIR 2005 SC 2441 : Kailash -V- Nanhku & Ors.
4. 2011 (Supp-II)OLR1090 : Rajen Ku. Parida -V- Jameswar Mallick

For Petitioner : M/s. Amit Pr. Bose, S.K.Dwibedi, R.K.Mohanta & D.J.Sahoo

For Opp.Parties : M/s. U.C.Mishra, A.Mishra, J.K.Mohapatra, B.P.Sasmal & Tulu Sahu
Mr. J. Patra, A.S.C.

Date of Hearing : 06.11.2017
Date of Dispose : 06.11.2017

O R D E R

K.R.MOHAPATRA, J.

This writ petition has been filed assailing order dated 11.09.2017 (Annexure-1) passed by learned Civil Judge (Senior Division), Jaleswar (for short 'the Civil Judge') in Election Misc. Case No.2 of 2017, whereby learned Civil Judge allowed the prayer of the election petitioner (OP No.1 herein) for amendment of the Election Petition.

2. In the said election petition (Election Misc. Case No.2 of 2017), challenge has been made essentially to the election of opposite party No.1 as a member of Panchayat Samiti of Analia Grama Panchayat of Bhogarai block, which was held on 13.02.2017. During pendency of the said election petition, opposite party No.1 filed a petition (Annexure-4) under Order-6 Rule 17 of CPC for correction of some inadvertent typographical errors which crept in during drafting of the petition. The proposed amendments were as follows:

"PROPOSED AMENDMENTS

1. The date "23.09.1999" appearing in Paragrpah-9 of the petition be substituted by the date "25.09.1999".

2. The name "Jagyaswini" and the name "Pragyanswari" written in Paragraph-9 of the petition be corrected to "Jajneswani" and "Tapaswini" respectively.

3. After the word "their" appearing in the 2nd sentence in Paragraph-9 of the petition the writings "Adhar Card as well as Census repot 25.10.2014" be deleted and in that place words "birth certificates" be written."

The returned candidate (the writ petitioner) filed his objection contending *inter alia* that the petition for amendment is barred by limitation. The petition has been filed without any just cause. The petition for amendment has been filed after filing of the written statement to the election petition and commencement of trial. The election petitioner by virtue of the proposed amendment wants to take away the admission made in the election petition. There is no basis to change the dates and particulars given in the election petition. The averments and allegations made in the amendment petition are also incorrect. As such, the petition for amendment would not be maintainable. Hence, he prayed for dismissal of the petition for amendment.

3. Learned Civil Judge, taking into consideration the nature of amendments proposed to be made in the Election petition as well as objection filed, allowed the petition for amendment vide order dated 11.09.2017 stating it to be formal in nature and that it would not change the nature and character of the Election petition.

4. Mr.Bose, learned counsel for the petitioner submits that amendment petition would not be maintainable as the same was filed beyond the statutory period prescribed for filing of the election petition itself. By allowing the petition for amendment, learned Civil Judge has allowed the election petitioner to introduce new material facts beyond the prescribed period for filing of election petition. As such, the amendment sought for is barred by limitation and the same is not permissible in law. The impugned order has seriously prejudiced the election petitioner. As such, the same is not permissible in law and order under Annexure-1 is liable to be set aside.

Mr.Bose, in support of his case, relied upon the decision of this Court in the case of ***Dibakara Patra Vs. Jatadhari Mishra and others***, reported in 2005 (II) OLR 628; ***Makardhwaja Mohanty Vs. Dharmabira Kanungo***, reported in 2013 (Supp.-II) OLR 825 as well as decision of the Hon'ble Supreme Court in ***Kailash Vs. Nanhku and others***, reported in AIR 2005 SC 2441.

5. Mr.Mishra, learned counsel for opposite party No.1 (returned candidate) refuting the submissions of Mr.Bose submitted that there will be no material change in the election petition by virtue of amendment. The amendment was only meant for correcting the inadvertent typographical errors in the election petition, which crept in course of drafting the same. The names of the daughters of the returned candidates were not properly described due to ignorance of the election petitioner. Moreover, the election petitioner in support of the date of birth of alleged third child of the returned candidate, had initially relied on Adhar Card as well as Census report dated 25.10.2015. By virtue of amendment, he wants to rely upon the birth certificate issued by the competent authority in support of the date of birth of the child of the returned candidate, which is more authentic. The aforesaid amendments will neither change the nature and character of the election petition nor it would bring any material change in the election petition. The plea of limitation was not taken in the objection of the returned candidate. Further, limitation prescribed for filing an election petition under Section 44-B of the Orissa Panchayat Samiti Act, 1959 (for short, 'the Act') cannot be a consideration for adjudicating the petition for amendment of the pleadings. In support of his case, Mr.Mishra placed reliance upon ***Rajen Kumar Parida –v- Jameswar Mallick***, reported in 2011 (Supp.-II) OLR 1090.

6. Having heard learned counsel for the parties and on perusal of record, it appears that by virtue of amendment, the election petitioner seeks to correct the date of birth of the first child of the returned candidate as 25.09.1999, in place of 23.09.1999. It appears to be a typographical error and change of date of birth of the first child of the returned candidate does not bring any material change to the election petition.

At paragraph-4 of the written statement, annexed to the writ petition as Annexure-3, the returned candidate has categorically stated that the opposite party No.4 (the returned candidate) is the father of only one child, namely Yangyaseny Paul. He does not have any other child, namely, Tejaswini Paul or Pragyanswani Paul. The election petitioner by virtue of amendment prayed for correction of names of children, he alleges to be of the

returned candidate as 'Jajneswani' in place of 'Jagyaswini' and 'Tapaswini' in place of 'Pragyanswari'. When the returned candidate at paragraph-4 of his written statement has admitted to have only one child, namely, Yangyaseny Paul and has categorically pleaded that he has no second child, change of names of alleged second and third child of the returned candidate would not prejudice him in any way.

Further, the election petitioner, in order to prove the date of birth of the alleged third child of the returned candidate, had initially relied upon the Adhar Card of the child as well as the Census report. Subsequently by virtue of amendment, he sought for an amendment to rely upon the birth certificate of alleged third child of the returned candidate to prove her parentage as well as the date of birth. The veracity of the allegation of the election petitioner to that effect requires adjudication by adducing both oral as well as documentary evidence. Mere pleadings of the election petitioner regarding the third child of the returned candidate relying either upon Adhar Card or Census report or Birth certificate, does not by itself proves such allegation. Thus, the amendment to that effect neither brings any material change to the election petition nor is it prejudicial to the case of returned candidate.

Moreover, the returned candidate has been given liberty to file additional Written Statement and has also the liberty to adduce rebuttal evidence in support of his case. In such view of the matter, the amendment to the election petition will, in no manner, prejudice the returned candidate. It also does not bring any material change to the election petition, as alleged.

7. The next and most important contention of Mr.Bose, learned counsel for the petitioner to the effect that, the amendment petition could not have been filed beyond the period of limitation provided for filing the election petition requires consideration.

8. The amendment petition was filed on 16.08.2017. Obviously the same was filed beyond the period of limitation provided for filing of the election petition under the Act. Perusal of the objection to the amendment petition filed by the returned candidate discloses that no specific plea with regard to the limitation in filing the amendment petition was taken by the returned candidate. Be that as it may, the question that arises for consideration as to whether such a petition could have been entertained beyond the period for filing the election petition under the provisions of the Act. Section 44-B of the said Act deals with presentation of election petition, which reads as follows:

"**44-B.Presentation of petitions**- (1) The petition shall be presented on one or more of the grounds specified in Section 44-L before the Civil Judge (Senior Division) having jurisdiction over the place at which the office of the Samiti is situated together with a deposit of two hundred rupees as security for costs within fifteen days after the day on which the result of the election was announced:

Provided that if the office of the Civil Judge (Senior Division) is closed on the last day of the period of limitation as aforesaid the petition may be presented on the next day on which such office is open:

Provided further that if the petitioner satisfies the Civil Judge (Senior Division) that sufficient cause existed for the failure to present the petition within the period aforesaid the Civil Judge (Senior Division) may in his discretion may condone such failure:

Provided also that in cases where the result of the election was announced prior to the 26th day of January 1961, the aforesaid period of limitation shall be computed from the said date."

(*emphasis supplied*)

The 2nd proviso to Section 44-B (1) provides that if the election petitioner satisfies the Civil Judge that sufficient cause existed for failure to present the election petition within the limitation period, learned Civil Judge may at his discretion condone such delay. It is the submission of Mr. Bose that entertaining an application for amendment of the pleadings of election petition after the statutory period provided under Section 44-B(1) of the Act, would amount to introduction of new pleadings and material facts after the limitation period, which is not permissible in law. In support of his case, he relied upon a decision of ***Dibakar Patra (supra)***. Although in the said case, election of Member of Zilla Parishad under the provisions of Orissa Zilla Parishad Act, 1991, was under challenge, this Court taking into consideration the provisions under Section 32 of the said Act, which stipulates that the provision under Section 44-B of the Orissa Panchayat Samiti Act would be applicable for presentation of an election petition under Section 32 of the Orissa Zilla Parishad Act, held as under:

"7. So, the law on the subject is perfectly settled. Amendment of an election petition seeking amendment of material facts not pleaded earlier or

introduction of new case is not permissible when the period of limitation prescribed for filing the election petition is over.

8. xx xx xx

9. Law is settled that amendment incorporating a fact, which was beyond the knowledge of the person seeking amendment, is permissible even at a later stage. Law is also fairly settled that in such contingency, the period of limitation will begin to run from the date of knowledge of the person concerned, if such person concerned under normal circumstance had no way of learning about the cause of action earlier.

10. xx xx xx
11. xx xx xx

12…...In view of the ratio laid down in the decisions referred to above, such an amendment carrying new plea was not permissible beyond the period of limitation. Thus, the learned District Judge, Puri, committed legal error in allowing the amendment filed by opposite party No. 1."

(emphasis supplied)

He further relied upon the decision in the case of ***Kailash (supra)***, which is a case under the provisions of Representation of Peoples Act. On the contrary, Mr.Mishra, in support of his case, relied upon the decision of this Court in the case of reported in ***Rajen Kumar Parida (supra)***, wherein, this Court, considering the *pari materia* provisions under Section 31(1) of the Grama Panchayats Act, 1964 Act, held as follows:-

"7. Since as per the second proviso to Section 31(1) an original election petition can be entertained if the petitioner satisfies the Court by showing sufficient cause for his failure to present the petition within the period of stipulated 15 days, there is no reason as to why the said provision shall not apply for introducing a new ground of challenge to the election of the returned candidate by way of amendment in a petition originally filed within time. In his amendment petition, the opposite party has clearly stated that the disqualification of the petitioner for holding an office of profit as a lecturer in the Indira Gandhi Mahila Mahavidyalaya, which is undisputedly an aided institution, was not within his knowledge at the time of filing of the election petition. This assertion of the opposite party has not been disputed or challenged in the objection filed by the petitioner to the amendment petition. Though the Court below has not specifically stated to have condoned the delay in entertaining a new ground by way of amendment, but it has taken note of the fact of lack of knowledge on the part of the opposite party about the disqualification of the petitioner at the time of filing of

> original application. If a fresh election petition challenging the election of the petitioner on the new ground of his disqualification can be entertained by condonation of delay, the trial Court has appropriately allowed the amendment by way of incorporation of the new ground in Original Application to avoid multiplicity of proceedings. "
>
> (*emphasis supplied*)

9. In view of the ratio decided in the aforesaid case law, there remains no iota of doubt that a petition for amendment of the election petition under the Act can be entertained even after expiry of the period of limitation provided for filing of an election petition on showing sufficient cause. Even new ground of challenge can be introduced by way of amendment of the election petition after the statutory period of filing an election petition upon showing sufficient cause thereto. The ratio decided in the case of ***Kailash (supra)*** is not applicable to the case at hand, as the same is under the provisions of Representation of Peoples Act, which has no application to the case at hand. Thus, amendment of pleadings of election petition cannot be an absolute bar, which can never be the intent or object of the statute. It depends upon the facts and circumstances of each case. In the case at hand, the election petitioner had only sought for correction of typographical errors, change of names of the children, alleged to be of returned candidate as well as the documents to be relied upon to prove the date of birth of the alleged third child of the returned candidate. As held earlier, it is neither a new plea /ground nor brings any material change to the election petition. Learned Civil Judge, upon being satisfied with the sufficiency of cause for amendment petition, has allowed the same. Thus, the amendments in question can, by no stretch of imagination, be said to be barred by limitation.

10. Mr.Bose, learned counsel for the petitioner relying upon the decision in the case of ***Makardhwaja Mohanty (supra)*** further contends that the trial of election petition commences from the date of receipt of the election petition by the Court and continues till the date of its decision and that since the amendment petition has been filed after trial in election petition has commenced, the same would be hit by proviso to Order 6 Rule 17 CPC, in absence of any specific plea of exercise of due diligence. Section 44-F of the Act deals with the procedure to be followed by learned Civil Judge while dealing with a petition under Section 44-B of the Act. It read as follows:

> "44F**. Procedure before the [Civil Judge (Senior Division**)]. - (1) Subject to the provisions of this Act and of any rules made thereunder every election petition shall be tried by the [Civil Judge (Senior Division)] as nearly may

be in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits.

(2) The [Civil Judge (Senior Division)] shall not be required to record or to have the evidence recorded in full but shall make a memorandum of the evidence sufficient in his opinion for the purpose of deciding the case.

(3) The [Civil Judge (Senior Division)] for the purpose of deciding any issue, shall receive so much evidence, oral or documentary, as he considers necessary and may require the production of any evidence.

(4) The [Civil Judge (Senior Division)] may at any stage of the proceedings, require the petitioner to give further security for the payment of all costs incurred or which is likely to be incurred by any opposite party and if within the time fixed by him or within such further time as he may allow such security is not furnished, he may dismiss the petition.

(5) No witness or other person shall be required to disclose the name of the person for whom he has voted at an election.

(6) The provisions of the Indian Evidence Act, 1872 (1 of 1872) shall, subject to the provisions of this Act, be deemed to apply in the trial of an election petition.

(7) Notwithstanding anything in any enactment to the contrary no document shall be inadmissible in evidence on the ground that it is not duly stamped or registered.

(8) Reasonable expenses incurred by any person in attending to give evidence may be allowed to such person which shall unless the [Civil Judge (Senior Division)] directs, be deemed to be part of the costs.

(9) Any order as to costs passed by the [Civil Judge (Senior Division)] shall be executed by him on application made in that behalf in the same manner and by the same procedure as if it were a decree for the payment of money passed by himself in a suit."

(*emphasis supplied*)

It provides that subject to the provisions of the Act, an election petition under the Act may be tried by learned Civil Judge (Senior Division), as nearly may be possible in accordance with the procedure laid down under the Code of Civil Procedure, 1908. Again, Section 44-H of the Act provides for the power of learned Civil Judge (Senior Division) in trying an election petition. It reads as follows:

> **"44H. Powers of [Civil Judge (Senior Division)]** - The [Civil Judge (Senior Division)] shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908 (5 of 1908) when trying a suit in respect of the following matters, namely :
>
> (a) discovery and inspection;
>
> (b) enforcing the attendance of witnesses and requiring the deposit of their expenses;
>
> (c) compelling the production of documents;
>
> (d) examining witnesses on oath;
>
> (e) granting adjournments;
>
> (f) reception of evidence taken on affidavit ; and
>
> (g) issuing commissions for the examination of witnesses,
>
> and may summon and examine suo motu any person whose evidence appears to it to be material; and shall be deemed to be a Civil Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898 (5 of 1898)."

11. A conjoint reading of both the provisions makes it abundantly clear that the provisions of Code of Civil Procedure, 1908 will be applicable as nearly as possible to a trial of the election petition, more particularly in respect of matters under Section 44-H of the Act. Even if it is considered that the trial of an election petition commences on presentation of the petition, the rigors of proviso to Order 6 Rule 17 C.P.C. will not be applicable to an election petition, as section 44-H of the Act specifies the matters to which Civil Procedure Code, 1908 is applicable. Thus, the restriction under Order 6 Rule 17, CPC is not strictly applicable to an election petition filed under Section 44-B of the Act. As such, the contention raised by Mr.Bose is not acceptable.

12. Taking into consideration the discussions made above, I find no infirmity in the impugned order under Annexure-1. Thus, the same warrants no interference. Accordingly, the writ petition stands dismissed. No cost.

Writ petition dismissed.