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CIVIL PROCEDURE CODE, 1908 – O-12, R-6

Whether judgment on admission can be held to be a compromise decree so as to be excluded from the purview of appeal U/s. 96 (3) of C.P.C. ? – Held, No.

Judgment and decree involving an application under Order 12, Rule 6 C.P.C. amounts to decree but it cannot be treated as a compromise decree – Held, the petitioner having clear remedy of appeal, the CMP filed by him under Article 227 of the Constitution of India is not maintainable.

Naba Kumar Shaw-V- Sisir Kumar Pal.

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CRIMINAL PROCEDURE CODE, 1973 – S.240(2)

Framing of charge in warrant case – Charge must be read over and explained to the accused in person for his/her understanding and answer whether he/she pleads guilty of the offence charged or claims to be tried – Held, the provision being mandatory, does not permit the accused to answer the charge through counsel.

Gandhi Jena & Anr.-V- State of Orissa & Anr.

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S.389

Suspension of conviction pending appeal – Only in rare and exceptional cases, the court may stay or suspend conviction by assigning reasons.

In this case, the learned trial Court while acquitting the petitioner of the charges under sections 420, 468, 201 and 120B I.P.C. has not assigned a single reason for convicting the petitioner U/s. 13(2) read with section 13(1)(d) of the P.C.Act, 1988 – So when the charge of criminal conspiracy has failed and there is nothing that the petitioner had conspired with other co-accused persons to grab the Government fund allotted for construction of pot-holes, the impugned judgment suffers from total non-application of mind and unless the said judgment relating to the petitioner is not stayed till disposal of the appeal, there will be failure of justice – Held, since the petitioner has made out an exceptional case, the impugned order of conviction passed against him by the learned Special Judge (Vigilance) is stayed/suspended till disposal of the appeal.

Sudarsan Sahani -V- State of Odisha (Vig.) 2018 (I) I.L.R. Cut…….. 374

S.391

Section 391 Cr.P.C. empowers the appellate Court to take further evidence or to direct it to be taken by the Court below – However, law is well settled that such power should not be exercised where either the prosecution had got ample opportunity to adduce evidence but has not availed it or the accused persons had got such opportunity for the same purpose or for cross-examining the witnesses and failed in that respect – In case of taking additional evidence, the Court must see whether the prosecution or the accused had no opportunity to produce such additional evidence before the trial Court – Additional evidence must be necessary not because it would be impossible to pronounce the judgment but because there would be failure of justice without it – So, such power has to be exercised sparingly and only in suitable cases.

In this case despite sufficient opportunity for the accused persons to cross-examine P.Ws. 4 and 6, they have not availed the same – So the appellate Court should not have exercised its power U/s. 391 Cr.P.C. in a liberal manner, which suffers from non-application of mind – Held, the impugned order allowing the petition U/s. 391 Cr.P.C. is quashed.

Mihir Chandra Dash-V- State of Orissa & Anr.

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S.482

Quashing of order taking cognizance – Offence U/ss. 493, 503, 313/34 I.P.C. – Petitioner-doctor challenged the order on the ground that he aborted pregnancy of the victim with her consent.

In this case the victim has categorically stated that she was taken to a private clinic by the family members of her lover by giving an impression of formal check up of the child in the womb where the doctor gave some medicines to her for which she became senseless and after one hour when she regained her sense, she came to know there has been termination of her pregnancy and when she confronted about such termination she was threatened with dire consequences if she would disclose the incident before anybody.

From the materials on record it is clear that neither the procedure laid under sections 3, 4 and 5 of the MTP Act have been followed nor the consent of the victim has been taken for termination of six months pregnancy – Rather in a clandestine manner the petitioner succumbed to the dirty tricks played by the lover and caused the abortion – Held,

this Court is not inclined to invoke its inherent power to interfere with the impugned order.

Dr. Binod Bihari Naik -V- State of Orissa.

2018 (I) I.L.R. Cut…….. 395

CONSTITUTION OF INDIA, 1950 – ART.21

Custodial torture – Compensation – Petitioner was called time and again to the police station, even though he was not named in the F.I.R./Chargesheet and there was no allegation against him – He was arrested as Tukuna Behera but the learned SDJM, Kendrapara on verification of his identity discharged him asking the police to arrest the proper man – Petitioner had undergone mental, physical and psychological torture in the hands of insensible police officer and suffered humiliation in the society – The very conduct of the police authority has destroyed the brightness and will power of the petitioner – Deliberate and willful violation of the fundamental right of the petitioner to live with dignity – Held, in order to restore the human dignity of the petitioner, this Court directed the State authority to pay Rs. 2,00,000/- as compensation which shall be realized from the erring officers from their salary in equal proportion as thought appropriate by the competent authority of the State.

Chittaranjan Behera -V- State of Orissa & Ors.

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ARTS 14, 226

Engagement of Sikhya Sahayak – Resolution of the Govt. Dt. 26.12.2016 restricting the age limit to 32 year is challenged basing on the fact that previously the Govt. on various resolutions extended the age limit to 42 years.

Since there was no recruitment for several years and intending candidates crossed 32 years, the Govt. on the recommendation of the High Power Committee extended the age limit of 32 years upto 42 years – The above issue was also considered in W.P.(C) NO. 18542/2014 by a co-ordinate Bench of this Court wherein it was observed that the same shall not be a precedent for other cases in future – This Court has also considered provisions of Odisha Elementary Education (Method of Recruitment and Conditions of Service of Teachers and Offices) Rules, 1997 and Odisha Civil Service (Fixation of Upper Age limit) Rules, 1989 wherein the State Govt. has fixed the upper age limit upto 32 years – So if there will be any deviation it would create discrimination – Held, this being the

policy decision of the Govt. and no case of malice or arbitrariness has been made out by the Petitioners-candidates, the writ petitions praying to relax the age upto 42 years have no merit, hence dismissed.

Bhabendra Pradhan & Ors. -V- State of Odisha & Ors.

2018 (I) I.L.R. Cut…….. 401

ARTS 14, 225

Engagement of Sikhya Sahayak – Challenge made to clause 6.1 of the resolution Dt. 26.12.2016 fixing minimum 50% marks in Higher Secondary/Graduation level.

Neither the rules and regulations governing the recruitment process by the National Council for Teacher Education (NCTE), the apex academic authority, nor the Right to Education Act, 2009 have been taken into account while fixing the minimum 50% marks – Held, the writ petitions of the candidates, deprived to participate in the selection process, are allowed and the matter is remitted to the State authorities for taking consequential steps in respect of such category of employees strictly as per NCTE regulation before proceeding further in the selection process.

Bhabendra Pradhan & Ors. -V- State of Odisha & Ors.

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ARTS 14, 226

Appointment of Sikhya Sahayak – Direction of O.P.No.1 to O.P.No.2 Dt. 26.12.2016 to reserve 60% vacancies to be filled up by candidates having science background i.e. +2 and +3 Science and 40% by candidates having Arts and Commerce background i.e. +2 Arts or Commerce / +3 Arts – Hence the writ petitions.

State Govt. is the best judge to induct persons as teachers to strengthen the foundation of the students of class-I to class-V – It is the policy decision of the Govt. in the larger interest of the students – Decision don't suffer from the vice of malice or arbitrariness – Held, this Court declined to interfere with the above action – However, the prayer regarding omission of consideration of candidature of B.A/B.Sc. and 2 years diploma in elementary education is allowed with a direction to state authorities to act strictly in pursuance to the minimum educational qualification provided under the NCTE notification before proceeding further in the selection process.

Bhabendra Pradhan & Ors. -V- State of Odisha & Ors.

2018 (I) I.L.R. Cut…….. 401

ART. 226

Appointment of Sikhya Sahayak – Clause 6.1 and 6.2 of the resolution Dt. 26.12.2016 relating to passing of Odiya, as M.I.L. upto class-X challenged.

In the State of Odisha it is required to extend education not only to Odiya knowing people but also to Urdu, Bengali, Telugu knowing candidates who are residing through out the state – Such teachers must know Odiya language, which is the requirement for the State of Odisha – Held, this court is not inclined to interfere in the above policy decision of the State Government.

Bhabendra Pradhan & Ors. -V- State of Odisha & Ors.

2018 (I) I.L.R. Cut…….. 401

ART. 226

Writ Court – Jurisdiction – Meaning of – It means the extent of power which is conferred upon the Court by its Constitution to try a proceeding, exercising jurisdiction in relation to the territories within which "the cause of action" wholly or in part arises – So question of territorial jurisdiction can be decided on the facts pleaded in the writ petition.

In this case the appellant was serving as Assistant Manager in NABARD at Guwahati – During the year 2014 she fell ill and the Medical Officer NABARD advised her that it would be risky to remain alone at Guwahati and she should stay with her near and dear ones at her native place and since then she is residing in Odisha – As a matter of fact, the advice of the Doctor cannot be treated as the command from the employer to stay at her native place – So, merely because she is residing in Odisha or may have sent representations to the authorities in Mumbai or Assam would not mean that any cause of action has arisen within the territorial jurisdiction of this Court – Held, the decision of the learned single Judge that the writ petition is not maintainable on the ground of jurisdiction is correct.

Shrabanti Das-V- Govt. of India & Ors.

2018 (I) I.L.R. Cut…….. 244

ART. 311(2)

Disciplinary proceeding – Dismissal from service – Appellate Authority confirmed the order – Hence the writ petition.

In this case it is alleged that the Departmental Authority and Enquiry Officer changed for four times and the Presenting Officer

changed for five times – The delinquent was not supplied relevant documents on the ground of being available in police custody – No opportunity to examine his own witnesses – Though the delinquent requested to defer the enquiry on account of his illness the Enquiry Officer allowed the Presenting Officer to prove the case of the Management and abruptly concluded the enquiry exparte – There is no counter denying all these allegations even though the writ petition is pending for more than 13 years – Gross-violation of the principles of natural justice – The manner of closing of the disciplinary proceeding is bad – Held, the impugned report of the Enquiry Officer, orders passed by the Disciplinary Authority as well as the Appellate Authority are set aside – However, considering the serious nature of allegations against the petitioner, this Court remands this matter to re-start the Enquiry Proceeding and to conclude the disciplinary proceeding within six months – The status of the petitioner shall be relegated back to the stage as on 23.06.2003 on which date he was set-exparte and his reinstatement is solely for the purpose of completing the departmental proceeding.

Kalpataru Senapati –V- Odisha Gramya Bank & Ors.

2018 (I) I.L.R. Cut…….. 351

CUTTACK GRAMYA BANK OFFICERS AND EMPLOYEES SERVICE REGULATION, 2000 – REGULATION - 47

Appeal against the punishment awarded by the Disciplinary Authority – Whether the appellate authority has jurisdiction to enhance the punishment ? – Held, No.

This Court while setting aside the impugned order, remitted back the matter to the appellate authority for re-hearing.

Pradeep Kumar Mohapatra –V- Chairman, Odisha Gramya Bank & Ors.

2018 (I) I.L.R. Cut…….. 370

EVIDENCE ACT, 1872 – S.3

Appreciation of evidence – Appellants convicted U/ss. 144, 148, 302 and 149 I.P.C – Their plea is that the learned trial Court illegally convicted them only relying on the evidence of P.W.1, who is the mother of the deceased and not an eye witness.

Evidence on record shows that P.W.1 is the pre-occurrence as well as the post occurrence witness – She deposed about the threatening given by Dharam Sing to her son for which she followed her son and was obstructed by the accused persons and when she reached the spot

alongwith her husband found her son with bleeding injuries on his head and legs – The facts stated in the F.I.R. corroborates her evidence – She has also explained the motive of the accused persons due to previous land dispute and pendency of civil suits – Moreover there was discovery of the weapon of offence and the prosecution case gets support from the evidence of P.Ws. 9 and 10 – This Court is of the opinion that the learned trial court on considering the proved facts convicted the appellants – Held, the impugned conviction and sentence passed by the learned trial Court is confirmed.

Nara Pujhari & Ors.-V- State of Orissa.

2018 (I) I.L.R. Cut…….. 271

HINDU SUCCESSION ACT, 1956 – S.6

Whether, the appellants, daughters of Gurulingappa Savadi, denied their share on the ground that they were born prior to the enactment of the act, 1956 and therefore, cannot be treated as coparceners ?

And whether, with the passing of Hindu succession (Amendment) Act, 2005, the appellants would become coparceners "by birth" in their "own right in the same manner as the son" and are therefore, entitled to equal share as that of a son ?

And whether the right would be conferred only upon the daughters who are born after September 9, 2005 when the Act came into force or even to those daughters who were born earlier ?

Held, on amendment of section 6 of the Act in 2005 both the sons and daughters of a coparcener have been conferred the right of becoming coparceners by birth.

In this case Gurulingappa Savadi died in the year 2001 and Partition Suit filed in the year 2002 and during the pendency of the suit section 6 was amended – Held, since Gurulingappa died leaving behind two sons, two daughters (present appellants) and a widow both the appellants would be entitled to $1/5^{th}$ share each in the said property.

Danamma @Suman Surpur & Anr.-V- Amar & Ors.

2018 (I) I.L.R. Cut…….. 218

MOTOR VEHICLES ACT, 1988 – S.168

Appellants mother died in road accident – She was an agricultural labourer – Due to head-on-collision between a bus and a truck the bus ran over her – Tribunal held her monthly income at Rs. 650/- and deducting Rs. 250/- towards personal expenses assessed her contribution to the family at Rs. 400/-P.M. – As deceased was 42

years old learned Tribunal adopted multiplier of "12" and awarded compensation of Rs. 57,600/- for the loss of dependency and adding conventional damages awarded total compensation of Rs. 70,600/-, holding both the vehicle owners to pay the compensation at 50% each alongwith 9% interest P.A. – On appeal the High Court affirmed the quantum of compensation but reduced the rate of interest from 9% to 7% - Hence this appeal for enhancement.

The High Court as well as the Tribunal while assessing the income of the deceased as a labourer did not keep in view her contribution in the household work as she contributed her physical labour for maintenance of household and also taking care of her husband and three children, for which her daily income should be fixed at Rs. 150/- per day and Rs. 4,500/- P.M. – So taking agricultural labour work at Rs. 3000/- P.M. and Rs. 1,500/- for the household work the monthly income of the deceased is fixed at Rs. 4,500/- P.M. and deducting 1/3rd for personal expenses, her contribution towards the family is at Rs. 3000/-P.M. and Rs. 36,000/- P.A. – As she was 42 years old multiplier "14" is adopted and loss of dependency is calculated at Rs. 5,04,000/- and further the appellants are entitled to Rs. 15,000/- for loss of estate and Rs.15,000/- for funeral expenses so the total compensation enhanced to Rs. 5,34,000/- with interest at the rate of 7%P.A. – Held, the impugned judgment is modified and the compensation to the claimants is enhanced to Rs. 5,34,000/- – The enhanced compensation is payable with interest at the rate of 7% P.A. from 27.01.2016, the date of judgment passed by the High Court – Respondent Nos. 1 to 3 are jointly and severally liable to pay the enhanced compensation with interest.

Laxmidhar Nayak & Ors.-V- Jugal Kishore Behera & Ors.

2018 (I) I.L.R. Cut…….. 240

NEGOTIABLE INSTRUMENTS ACT, 1881 – S.138

Cheque issued towards advance payment, for acquiring land – Non-existence of legally enforceable debt or other liability – Held, there being no existing liability, it does not attract the provision – The impugned order taking cognizance U/s. 138 N.I. Act is quashed.

Ajaya Kumar Choudhury-V- Smt. Sarada Nanda.

2018 (I) I.L.R. Cut…….. 458

Ss. 138, 142

Complaint Petition by company – Board of Directors of the

Complainant-company authorised the Managing Director, who in turn delegated the power to General Manager (Accounting) to present the complaint petition – Cognizance taken against the petitioners – Order challenged on the ground of locus standi of the person filed the complaint petition.

There is neither any resolution of the Board of Directors nor any authorization of the company but only an authorization letter of the Managing Director in favour of the General Manager (Accounting) to file the complaint case – The authorization letter does not indicate whether the Board of Directors authorised the Managing Director to re-delegate his power to the G.M. (Accounting) to file the complaint on behalf of the company – Held, the complaint case is not maintainable being filed by an incompetent person – The impugned order taking cognizance against the petitioner is quashed.

M/s. SMS ASIA Pvt. Ltd. & Anr.-V- M/s. Trl Krosaki Refractories Ltd.

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Ss.138, 141

Offence by Company – Company is to be made an accused alongwith the person represented the Company.

In this case, the petitioner being the Managing Director, issued cheques on behalf of the Company – So the complaint cannot sustain in the absence of company as an accused because of the doctrine of vicarious liability – Held, the impugned order taking cognizance against the petitioner U/s. 138 N.I. Act is quashed.

Ajaya Kumar Choudhury-V- Smt. Sarada Nanda.

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N.D.P.S. ACT, 1985 – S. 20(b)(ii)(B)

Conviction of the appellant U/s. 20(b)(ii)(B) of the Act 1985 and he was sentenced to undergo R.I. for 10 years – Hence the appeal.

There was allegation of recovery of 5 K.Gs. 200 grams of Ganja from the exclusive conscious possession of the appellant – When small quantity of Ganja as described in the Act is one K.G. and commercial quantity is 20 K.Gs., the punishment of 10 years for seizure of 5 K.Gs. 200 grams of Ganja cannot be said to be proportionate to the quantity of Ganja seized – Held, there being no criminal antecedent or previous conviction proved against the petitioner and the appellant being only 42 years old, the sentence of 10 years R.I. awarded by the learned trial Court is reduced to R.I. for five years.

Debendra Pradhan –V- State of Orissa.

2018 (I) I.L.R. Cut…….. 468

ODISHA MONEY LENDERS' ACT, 1939 – Ss. 2(i), 8

Plaintiff was carrying on money lending business without license – During 1970-73 three transactions had been established so inference can be drawn that there was continuity in transaction and not casual act representing occasional loans to relations etc. – Held, the alleged transaction is hit U/s. 8 of the Act – Findings of the learned Courts below are not correct, hence the impugned judgments are set aside and the suit filed by the plaintiff is dismissed.

Benu Behera -V- Gourahari Pradhan.

2018 (I) I.L.R. Cut…….. 311

ODISHA PREVENTION OF LAND ENCROACHMENT ACT,1972 –S.3(a-1)

"Landless person" – Whether the plaintiff-deity can be said to be a "landless person" as defined U/s. 3(a-1) of the OPLE Act, 1972 ? - Held, No.

On a bare perusal of the provision it is evident that the words "Landless Person" relate to a natural person but not a juristic person – Held, the deity being a juristic person can never be said to be a "Landless person".

State of Orissa & Anr. -V- Sri Sri Radha Govinda Swami.

2018 (I) I.L.R. Cut…….. 305

PARTITION ACT, 1893 – S.4

Whether the sister's son of deceased defendant No.1 can be treated as stranger to the family for the purpose of section 4 of the Partition Act, 1893 ? – Held, No.

Merely because a person is related by blood through common ancestor cannot be considered as a member of the family within the meaning of the term as used in section 4 of the Partition Act – Learned Courts below fell into patent error of law in allowing the prayer of the plaintiffs U/s. 4 of the Act – Held, impugned judgments and decrees of the Courts below with regard to the prayer U/s. 4 of the Partition Act, is set aside.

Keshaba Charan Nayak & Anr. -V- Biswanath Swain & Ors.

2018 (I) I.L.R. Cut…….. 300

PENAL CODE, 1860 – S.201

Whether conviction U/s. 201 I.P.C. can be maintained while acquitting the appellant of the main offence U/s. 498-A I.P.C. ?

Charge U/s. 201 I.P.C. can be laid independently and conviction can be maintained if the prosecution is able to establish that an offence had been committed and the person charged with the offence had the knowledge or the reason to believe that the offence had been committed and the said person has caused disappearance of evidence and such act of disappearance has been done with the intention of screening the offender from legal punishment – However, mere suspicion is not sufficient but it must be proved that the accused knew or had the reason to believe that the offence has been committed and yet he caused the evidence to disappear so as to screen the offender – The offender may be either himself or any other person.

In this case, the High Court while acquitting the appellant U/s. 498-A I.P.C. maintained his conviction U/s. 201 I.P.C., on the ground that no post mortem was conducted and no information given to police – On the other hand the learned trial court had taken note of the fact that the father of the deceased and her brother had attended the last rites of the deceased and none of them had any complaint or suspicion at the time of commission of any offence – Further the trial court has also taken note of the suicide note left by the deceased wherein she had taken the entire blame on herself – Neither the Sessions Court nor the High Court have held that there was any intentional omission by the appellant to give information to police – Prosecution had also no case U/s. 202 I.P.C. against the appellant – Though the complaint was lodged by the father-in-law of the appellant three months after the incident it was not his case that he had requested for post-mortem of the body and to give information to police – Held, the conviction of the appellant U/s. 201 I.P.C. is set aside.

Dinesh Kumar Kalidas Patel -V- The State Of Gujarat.

2018 (I) I.L.R. Cut…….. 232

S.302

Murder – No eye witness to the occurrence – Conviction solely based on circumstantial evidence – Circumstances must/should be established beyond reasonable doubt.

In this case, the appellant has not led the police for recovery of the weapon of offence i.e. tangia (M.O.1) but the I.O. (P.W.12) seized the same with blood from the roof of the house of the appellant which was

showed to him by persons present there but he has not pin pointed who were such persons – On the other hand P.Ws. 2 and 8 who have stated to have overpowered the appellant and snatched the tangia have not stated to have kept the same in the roof of the house of the appellant – Neither P.Ws. 2 & 8 nor P.Ws. 1, 2, 3, 4, 5, 7, 8 and 11 who were at the spot, have stated to have seen the appellant holding a tangia, stained with blood – P.Ws. 4 and 8 spoke of the appellant striking at different trees but strangely the chemical report is silent about presence of any botanical materials on M.O.1 – P.W.13 the doctor who opined that the wound of the deceased was possible with the help of M.O.1 said in the cross-examination that the tangia produced by the police was not sealed – This gives rise to a doubt about the veracity of the prosecution case – Moreover, the extra judicial confession was made while the appellant tied by many people surrounding him which cannot be said to be voluntary rather under the threat of a mob – Held, the prosecution failed to prove extra judicial confession made by the appellant and it gives rise a suspicion about the involvement of the appellant, hence the impugned judgment is liable to be set aside.

Sadan Gouda -V- State of Orissa.

2018 (I) I.L.R. Cut…….. 261

S.493

Offence U/s. 493 I.P.C. – Ingredients – There must be allegation that a man caused deception on a woman, that she is lawfully married to him and made sexual intercourse in that belief, when they are actually not lawfully married – Mere sexual relationship with a promise to marry in future will not attract the offence U/s. 493 I.P.C, rather it attracts the offence U/s. 417 I.P.C – Held, the impugned order taking cognizance U/s. 493 I.P.C. is quashed.

Pradeep Ku. Mahananda.-V- State of Orissa.

2018 (I) I.L.R. Cut…….. 463

PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994 – Ss.18(1), 28(1)(a)

No Court shall take cognizance of an offence under the Act, 1994 except on the complaint made by the Appropriate Authority, or any other officer authorized by the Central Govt. or State Govt. or the Appropriate Authority.

In this case CDMO, Jharsuguda was the appropriate authority till 26.07.2007 – However, the Govt. of Odisha in its Health and Family Welfare Department office memorandum Dt. 27.07.2007 appointed

the District Magistrate of each District as the District Appropriate Authority for the district under the Act, 1994, superseding the earlier notification appointing CDMO as the appropriate authority – So in the present case the search and seizure having been conducted on 27.07.2007 was not valid as the CDMO was not the appropriate authority on that day so as to validate the search and seizure conducted by the ADMO on the authorization of the CDMO.

Second allegation against the petitioner is non-renewal of the registration certificate – Since it was not the case of non-registration it would not attract section 18(1) of the Act, 1994 – Further as per Rule-8 of the relevant Rules, 1996 there is no provision for punishment in case of delay in making application for renewal – Moreover, the petitioner made application for renewal of the registration depositing the registration fee as well as penalty – Held, prosecution having failed to establish the alleged offences, the impugned criminal proceeding against the petitioner is quashed.

Dr. Prabhat Ku. Jain -V- State of Orissa.

2018 (I) I.L.R. Cut…….. 452

SERVICE LAW – Petitioner born in a Brahmin family and married to a Schedule Caste boy – After marriage she obtained Scheduled Caste Certificate in her favour and got a job in a duly constituted recruitment process – Departmental proceeding initiated against her for obtaining Caste Certificate by applying fraud and misrepresentation and she was dismissed from service – Hence the writ petition.

This Court considering the conduct of the petitioner, that she has not obtained the Caste Certificate by dishonest or fabricated manner but under mistaken impression, set aside the order of dismissal and directed for consideration of her case for continuance in the post as she was holding at the time of dismissal, if the said post is still laying vacant – However, in the event the said post is not lying vacant, then to consider her absorption in the said post or a parallel post provided she has not attended the age of superannuation – It is also made clear that in the event, the petitioner is re-instated in future, she will not be entitled to any future promotion or benefit.

Madhumita Das-V- The Collector, Khurda & Ors.

2018 (I) I.L.R. Cut…….. 341

SERVICE LAW – Promotion – Petitioner claims that he was senior to 15 Revenue Inspectors, who were given promotion as Revenue Supervisors in between 01.07.1989 and 21.07.1992 – Admittedly

petitioner had not worked in the promotional post as he was superannuated from service by the learned Tribunal directing to convene a review D.P.C. to consider the suitability of the petitioner for promotion – Further the petitioner has not made out a case that he was suitable to be promoted to the post but he has only pleaded discrimination.

Held, the petitioner is entitled to arrear salary which can only be examined by the competent authority but not by this Court in exercise of power of Judicial review – The finding of the learned Tribunal that the petitioner is not entitled to arrear salary for the period for which he has not discharged his duties in the promotional cadre is set aside – Direction issued to the opposite parties to consider the entitlement of the petitioner for arrear salary in view of his promotion to the post of Revenue Supervisor within four months and if the petitioner is held to be entitled to the arrear salary the actual financial benefit shall be released within two months from the date of taking such decision.

Narayan Prasad Mohanty-V- State of Odisha & Anr.

2018 (I) I.L.R. Cut…….. 277

SERVICE LAW – Compassionate appointment – Petitioners were appointed during 06.04.1994 to 26.03.1997 – Circular issued on 24.03.1998 stating removal of employees appointed after 01.01.1990 and there shall be no fresh appointment on the ground of economic measures – Action challenged – Petitioners continued in service due to interim protection by the Court – Subsequent letter issued on 01.02.2003 removing the petitioners from service – Hence the present writ petition.

Compassionate appointment cannot be frustrated by issuing a circular, specially when the institution is running with dearth of staff – Moreover the petitioners have been appointed against sanctioned posts and discharging their duties sincerely – Held, the impugned letter Dt. 01.02.2003 issued by the General Manager, CARD Bank, Berhampur to the Secretary CARD Bank, Berhampur advising to remove the petitioners from service is quashed – As the petitioners have been given compassionate appointment, they should be allowed to continue in service as before and they are entitled to all consequential service benefits admissible to them.

Bhabani Shankar Pandit & Ors. -V- Registrar of Co-Operative Societies, Orissa & Ors.

2018 (I) I.L.R. Cut…….. 316

SERVICE LAW – Whether after fixing minimum qualifying marks in the written examination, the High Court was justified in fixing minimum qualifying marks for the interview and whether such fixation was in accordance with the direction of the Apex Court contained in paragraph 207.9 of the judgment in the case of Brij Mohanlal reported in (2012) 6 SCC 502 ?

There is no ambiguity in the directions of the Hon'ble Supreme Court that the qualifying marks for the persons working as First Track Court Judges would be 40% in aggregate for general candidates and 35% for SC/ST/OBC candidates, both the written examination and interview combined – So the Reference Bench agreed with the views expressed by Hon'ble Justice B.K.Nayak.

Madhumita Das- V- State of Orissa & Ors.

2018 (I) I.L.R. Cut…….. 285

TENDER – O.P.No.3 issued tender call notice on 04.05.2017 for 380 number of works fixing 03.06.2017 as the last date for on line bidding and to open the technical bid on 05.06.2017 – During such process 1st corrigendum issued on 16.05.2017 extending the last date from 03.06.2017 to 17.06.2017 and 2nd and 3rd corrigendum issued making necessary corrections in the tender stipulation – While the matter stood thus with the intervention of local MLA, O.P.3 issued 4th corrigendum on 13.06.2017 cancelling part of the tender items i.e. serial No. 1 to 168 – When the above action challenged in writ petition fresh tender call notice issued on 21.08.2017 which was challenged in the said writ petition by way of amendment.

4th corrigendum Dt. 13.06.2017 issued on the ground of unavoidable circumstances which could not be inferred from the circumstances mentioned there in – Therefore, the cancellation of tenders is a cryptic one and no reason having been assigned it shows that the authority has not applied his mind to the subject matter – Held, the impugned 4th corrigendum notice Dt. 13.06.2017 cancelling tenders for the works from serial Nos. 1 to 168 and fresh tender call notice Dt. 21.08.2017 are quashed.

United Contractors Association -V- State of Orissa & Ors.

2018 (I) I.L.R. Cut…….. 254

SUPREME COURT OF INDIA

A.K.SIKRI, J. & ASHOK BHUSHAN, J.

CIVIL APPEAL NOs. 188-189 OF 2018
[@SLP(C) NOs. 10638-10639 OF 2013]

DANAMMA @SUMAN SURPUR & ANR. ……..Appellant(s)

.Vrs.

AMAR & ORS. ……..Respondent(s)

HINDU SUCCESSION ACT, 1956 – S.6
(As amended vide Amendment Act, 2005)

Whether, the appellants, daughters of Gurulingappa Savadi, denied their share on the ground that they were born prior to the enactment of the act, 1956 and therefore, cannot be treated as coparceners ?

And whether, with the passing of Hindu succession (Amendment) Act, 2005, the appellants would become coparceners "by birth" in their "own right in the same manner as the son" and are therefore, entitled to equal share as that of a son ?

And whether the right would be conferred only upon the daughters who are born after September 9, 2005 when the Act came into force or even to those daughters who were born earlier ?

Held, on amendment of section 6 of the Act in 2005 both the sons and daughters of a coparcener have been conferred the right of becoming coparceners by birth.

In this case Gurulingappa Savadi died in the year 2001 and Partition Suit filed in the year 2002 and during the pendency of the suit section 6 was amended – Held, since Gurulingappa died leaving behind two sons, two daughters (present appellants) and a widow both the appellants would be entitled to 1/5th share each in the said property.

(Paras 23 to 28)

Case Laws Referred to

1. (2006) 8 SCC 656 : Anar Devi & Ors. v. Parmeshwari Devi & Ors.
2. AIR 2012 Bom 110 : Vaishali Satish Gonarkar v. Satish Keshorao Gonarkar
3. 2011 (5) Bom CR 726 : Sadashiv Sakharam Patil v. Chandrakant Gopal Desale
4. AIR 2014 Bom 151 : Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari

5. AIR 2008 Ori 133 : Pravat Chandra Pattnaik v. Sarat Chandra Pattnaik
6. (2016) 2 SCC 36 : Prakash & Ors. v. Phulavati & Ors.
7. AIR 1969 SC 1330 : State Bank of India v. Ghamandi Ram
8. (2011)9SCC 788 : Ganduri Koteshwaramma & Anr.v.Chakiri Yanadi & Anr.

For Appellant(s) : M/s. S. N. Bhat
For Respondent(s) : M/s. H. Chandra Sekhar

Date of judgment : 01.02. 2018

JUDGMENT

A.K. SIKRI, J.

The appellants herein, two in number, are the daughters of one, Gurulingappa Savadi, propositus of a Hindu Joint Family. Apart from these two daughters, he had two sons, namely, Arunkumar and Vijay. Gurulingappa Savadi died in the year 2001 leaving behind the aforesaid two daughters, two sons and his widow, Sumitra. After his death, Amar, S/o Arunkumar filed the suit for partition and a separate possession of the suit property described at Schedule B to E in the plaint stating that the two sons and widow were in joint possession of the aforesaid properties as coparceners and properties mentioned in Schedule B was acquired out of the joint family nucleus in the name of Gurulingappa Savadi. Case set up by him was that the appellants herein were not the coparceners in the said joint family as they were born prior to the enactment of Hindu Succession Act, 1956 (hereinafter referred to as the 'Act'). It was also pleaded that they were married daughters and at the time of their marriage they had received gold and money and had, hence, relinquished their share.

2) The appellants herein contested the suit by claiming that they were also entitled to share in the joint family properties, being daughters of Gurulingappa Savadi and for the reason that he had died after coming into force the Act of 1950.

3) The trial court, while decreeing the suit held that the appellants were not entitled to any share as they were born prior to the enactment of the Act and, therefore, could not be considered as coparceners. The trial court also rejected the alternate contention that the appellants had acquired share in the said properties, in any case, after the amendment in the Act vide amendment Act of 2005. This view of the trial court has been upheld by the High Court in the impugned judgement dated January 25, 2012 thereby confirming the

decree dated August 09, 2007 passed in the suit filed for partition. 4) In the aforesaid backdrop, the question of law which arises for consideration in this appeal is as to whether, the appellants, daughters of Gurulingappa Savadi, could be denied their share on the ground that they were born prior to the enactment of the Act and, therefore, cannot be treated as coparceners? Alternate question is as to whether, with the passing of Hindu Succession (Amendment) Act, 2005, the appellants would become coparcener "by birth" in their "own right in the same manner as the son" and are, therefore, entitled to equal share as that of a son?

5) Though, we have mentioned the gist of the *lis* involved in this case alongwith brief factual background in which it has arisen, some more facts which may be necessary for understanding the genesis of issue involved may also be recapitulated. We may start with the genealogy of the parties, it is as under:

" Guralingappa=Sumitra
(Def.8)

Mahandanda Arunkumar @ Arun=Sarojini Vijay Danamma
(Def. 7) (Def.1) (dead) (Def.2) (Def.5) (Def. 6)

Sheetal Amar Triveni
(Def. 3) (Plff) (Def. 4) "

6) Respondent No. 1 herein (the plaintiff) filed the suit on July 01, 2002 claiming 1/15th share in the suit schedule properties. In the said suit, he mentioned the properties which needed partition.

7) The plaint schedule C compromised of the house properties belonging to the joint family. The plaint schedule D comprised of the shop properties belonging to the joint family. The plaint schedule E comprised of the machineries and movable belonging to the joint family. The plaintiff averred that the plaint schedule properties belonged to the joint family and that defendant no. 1, the father of the plaintiff was neglecting the plaintiff and his siblings and sought partition of the suit schedule properties. The plaintiff contended that all the suit schedule properties were the joint family properties. The plaintiff contended in para 5 of the plaint that the propositus, Guralingappa died 1 year prior to the filing of the suit. In para 7 of the plaint, the plaintiff contended that defendant no. 1 had 1/3rd share and defendant no. 5 and 8 had 1/3rd share each in the suit schedule properties. The plaintiff also

contended that defendants 6 and 7 did not have any share in the suit schedule properties.

8) Defendant no. 1 (father of the plaintiff) and son of Guralingappa Savadi did not file any written statement. Defendant nos. 2, 3 and 4 filed their separate written statements supporting the claim of the plaintiff. Defendant no. 5 (respondent no. 5 herein and son of Guralingappa Savadi), however, contested the suit. He, inter alia, contended that after the death of Guralingappa, an oral partition took place between defendant no. 1, defendant no. 5 and others and in the said partition, defendant no. 1 was allotted certain properties and defendant no. 5 was allotted certain other properties and defendant no. 8, Sumitra, wife of Guralingappa Savadi was allotted certain other properties. Defendant no. 5 further contended that defendant nos. 6 and 7 were not allotted any properties in the said alleged oral partition.

9) Defendant no. 5 further contended that one of the properties, namely, C.T.S. No. 774 and also certain other properties were not joint family properties.

10) The appellants claimed that they were also entitled to their share in the property. After framing the issues and recording the evidence, the trial court by its judgment and decree dated August 09, 2007 held that the suit schedule properties were joint family properties except CTS No. 774 (one of the house properties in plaint C schedule).

11) The trial court held that the plaintiff, defendant nos. 2 to 4 were entitled to 1/8th share in the joint family properties. The trial court further noted that defendant no. 8 (wife of Gurulingappa Savadi) died during the pendency of the suit intestate and her share devolved in favour of defendants no. 1 and 5 only and, therefore, defendant nos. 1 and 2 were entitled to ½ share in the said share. The trial court passed the following order:

> "The suit of the plaintiff is decreed holding that the plaintiff is entitled for partition and separate possession of his 1/8th share in the suit 'B', 'C' and 'D' schedule properties (except CTS No. 774) and also in respect of the Machinery's stated in the report of the commissioner. The commissioners report Ex. P16 which contains the list of machinery's to form part of the decree.

The defendants 2 to 4 are each entitled to a/8th share and the 5th defendant is entitled for 4/8 share in the above said properties."

12) The trial court, thus, denied any share to the appellants.

13) Aggrieved by the said judgment and decree of the trial court, the defendant nos. 6 and 7 filed an appeal bearing R.F.A. No. 322 of 2008 before the High Court seeking equal share as that of the sons of the propositus, namely, defendant nos. 1 and 5.

14) The High Court by its impugned judgment and order dated January 25, 2012 dismissed the appeal. Thereafter, on March 04, 2012 defendant nos. 6 and 7 filed a review petition bearing no. 1533 of 2012 before the High Court, which met the same fate.

15) We have heard the learned counsel for the parties. Whereas, the learned counsel for the appellants reiterated his submissions which were made before the High Court as well and noted above, learned counsel for the respondents refuted those submissions by relying upon the reason given by the High Court in the impugned judgment.

16) In the first instance, let us take note of the provisions of Section 6 of the Act, as it stood prior to its amendment by the Amendment Act, 2005. This provision reads as under:

> "6. *Devolution of interest in coparcenary property.*—When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act: Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.
>
> *Explanation 1*.—For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.
>
> *Explanation 2*.—Nothing contained in the proviso to this section shall be construed as enabling a person who had separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

17) No doubt, Explanation 1 to the aforesaid Section states that the nterest of the deceased Mitakshara coparcenary property shall be deemed to be the share in the property that would have been allotted to him if the partition of the property had taken place immediately before his death, irrespective whether he was entitled to claim partition or not. This Explanation came up for interpretation before this Court in ***Anar Devi & Ors.*** v. ***Parmeshwari Devi & Ors.***[1]. The Court quoted, with approval, the following passage from the authoritative treatise of Mulla, Principles of Hindu Law, 17th Edn., Vol. II, p. 250 wherein the learned author made following remarks while interpreting Explanation 1 to Section 6:

> "…Explanation 1 defines the expression 'the interest of the deceased in Mitakshara coparcenary property' and incorporates into the subject the concept of a notional partition. It is essential to note that this notional partition is for the purpose of enabling succession to and computation of an interest, which was otherwise liable to devolve by survivorship and for the ascertainment of the shares in that interest of the relatives mentioned in Class I of the Schedule. Subject to such carving out of the interest of the deceased coparcener the other incidents of the coparcenary are left undisturbed and the coparcenary can continue without disruption. A statutory fiction which treats an imaginary state of affairs as real requires that the consequences and incidents of the putative state of affairs must flow from or accompany it as if the putative state of affairs had in fact existed and effect must be given to the inevitable corollaries of that state of affairs."

7. The learned author further stated that:

> "[T]he operation of the notional partition and its inevitable corollaries and incidents is to be only for the purposes of this section, namely, devolution of interest of the deceased in coparcenary property and would not bring about total disruption of the coparcenary as if there had in fact been a regular partition and severance of status among all the surviving coparceners."

8. According to the learned author, at pp. 253-54, the undivided Interest

> "of the deceased coparcener for the purpose of giving effect to the rule laid down in the proviso, as already pointed out, is to be ascertained on the footing of a notional partition as of the date of his death. The determination of that share must depend on the number of persons who would have been entitled to a share in the coparcenary property if a partition had in fact taken place immediately before his death and such person would have to be ascertained according to the law of joint family and partition. The rules of

[1](2006) 8 SCC 656

> Hindu law on the subject in force at the time of the death of the coparcener must, therefore, govern the question of ascertainment of the persons who would have been entitled to a share on the notional partition".

18) Thereafter the Court spelled out the manner in which the statutory fiction is to be construed by referring to certain judgments and summed up the position as follows:

> "11. Thus we hold that according to Section 6 of the Act when a coparcener dies leaving behind any female relative specified in Class I of the Schedule to the Act or male relative specified in that class claiming through such female relative, his undivided interest in the Mitakshara coparcenary property would not devolve upon the surviving coparcener, by survivorship but upon his heirs by intestate succession. Explanation 1 to Section 6 of the Act provides a mechanism under which undivided interest of a deceased coparcener can be ascertained and i.e. that the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. It means for the purposes of finding out undivided interest of a deceased coparcener, a notional partition has to be assumed immediately before his death and the same shall devolve upon his heirs by succession which would obviously include the surviving coparcener who, apart from the devolution of the undivided interest of the deceased upon him by succession, would also be entitled to claim his undivided interest in the coparcenary property which he could have got in notional partition."

19) This case clearly negates the view taken by the High Court in the impugned judgment.

20) That apart, we are of the view that amendment to the aforesaid Section vide Amendment Act, 2005 clinches the issue, beyond any pale of doubt, in favour of the appellants. This amendment now confers upon the daughter of the coparcener as well the status of coparcener in her own right in the same manner as the son and gives same rights and liabilities in the coparcener properties as she would have had if it had been son. The amended provision reads as under:

> "6. Devolution of interest in coparcenary property.—(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—

(a) by birth become a coparcener in her own right the same manner as the son;

(b) have the same rights in the coparcenery property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenery property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenery property shall be deemed to have been divided as if a partition had taken place and,—

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.—For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place

immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), no court shall recognize any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), nothing contained in this sub-section shall affect—

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 (39 of 2005) had not been enacted. Explanation.—For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005).

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation.—For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.]"

21) The effect of this amendment has been the subject matter of pronouncements by various High Courts, in particular, the issue as to whether the right would be conferred only upon the daughters who are born after September 9, 2005 when Act came into force or even to those daughters who were born earlier. Bombay High Court in ***Vaishali Satish Gonarkar*** v. ***Satish Keshorao Gonarkar***[2] had taken the view that the provision cannot be made applicable to all daughters born even prior to the amendment, when the Legislature itself specified the posterior date from which the Act would come into force. This view was contrary to the view taken by the same High Court

[2] AIR 2012 Bom 110

in ***Sadashiv Sakharam Patil*** v. ***Chandrakant Gopal Desale***[3]. Matter was referred to the Full Bench and the judgment of the Full Bench is reported as ***Badrinarayan Shankar Bhandari*** v. ***Omprakash Shankar Bhandari***[4]. The Full Bench held that clause (a) of sub-section (1) of Section 6 would be prospective in operation whereas clause (b) and (c) and other parts of sub-section (1) as well as sub-section (2) would be retroactive in operation. It held that amended Section 6 applied to daughters born prior to June 17, 1956 (the date on which Hindu Succession Act came into force) or thereafter (between June 17, 1956 and September 8, 2005) provided they are alive on September 9, 2005 i.e. on the date when Amended Act, 2005 came into force. Orissa, Karnataka and Delhi High Court have also held to the same effect5.

22) The controversy now stands settled with the authoritative pronouncement in the case of ***Prakash & Ors.*** v. ***Phulavati & Ors.***[6] which has approved the view taken by the aforesaid High Courts as well as Full Bench of the Bombay High Court. Following discussion from the said judgment is relevant:

> "17. The text of the amendment itself clearly provides that the right conferred on a "daughter of a coparcener" is "on and from the commencement of the Hindu Succession (Amendment) Act, 2005". Section 6(3) talks of death after the amendment for its applicability. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective. [*Shyam Sunder* v. *Ram Kumar*, (2001) 8 SCC 24, paras 22 to 27] In the present case, there is neither any express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect. Requirement of partition being registered can have no application to statutory notional partition on opening of succession as per unamended provision, having regard to nature of such partition which is by operation of law. The intent and effect of the amendment will be considered a little later. On this finding, the view of the High Court cannot be sustained.
>
> 18. The contention of the respondents that the amendment should be read as retrospective being a piece of social legislation cannot be accepted. Even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature. In the present case, the

[3] 2011 (5) Bom CR 726, [4] AIR 2014 Bom 151, [6] (2016) 2 SCC 36

[5] AIR 2008 Ori 133: Pravat Chandra Pattnaik v. Sarat Chandra Pattnaik; ILR 2007 Kar 4790: Sugalabai v. Gundappa A. Maradi and 197 (2013) DLT 154: Rakhi Gupta v. Zahoor Ahmad

legislature has expressly made the amendment applicable on and from its commencement and only if death of the coparcener in question is after the amendment. Thus, no other interpretation is possible in view of the express language of the statute. The proviso keeping dispositions or alienations or partitions prior to 20-12-2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when the main provision is applicable. Similarly, Explanation has to be read harmoniously with the substantive provision of Section 6(5) by being limited to a transaction of partition effected after 20-12-2004. Notional partition, by its very nature, is not covered either under the proviso or under sub-section (5) or under the Explanation.

[5]AIR 2008 Ori 133: Pravat Chandra Pattnaik v. Sarat Chandra Pattnaik; ILR 2007 Kar 4790: Sugalabai v. Gundappa A. Maradi and 197 (2013) DLT 154: Rakhi Gupta v. Zahoor Ahmad

19. Interpretation of a provision depends on the text and the context. [*RBI* v. *Peerless General Finance & Investment Co. Ltd.*, (1987) 1 SCC 424, p. 450, para 33] Normal rule is to read the words of a statute in ordinary sense. In case of ambiguity, rational meaning has to be given. [*Kehar Singh* v. *State (Delhi Admn.)*, (1988) 3 SCC 609 : 1988 SCC (Cri) 711] In case of apparent conflict, harmonious meaning to advance the object and intention of legislature has to be given. [*District Mining Officer*v. *TISCO*, (2001) 7 SCC 358]

20. There have been number of occasions when a proviso or an explanation came up for interpretation. Depending on the text, context and the purpose, different rules of interpretation have been applied. [*S. Sundaram Pillai* v. *V.R. Pattabiraman*, (1985) 1 SCC 591]

21. Normal rule is that a proviso excepts something out of the enactment which would otherwise be within the purview of the enactment but if the text, context or purpose so require a different rule may apply. Similarly, an explanation is to explain the meaning of words of the section but if the language or purpose so require, the explanation can be so interpreted. Rules of interpretation of statutes are useful servants but difficult masters. [*Keshavji Ravji & Co.* v. *CIT*, (1990) 2 SCC 231 : 1990 SCC (Tax) 268] Object of interpretation is to discover the intention of legislature.

22. In this background, we find that the proviso to Section 6(1) and sub-section (5) of Section 6 clearly intend to exclude the transactions

> referred to therein which may have taken place prior to 20-12-2004 on which date the Bill was introduced. Explanation cannot permit reopening of partitions which were valid when effected. Object of giving finality to transactions prior to 20-12-2004 is not to make the main provision retrospective in any manner. The object is that by fake transactions available property at the introduction of the Bill is not taken away and remains available as and when right conferred by the statute becomes available and is to be enforced. Main provision of the amendment in Sections 6(1) and (3) is not in any manner intended to be affected but strengthened in this way. Settled principles governing such transactions relied upon by the appellants are not intended to be done away with for period prior to 20-12-2004. In no case statutory notional partition even after 20-12-2004 could be covered by the Explanation or the proviso in question.
>
> 23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9-9-2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20-12-2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation."

23) The law relating to a joint Hindu family governed by the *Mitakshara* law has undergone unprecedented changes. The said changes have been brought forward to address the growing need to merit equal treatment to the nearest female relatives, namely daughters of a coparcener. The section stipulates that a daughter would be a coparcener from her birth, and would have the same rights and liabilities as that of a son. The daughter would hold property to which she is entitled as a coparcenary property, which would be construed as property being capable of being disposed of by her either by a will or any other testamentary disposition. These changes have been sought to be made on the touchstone of equality, thus seeking to remove the perceived disability and prejudice to which a daughter was subjected. The fundamental changes brought forward about in the Hindu Succession Act, 1956 by amending it in 2005, are perhaps a realization of the immortal words of **Roscoe Pound** as appearing in his celebrated treaties, *The Ideal Element in Law,* that "the law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change."

24) Section 6, as amended, stipulates that ***on and from*** the commencement of the amended Act, 2005, the daughter of a coparcener shall ***by birth*** become a coparcener in her own right in ***th e same manner as the***

son. It is apparent that the status conferred upon sons under the old section and the old Hindu Law was to treat them as coparceners ***since birth***. The amended provision now statutorily recognizes the rights of coparceners of daughters as well ***since birth***. The section uses the words *in the same manner as the son***.** It should therefore be apparent that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners ***by birth***. It is the very ***factum of birth*** in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners by ***virtue of birth***. Devolution of coparcenary property is the later stage of and a consequence of death of a coparcener. The first stage of a coparcenary is obviously its creation as explained above, and as is well recognized. One of the incidents of coparcenary is the right of a coparcener to seek a severance of status. Hence, the rights of coparceners emanate and flow from birth (now including daughters) as is evident from sub-s (1)(a) and (b).

25) Reference to the decision of this Court, in the case of ***State Bank of India v. Ghamandi Ram***[7] in essential to understand the incidents of coparceneryship *as was always inherited* in a Hindu *Mitakshara* coparcenary:

> "*According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (See Mitakshara, Ch. I. 1-27).* ***The incidents of coparcenership under the Mitakshara law are****: first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties is common;* ***secondly, that such descendants can at any time work out their rights by asking for partition;*** *thirdly, that till partition each member has got ownership extending over the entire property, conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors."*

26) Hence, it is clear that the right to partition has not been abrogated.**The right is *inherent* and can be availed of by *any* coparcener, *now even a daughter who is a coparcener.***

27) In the present case, no doubt, suit for partition was filed in the year

7 AIR 1969 SC 1330

2002. However, during the pendency of this suit, Section 6 of the Act was amended as the decree was passed by the trial court only in the year 2007. Thus, the rights of the appellants got crystallised in the year 2005 and this event should have been kept in mind by the trial court as well as by the High Court. This Court in ***Ganduri Koteshwaramma & Anr.*** v. ***Chakiri Yanadi & Anr.***[8] held that the rights of daughters in coparcenary property as per the amended S. 6 are not lost merely because a preliminary decree has been passed in a partition suit. So far as partition suits are concerned, the partition becomes final only on the passing of a final decree. Where such situation arises, the preliminary decree would have to be amended taking into account the change in the law by the amendment of 2005. 28) On facts, there is no dispute that the property which was the subject matter of partition suit belongs to joint family and Gurulingappa Savadi was propositus of the said joint family property. In view of our aforesaid discussion, in the said partition suit, share will devolve upon the appellants as well. Since, Savadi died leaving behind two sons, two daughters and a widow, both the appellants would be entitled to 1/5th 8 (2011) 9 SCC 788 share each in the said property. Plaintiff (respondent No.1) is son of Arun Kumar (defendant No.1). Since, Arun Kumar will have 1/5th share, it would be divided into five shares on partition i.e. between defendant No.1 Arun Kumar, his wife defendant No.2, his two daughters defendant Nos.3 and 4 and son/plaintiff (respondent No.1). In this manner, the plaintiff/respondent No.1 would be entitled to 1/25th share in the property.

29) The appeals are allowed in the aforesaid terms and decree of partition shall be drawn by the trial court accordingly. No order as to costs.

8 (2011)9SCC 788

Appeals allowed.

2018 (I) ILR - CUT-232 (S.C.)

SUPREME COURT OF INDIA

KURIAN JOSEPH, J. & AMITAVA ROY, J.

CRIMINAL APPEAL NOs. 265-266 OF 2018
[ARISING OUT OF SLP(CRL.) NOs. 1815-1816 OF 2016]

DINESH KUMAR KALIDAS PATEL ……..Appellant(s)

.Vrs.

THE STATE OF GUJARAT ……...Respondent(s)

PENAL CODE, 1860 – S.201

Whether conviction U/s. 201 I.P.C. can be maintained while acquitting the appellant of the main offence U/s. 498-A I.P.C. ?

Charge U/s. 201 I.P.C. can be laid independently and conviction can be maintained if the prosecution is able to establish that an offence had been committed and the person charged with the offence had the knowledge or the reason to believe that the offence had been committed and the said person has caused disappearance of evidence and such act of disappearance has been done with the intention of screening the offender from legal punishment – However, mere suspicion is not sufficient but it must be proved that the accused knew or had the reason to believe that the offence has been committed and yet he caused the evidence to disappear so as to screen the offender – The offender may be either himself or any other person.

In this case, the High Court while acquitting the appellant U/s. 498-A I.P.C. maintained his conviction U/s. 201 I.P.C., on the ground that no post mortem was conducted and no information given to police – On the other hand the learned trial court had taken note of the fact that the father of the deceased and her brother had attended the last rites of the deceased and none of them had any complaint or suspicion at the time of commission of any offence – Further the trial court has also taken note of the suicide note left by the deceased wherein she had taken the entire blame on herself – Neither the Sessions Court nor the High Court have held that there was any intentional omission by the appellant to give information to police – Prosecution had also no case U/s. 202 I.P.C. against the appellant – Though the complaint was lodged by the father-in-law of the appellant three months after the incident it was not his case that he had requested for post-mortem of the body and to give information to police – Held, the conviction of the appellant U/s. 201 I.P.C. is set aside. (Paras 15 to 23)

Case Laws Referred to

1. AIR 1952 SC 354 : Palvinder Kaur v. State of Punjab[1], Smt. Kalawati.
2. 2 AIR 1953 SC 131 : Ranjit Singh v. State of Himachal Pradesh.
3. AIR 1968 SC 829 : Suleman Rehiman Mulani and another v. State of Maharashtra
4. (1999) 9 SCC 486 : Ram Saran Mahto and another v. State of Bihar
5. (2001) 3 SCC 549 : V.L. Tresa v. State of Kerala
6. (2007) 7 SCC 502 : Sukhram v. State of Maharashtra
7. (2003) 8 SCC 296 : Sou Vijaya @ Baby v. State of Maharashtra
8. (2007) 7 SCC 35 : State of Karnataka v. Madesha
9. 1994 Supp (2) SCC 39: Hanuman and others v. State of Rajasthan

For Appellant(s) : M/s. Vipin Nair
For Respondent(s) : M/s. Hemantika Wahi

Date of Judgment : 12. 02.2018

JUDGMENT

KURIAN, J.

Leave granted.

2. The appellant was convicted by the Sessions Judge, Mehsana (State of Gujarat) for offences under Sections 498A and 201 of the Indian Penal Code, 1860 (hereinafter referred to as "the IPC"). A sentence of one year rigorous imprisonment and a penalty of Rs.1,000/- with a default sentence of three months was awarded under Section 498A and six months and Rs.500/- with a default sentence of one month for the offence under Section 201 of the IPC.

3. This is a case where the appellant's wife committed suicide by hanging. The incident took place on 26.12.1990. The information was conveyed to the family of the deceased. The father and brother of the deceased, who is a doctor by profession, attended the last rites. After more than three months, the father of the deceased filed a complaint before the Judicial Magistrate at Kadi on 01.04.1991. The same was investigated, and the appellant was charged under Sections 304B, 306, 498A and 201 read with Section 120B of the IPC and Section 4 of the Dowry Prohibition Act, 1961. Along with the appellant, seven other persons also faced the trial. By judgment dated 12.09.1995, the Sessions Judge convicted the appellant under Sections 498A and 201 of the IPC but acquitted the seven others.

4. The appeals filed in 1995 were heard in the year 2015 and, as per the impugned judgment, the appellant was acquitted of the offence under Section 498A of the IPC but conviction under Section 201 of the IPC was maintained. Thus aggrieved, the appellant is before this Court.

5. Heard learned Counsel appearing for the appellant and learned Counsel appearing for the State.

6. Several contentions have been raised on merits. That apart, the appellant has also raised a question of law as to whether the conviction under Section 201 of the IPC could have been maintained while acquitting him of the main offence under Section 498A of the IPC.

7. Learned Counsel have placed reliance on the decisions of this Court in **Palvinder Kaur v. State of Punjab**[1], **Smt. Kalawati and Ranjit Singh v. State of Himachal Pradesh**[2], and **Suleman Rehiman Mulani and another v. State of Maharashtra**[3].

8. In **Palvinder Kaur** (supra)**,** this Court held as follows:

> **"14.** In order to establish the charge under Section 201 of the Indian Penal Code, it is essential to prove that an offence has been committed, — mere suspicion that it has been committed is not sufficient, — that the accused knew or had reason to believe that such offence had been committed and with the requisite knowledge and with the intent to screen the offender from legal punishment causes the evidence thereof to disappear or gives false information respecting such offences knowing or having reason to believe the same to be false."

The conviction in this case was ultimately set aside on the aforementioned legal position and the facts.

9. The Constitution Bench decision in **Kalawati** (supra) may not be of much assistance in this case since the facts are completely different. The co-accused was convicted under Section 302 of the IPC for the main offence, and in the peculiar facts and circumstances of that case, this Court deemed it fit to convict Kalawati only under Section 201 of the IPC.

10. Relying on **Palvinder Kaur** (supra), this Court in **Suleman Rehiman** (supra), made the following observation:

> **"6.** The conviction of Appellant 2 under Section 201 IPC depends on the sustainability of the conviction of Appellant 1 under Section 304-A IPC. If

[1] AIR 1952 SC 354, [2] AIR 1953 SC 131, [3] AIR 1968 SC 829

> Appellant 1 was rightly convicted under that provision, the conviction of Appellant 2 under Section 201 IPC on the facts found cannot be challenged. But on the other hand, if the conviction of Appellant 1 under Section 304-A IPC cannot be sustained, then, the second appellant's conviction under Section 201 IPC will have to be set aside, because to establish the charge under Section 201, the prosecution must first prove that an offence had been committed not merely a suspicion that it might have been committed — and that the accused knowing or having reason to believe that such an offence had been committed, and with the intent to screen the offender from legal punishment, had caused the evidence thereof to disappear. The proof of the commission of an offence is an essential requisite for bringing home the offence under Section 201 IPC — see the decision of this Court in *Palvinder Kaur* v. *State of Punjab."*

It is necessary to note that the reason for acquittal under Section 201 in the above case was that there was no evidence to show that the rash and negligent act of appellant No.1 caused the death of the deceased. Hence, the court acquitted appellant No. 2 under Section 201. The observation at paragraph 6 has to be viewed and analysed in that background.

11. In **Ram Saran Mahto and another** v. **State of Bihar**[4], this Court discussed **Kalawati** (supra) and **Palvinder Kaur** (supra). It has been held at paragraphs-13 to 15 that conviction under the main offence is not necessary to convict the offender under Section 201 of the IPC. To quote:

> "**13.** It is not necessary that the offender himself should have been found guilty of the main offence for the purpose of convicting him of offence under Section 201. Nor is it absolutely necessary that somebody else should have been found guilty of the main offence. Nonetheless, it is imperative that the prosecution should have established two premises. The first is that an offence has been committed and the second is that the accused knew about it or he had reasons to believe the commission of that offence. Then and then alone the prosecution can succeed, provided the remaining postulates of the offence are also established.
>
> **14.** The above position has been well stated by a three-Judge Bench of this Court way back in 1952, in *Palvinder Kaur* v. *State of Punjab*:
>
> "In order to establish the charge under Section 201, Penal Code, it is essential to prove that an offence has been committed, — mere suspicion that it has been committed is not sufficient — that the accused knew or had reason to believe that such offence had been committed and with the requisite knowledge and with the intent to screen the offender from legal

[4] (1999) 9 SCC 486

punishment causes the evidence thereof to disappear or gives false information respecting such offences knowing or having reason to believe the same to be false."

15. It is well to remind that the Bench gave a note of caution that the court should safeguard itself against the danger of basing its conclusion on suspicions however strong they may be. In *Kalawati* v. *State of H.P* a Constitution Bench of this Court has, no doubt, convicted an accused under Section 201 IPC even though he was acquitted of the offence under Section 302. But the said course was adopted by this Court after entering the finding that another accused had committed the murder and the appellant destroyed the evidence of it with full knowledge thereof. In a later decision in *Nathu* v. *State of U.P.* this Court has repeated the caution in the following words: (SCC p. 575, para 1)

"Before a conviction under Section 201 can be recorded, it must be shown to the satisfaction of the court that the accused knew or had reason to believe that an offence had been committed and having got this knowledge, tried to screen the offender by disposing of the dead body."

12. In **V.L. Tresa** v. **State of Kerala**[5], this Court has discussed the essential ingredients of the offence under Section 201 of the IPC at paragraph 12:

"**12.** Having regard to the language used, the following ingredients emerge:
(*I*) committal of an offence;

(*II*) person charged with the offence under Section 201 must have the knowledge or reason to believe that the main offence has been committed;

(*III*) person charged with the offence under Section 201 IPC should have caused disappearance of evidence or should have given false information regarding the main offence; and

(*IV*) the act should have been done with the intention of screening the offender from legal punishment."

13. In **Sukhram** v. **State of Maharashtra**[6], this Court discussed **Kalawati** (supra), **Palvinder Kaur** (supra), **Suleman Rehiman** (supra) and **V.L. Tresa** (supra) among others. The essential ingredients for conviction under Section 201 of the IPC have been discussed at paragraph 18:

"**18.** The first paragraph of the section contains the postulates for constituting the offence while the remaining three paragraphs prescribe three

[5] (2001) 3 SCC 549, [6] (2007) 7 SCC 502

> different tiers of punishments depending upon the degree of offence in each situation. To bring home an offence under Section 201 IPC, the ingredients to be established are: (*i*) committal of an offence; (*ii*) person charged with the offence under Section 201 must have the knowledge or reason to believe that an offence has been committed; (*iii*) person charged with the said offence should have caused disappearance of evidence; and (*iv*) the act should have been done with the intention of screening the offender from legal punishment or with that intention he should have given information respecting the offence, which he knew or believed to be false. It is plain that the intent to screen the offender committing an offence must be the primary and sole aim of the accused. It hardly needs any emphasis that in order to bring home an offence under Section 201 IPC, a mere suspicion is not sufficient. There must be on record cogent evidence to prove that the accused knew or had information sufficient to lead him to believe that the offence had been committed and that the accused has caused the evidence to disappear in order to screen the offender, known or unknown."

In **Sou Vijaya @ Baby** v. **State of Maharashtra**[7], though this Court held that the decision in **V.L. Tresa** (supra) was of no assistance to the State in the particular facts, it re-iterated that "*there is no quarrel with the legal principle that notwithstanding acquittal with reference to the offence under Section 302 IPC, conviction under Section 201 is permissible, in a given case*."

14. The decisions in **Sou Vijaya** (supra) and **V.L. Tresa** (supra) were noticed in **State of Karnataka** v. **Madesha**[8]**.** While the appeal of the State was dismissed, this Court in unmistakeable terms held that:

> **"9.** It is to be noted that there can be no dispute that Section 201 would have application even if the main offence is not established in view of what has been stated in *V.L. Tresa* and *Sou. Vijaya* cases…"

15. Thus, the law is well-settled that a charge under Section 201 of the IPC can be independently laid and conviction maintained also, in case the prosecution is able to establish that an offence had been committed, the person charged with the offence had the knowledge or the reason to believe that the offence had been committed, the said person has caused disappearance of evidence and such act of disappearance has been done with the intention of screening the offender from legal punishment. Mere suspicion is not sufficient, it must be proved that the accused knew or had a reason to believe that the offence has been committed and yet he caused the evidence to disappear so as to screen the offender. The offender may be either himself or any other person.

[7] (2003) 8 SCC 296, [8] (2007) 7 SCC 35,

16. Having thus analysed the legal position, we shall revert to the factual matrix and see whether the conviction in the facts and circumstances of the case under Section 201 of the IPC could be sustained.

17. An analysis of the judgment of the Sessions Judge in this context would be quite relevant. At paragraph-16, having analysed the facts and having referred to the minute details of the alleged commission of the offence, the court has entered the following finding:

> "**16**....In this manner this entire case suggest that the behaviour of the accused no. 1 was very suspicious. He has not undertaken the process for the PM of the dead body. He has not declared the facts before the police and the last rites of the dead body have been performed before the maternal family reaches from Ahmedabad. In this manner, while considering the facts on record I come at a conclusion that the accused no. 1 has failed in his duty as a husband. The husband has kept the wife in a bungalow and has most of the time remained away from her. This is very torturing and harassing for a wife. Thus as per my opinion it is proved by the prosecution on the basis of the facts on record and especially the chit at 0-1 that there was mental harassment upon the deceased Lila, from the side of the accused no.1. The fact remains that the accused no.1 has not informed the police even though an unnatural death has occurred and the last rites have also been performed without performing the post-mortem and without informing the police. Thus as per my opinion the accused no. 1 is prima facie guilty of the crime under section 498(a) and 201 of the IPC and therefore the prosecution has proved the case partly in affirmation."

18. The High Court, in appeal, however, took the view that the appellant was not liable to be convicted under Section 498A of the IPC. However, his conviction under Section 201 of the IPC was liable to be maintained. To quote:

> "5... We have re-appreciated and re-evaluated the evidence on the touchstone of the latest decisions of the Hon'ble Apex Court. Taking into consideration the fact that the complaint was lodged almost after a period of four months of the incident in question, the fact remains is that no *post mortem* was performed of the deceased. Even if the case of defence is accepted, it was a premature and unnatural death and therefore the mandatory requirements under the law, at least to inform the police of the death and to get the *post mortem* of the deceased done, were not fulfilled. Admittedly, nothing has come on record to show that the *post mortem* was carried out and/or the police complaint was immediately filed. Considering the said aspect, we have all reasons to believe that the offence is made out

> under section 201 of the IPC. However, so far as offence punishable under Section 498A of the IPC is concerned, we believe the contention of Mr. Anandjiwala, learned senior advocate for the accused No.1, that almost after a period of four months, the complaint was lodged and there is nothing on record to substantiate the case of the prosecution *qua* cruelty being perpetrated to the deceased for want of dowry and on the contrary, the accused No.1 had helped the father of the deceased and gave Rs.1 lakh. Under the circumstances, we are of the opinion that the learned trial judge has rightly convicted the accused No.1 for the offence punishable under Section 201 of the IPC, however, has committed an error in holding conviction of the accused No.1 for the offence punishable under Section 498A of the IPC and same is not sustainable."

19. Thus, the only ground for maintaining the conviction under Section 201 of the IPC is that the appellant did not give intimation to the police of the unnatural death and that no post-mortem was conducted.

20. We are afraid, the High Court is not justified in maintaining the conviction under Section 201 only on the ground that no communication was given to the police and that the post-mortem had not been performed. The Trial Court has taken note of the fact that the father of the deceased and her brother (who is a doctor) had attended the last rites of the deceased and neither of them had any complaint or suspicion at that time of the commission of any offence. The Sessions Court has also taken note of the suicide note left by the deceased wherein she had taken the entire blame on herself. Yet the court has taken the view, from the consideration we have extracted from paragraph-16 of the Sessions court judgment, that the deceased might have been in a state of depression having remained alone for most of the time and it amounted to torture.

The appellant has been acquitted of the offence under Section 498A by the High Court, and rightly so. The prosecution has also not been able to satisfy the ingredients under Section 201 of the IPC. Neither the Sessions Court nor the High Court has any case that there is any intentional omission to give information by the appellant to the police. It is also to be noted that prosecution has no case under Section 202 of the IPC against the appellant.

21. As held by this Court in **Hanuman and others v. State of Rajasthan**[9]**,** the mere fact that the deceased allegedly died an unnatural death could not be sufficient to bring home a charge under Section 201 of the IPC.

[9] 1994 Supp (2) SCC 39,

Unless the prosecution was able to establish that the accused person knew or had reason to believe that an offence has been committed and had done something causing the offence of commission of evidence to disappear, he cannot be convicted.

22. There is no such allegation against the appellant. The last rites of the deceased were performed in the presence of the members of her family. They had no suspicion at that time of the commission of any offence. The private complaint was lodged after more than three months. There is no charge under Section 202 of the IPC of intentionally omitting to give information of the unnatural death to the police. It is also not the case of the complainant that he had requested for post-mortem of the body and that intimation should have been given to the police before the last rites were performed.

23. In the above facts and circumstances, we are of the view that the Sessions Court is not justified in convicting the appellant under Section 201 of the IPC and the High Court maintaining the same. Accordingly, the appeals are allowed. The conviction of the appellant under Section 201 of the IPC is set aside.

Appeals allowed.

2018 (I) ILR - CUT- 240

SUPREME COURT OF INDIA

RANJAN GOGOI, J. & R.BANUMATHI, J.

CIVIL APPEAL NO. 19856 OF 2017
[Arising out of SLP(C) NO. 31405 OF 2016]

LAXMIDHAR NAYAK & ORS. ……..Appellants

.Vrs.

JUGAL KISHORE BEHERA & ORS. ……...Respondents

MOTOR VEHICLES ACT, 1988 – S.168

Appellants mother died in road accident – She was an agricultural labourer – Due to head-on-collision between a bus and a truck the bus ran over her – Tribunal held her monthly income at Rs.

650/- and deducting Rs. 250/- towards personal expenses assessed her contribution to the family at Rs. 400/-P.M. – As deceased was 42 years old learned Tribunal adopted multiplier of "12" and awarded compensation of Rs. 57,600/- for the loss of dependency and adding conventional damages awarded total compensation of Rs. 70,600/-, holding both the vehicle owners to pay the compensation at 50% each alongwith 9% interest P.A. – On appeal the High Court affirmed the quantum of compensation but reduced the rate of interest from 9% to 7% - Hence this appeal for enhancement.

The High Court as well as the Tribunal while assessing the income of the deceased as a labourer did not keep in view her contribution in the household work as she contributed her physical labour for maintenance of household and also taking care of her husband and three children, for which her daily income should be fixed at Rs. 150/- per day and Rs. 4,500/- P.M. – So taking agricultural labour work at Rs. 3000/- P.M. and Rs. 1,500/- for the household work the monthly income of the deceased is fixed at Rs. 4,500/- P.M. and deducting 1/3rd for personal expenses, her contribution towards the family is at Rs. 3000/-P.M. and Rs. 36,000/- P.A. – As she was 42 years old multiplier "14" is adopted and loss of dependency is calculated at Rs. 5,04,000/- and further the appellants are entitled to Rs. 15,000/- for loss of estate and Rs.15,000/- for funeral expenses so the total compensation enhanced to Rs. 5,34,000/- with interest at the rate of 7%P.A. – Held, the impugned judgment is modified and the compensation to the claimants is enhanced to Rs. 5,34,000/- – The enhanced compensation is payable with interest at the rate of 7% P.A. from 27.01.2016, the date of judgment passed by the High Court – Respondent Nos. 1 to 3 are jointly and severally liable to pay the enhanced compensation with interest. (Para 6 to 9)

Case Laws Referred to

1. (2009) 6 SCC 121 : Sarla Verma (Smt.) & Ors. -V- Delhi Transport Corporation & Anr.
2. 2017 (13) SCALE 12 : National Insurance Co. Ltd.-V- Pranay Sethi & Ors.

For Appellants : M/s. Binaya Kumar Das
For Respondents : M/s.

Date of judgment : 28.11.2017

JUDGMENT

R. BANUMATHI, J.

Leave granted.

2. Appellants who are the sons and daughter of the deceased Chanchali Nayak have filed this appeal seeking enhancement of compensation for the death of their mother in the road accident on 29.09.1991 as against compensation of Rs.70,600/- awarded by the tribunal and affirmed by the High Court of Orissa.

3. Mother of appellants-Chanchali Nayak was working as an agricultural labourer. On the date of accident - 29.09.1991 at about 8.00 a.m., Chanchali Nayak was proceeding on the left side of the road alongwith some other labourers. At that time, due to head-on-collision between two vehicles-bus (bearing No.OSF 5157) and truck (bearing No.OAC 495), the bus swerved to the extreme left side of the road and ran over Chanchali Nayak and she succumbed to injuries. In the claim petition filed by the claimants, the tribunal held that the accident was due to rash and negligent driving of both the vehicles.

4. So far as the compensation is concerned, the tribunal has taken the monthly income of the deceased at Rs.650/- per month and after deducting an amount of Rs.250/- towards her personal expenses, assessed the contribution to the family at Rs.400/- per month. Deceased was aged 42 years and the tribunal adopted multiplier of "12" and awarded compensation of Rs.57,600/- for the loss of dependency and adding conventional damages, tribunal has awarded total compensation of Rs.70,600/-. The respondents No.1 and 2 - owners of the bus and the truck were held liable to pay the compensation to the claimants at 50% each alongwith interest at the rate of 9% per annum. Pointing out that the claimants have not produced the insurance policies of the vehicles, the tribunal held that the insurance company is not liable to indemnify the compensation. However, it is seen from the judgment of the High Court that the insurance company has been satisfied with the award. On appeal to the High Court by the claimants, the High Court affirmed the quantum of compensation of Rs.70,600/- awarded to the claimants but reduced the rate of interest from 9% to 7%. So far as the liability of the insurance company is concerned, the High Court held that the insurance company-respondent No.3 having paid the compensation to the claimants cannot avoid its liability to pay the compensation amount. Being dissatisfied with the quantum of compensation, the appellants have filed this appeal.

5. We have heard the learned counsel for the appellants. Respondent No.2 and insurance company-respondent No.3 have not entered their appearance. We have perused the impugned judgment and the materials placed on record.

6. PW-1 in his evidence stated that Chanchali Nayak was earning Rs.35/- per day as wages out of the labour work. Deceased Chanchali Nayak was an agricultural labourer. The tribunal has taken her income at the rate of Rs.25/- per day and assessed the monthly income at Rs.650/- per month. It is quite improbable that a labourer would be available for such a small amount of Rs.25/- per day. The wages fixed by the tribunal for the daily labourer at Rs.25/- per day and the monthly income at Rs.650/- is too low. The reasoning of the tribunal that a lady labourer may not get engagement daily is not acceptable. Even though works like cutting of paddy and other agricultural labour may not be available on all days throughout the year, in rural areas other kinds of work are available for a labourer. Deceased Chanchali Nayak even though was said to be earning only Rs.35/- per day at that time, over the years, she would have earned more. In our view, deceased Chanchali Nayak, being a woman and mother of three children, would have also contributed her physical labour for maintenance of household and also taking care of her children. The High Court as well as the tribunal did not keep in view the contribution of the deceased in the household work, being a labourer and also maintaining her husband, her daily income should be fixed at Rs.150/- per day and Rs.4,500/- per month.

7. Taking income from the agricultural labour work at Rs.3,000/- per month and Rs.1,500/- per month for the household work, the monthly income of the deceased is fixed at Rs.4,500/- per month deducting 1/3rd for personal expenses, contribution of deceased towards the family is calculated at Rs.3,000/- per month and Rs.36,000/- per annum. Deceased Chanchali Nayak was aged 42 years. As per the second schedule to the Motor Vehicles Act, 1988, for the age groups 40-45 years multiplier is "15". As per *Sarla Verma (Smt.) and Others v. Delhi Transport Corporation and Another* (2009) 6 SCC 121, for the age groups 41-45 years multiplier to be adopted is "14". Therefore, the multiplier of "12" adopted by the tribunal and the High Court may not be correct. Hence, the multiplier of "12" adopted may not be correct. Adopting the multiplier of "14" loss of dependency is calculated at Rs.5,04,000/- (3,000x12x14).

8. As per the decision of the Constitution Bench in *National Insurance Company Limited v. Pranay Sethi and Others* 2017 (13) SCALE 12, compensation of Rs.15,000/- for loss of estate and Rs.15,000/- for funeral expenses is awarded. Thus total compensation awarded to the claimants is enhanced to Rs.5,34,000/- payable with interest at the rate of 7% per annum.

9. The impugned judgment is modified and the compensation payable to the claimants is enhanced to Rs.5,34,000/-. The enhanced compensation is payable with interest at the rate of 7% per annum from 27.01.2016 (the date of judgment of the High Court) and this appeal is partly allowed. Respondents No.1 to 3 are jointly and severally liable to pay the enhanced compensation with interest.

Appeal allowed in part.

2018 (I) ILR - CUT- 244

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

W.A. NO. 418 OF 2016

SHRABANTI DAS .....Appellant

.Vrs.

GOVT. OF INDIA & ORS. .....Respondents

CONSTITUTION OF INDIA, 1950 – ART. 226

Writ Court – Jurisdiction – Meaning of – It means the extent of power which is conferred upon the Court by its Constitution to try a proceeding, exercising jurisdiction in relation to the territories within which "the cause of action" wholly or in part arises – So question of territorial jurisdiction can be decided on the facts pleaded in the writ petition.

In this case the appellant was serving as Assistant Manager in NABARD at Guwahati – During the year 2014 she fell ill and the Medical Officer NABARD advised her that it would be risky to remain alone at Guwahati and she should stay with her near and dear ones at her native place and since then she is residing in Odisha – As a matter of fact, the advice of the Doctor cannot be treated as the command from the employer to stay at her native place – So, merely because she is

residing in Odisha or may have sent representations to the authorities in Mumbai or Assam would not mean that any cause of action has arisen within the territorial jurisdiction of this Court – Held, the decision of the learned single Judge that the writ petition is not maintainable on the ground of jurisdiction is correct.

(Paras 9,10)

Case Laws Referred to :-

1. AIR 2011Delhi 174 : M/s.Sterling Agro Industries Ltd. -V- Union of India & Ors.
2. AIR 1965 SC 1449 : Raja Soap Factory -V- S.P.Shantharaj
3. AIR 2004 SC 2345 : CIT -V- Pearl Mech Engg. & Foundry Works (P) Ltd.
4. AIR 2000 SC 29 : Navinchandra N.Majithia -V- State of Maharashtra
5. (2008) 3 SCC 456 : Eastern Coalfields Ltd. -V- Kalyan Banerjee

For Appellant : Mr.N.K.Mishra, Sr.Adv., M/s.A.K.Roy & A.Mishra

For Respondents : Mr.A.Mohanty, Central Govt.Counsel
M/s.B.P.Tripathy, D.Pradhan, G.S.Das
& B.S.Mishra

Date of judgment: 12.10.2017

JUDGMENT

VINEET SARAN, C.J.

The appellant was serving as an Assistant Manager in NABARD and was posted at Guwahati (Assam). In the year 2014 she fell ill and it is contended that the Medical Officer of NABARD advised that it would be troublesome and risky for her to stay alone at Guwahati and thus the appellant shifted to her native place in Cuttack, Odisha. Since August 2014 she has been staying in Odisha. However, since she has not been attending her duty in Assam, her salary has been stopped w.e.f. October, 2014. She has made representation for her transfer from Assam to any part of the Odisha on medical ground, which has not been acceded/considered by the respondent-Bank. Thus, the appellant filed W.P.(C) No.7117 of 2016 with the prayer for direction to the respondent-Bank to transfer her from Assam to Odisha on medical ground. By order dated 10.05.2016, learned Single Judge dismissed the writ petition on the ground that no part of cause of action has accrued within the territorial jurisdiction of Odisha and merely because the appellant has been staying in the State of Odisha it cannot be said that any part of cause of action has accrued here. Challenging the said order, this writ appeal has been filed.

2. Heard Mr. N.K. Mishra, learned Senior Counsel along with Mr. A. Mishra, learned counsel for the appellant and Mr. B.P. Tripathy, learned counsel for the respondents. Perused the order impugned in this appeal.

3. Mr. N.K. Mishra, learned Senior Counsel appearing for the appellant has submitted that the appellant was advised not to stay alone in Assam and be with her near and dear ones in her native place. It is thus submitted that it was on such advice of the Medical Officer of the respondent-Bank that the appellant has come to her native place in Odisha and as such cause of action has accrued in Odisha because her representations have been sent from Odisha. It has also been submitted that during her stay in Odisha, the appellant was permitted to take promotional interview twice in Bhubaneswar office, Odisha of the respondent bank and, as such, part of cause of action has arisen within the territorial jurisdiction of Odisha. To substantiate his contention, he has relied upon the judgment of Special Bench of Delhi High Court in ***M/s. Sterling Agro Industries Ltd. v. Union of India & Ors.***, AIR 2011 Delhi 174, and judgment dated 04.08.2015 of this Court in W.P.(C) No. 5845 of 2003 (***P.K. Pani v. Chairman & Managing Director***), rendered by one of us (Dr. B.R. Sarangi,J), which has been confirmed by the Division Bench of this Court in W.A. No. 543 of 2015 (***Chairman & Managing Director, Allahabad Bank v. Shri P.K. Pani***) by judgment dated 17.10.2016.

4. Mr. B.P. Tripathy, learned counsel for respondent no.5 justified the order passed by the learned Single Judge and contended that since no part of the cause of action arises in the State of Odisha, as such, no fault can be found with the order of learned Single Judge in dismissing the writ petition on the ground of lack of jurisdiction.

5. In view of the facts and circumstances, as narrated above, the only question to be decided in the instant case is whether this Court has got jurisdiction to entertain the writ application.

6. In ***Raja Soap Factory v. S.P. Shantharaj,*** AIR 1965 SC 1449 the apex Court held that by "jurisdiction" is meant the extent of power which is conferred upon the court by its constitution to try a proceedings.

6.1. In ***CIT V. Pearl Mech Engineering & Foundry Works (P) Ltd.,*** AIR 2004 SC 2345, the apex court held that the word "jurisdiction" implies the court or tribunal with judicial power to hear and determine a cause, and such tribunal cannot exist except by authority of law. Jurisdiction always emanates

directly and immediately from the law; it is a power which, nobody on whom the law has not conferred on, can exercise.

6.2. In ***Navinchandra N. Majithia v. State of Maharashtra,*** AIR 2000 SC 29, the apex Court in paragraphs 7, 8, 33 to 37, has held as follows:

> *"7. The object of the amendment by inserting clause (2) in the Article was to supersede the decision of the Supreme Court in Election Commission v. Saka Venkata Subba Rao (AIR 1953 SC 210) (supra) and to restore the view held by the High Courts in the decisions cited above. Thus the power conferred on the High Courts under Article 226 could as well be exercised by any High Court exercising jurisdiction in relation to the territories within which "the cause of action, wholly or in part, arises" and it is no matter that the seat of the authority concerned is outside the territorial limits of the jurisdiction of that High Court. The amendment is thus aimed at widening the width of the area for reaching the writs issued by different High Courts.*
>
> *8."Cause of action" is a phenomenon well understood in legal parlance. Mohapatra, J. has well delineated the import of the said expression by referring to the celebrated lexicographies. The collocation of the words "cause of action wholly or in part arises" seems to have been lifted from Section 20 of the Code of Civil Procedure, which section also deals with the jurisdictional aspect of the Courts. As per that section the suit could be instituted in a Court within the legal limits of whose jurisdiction the "cause of action wholly or in part arises". Judicial pronouncements have accorded almost a uniform interpretation to the said compendious expression even prior to the Fifteenth Amendment of the Constitution as to mean "the bundle of facts which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court."*
>
> *33.From the provision in clause (2) of Art. 226 it is clear that the maintainability or otherwise of the writ petition in the High Court depends on whether the cause of action for filing the same arose, wholly or in part, within the territorial jurisdiction of that Court.*
>
> *34.In legal parlance the expression 'cause of action' is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a Court or a tribunal; a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person. (Black's Law Dictionary).*
>
> *35. In Stroud's Judicial Dictionary a 'cause of action' is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase*

comprises every fact, which if traversed, the plaintiff must prove in order to obtain judgment.

36. In 'Words and Phrases' (fourth edition) the meaning attributed to the phrase 'cause of action' in common legal parlance is existence of those facts which give a party a right to judicial interference on his behalf.

37. A Bench of three learned Judges of this Court in the case of Oil and Natural Gas Commission v. Uptal Kumar Basu (1994) 4 SCC 711 : (1994 AIR SCW 3287), considered at length the question of territorial jurisdiction under Art. 226 (2) of the Constitution of India. Some of the relevant observations made in the Judgment are extracted hereunder (Paras 5 and 6 of AIR SCW) :

Clause (1) of Art. 226 begins with a non obstante clause - notwithstanding anything in Art. 32 - and provides that every High Court shall have power "throughout the territories in relation to which it exercises jurisdiction", to issue to any person or authority, including in appropriate cases, any Government. "Within those territories directions, orders or writs, for the enforcement of any of the rights conferred by Part III or for any other purpose. Under clause (2) of Art. 226 the High Court may exercise its power conferred by clause (1) if the cause of action, wholly or in part, had arisen within the territory over which it exercises jurisdiction, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. On a plain reading of the aforesaid two clauses of Art. 226 of the Constitution it becomes clear that a High Court can exercise the power to issue directions, orders or writs for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action, wholly or in part, had arisen within the territories in relation to which it exercises jurisdiction, notwithstanding that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within the said territories. In order to confer jurisdiction on the High Court of Calcutta, NICCO must show that at least a part of the cause of action had arisen within the territorial jurisdiction of that Court. That is at best its case in the writ petition.

It is well settled that the expression "cause of action" means that bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgment in his favour by the Court. In Chand Kour v. Partab Singh,((1889) ILR 16 Cal 98) Lord Watson said :

"..... the cause of action has no relation whatever to the defence which may be set up the defendant nor does it depend upon the character of the

relief prayed for by the plaintiff. It refers entirely to the ground set forth in the plaint as the cause of action or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

Therefore, in determining the objection of lack of territorial jurisdiction the Court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. In other words the question whether a High Court has territorial jurisdiction to entertain a writ petition must be answered on the basis of the averments made in the petition, the truth or otherwise whereof being immaterial. To put it differently, the question of territorial jurisdiction must be decided on the facts pleaded in the petition. Therefore, the question whether in the instant case the Calcutta High Court had jurisdiction to entertain and decide the writ petition in question even on the facts alleged must depend upon whether the averments made in paragraphs 5, 7, 18, 22, 26 and 43 are sufficient in law to establish that a part of the cause of action had arisen within the jurisdiction of the Calcutta High Court."

6.3. In ***Eastern Coalfields Ltd. v. Kalyan Banerjee*****,** (2008) 3 SCC 456, the apex Court in paragraphs 7 to 11, observed as follows:

7. *"Cause of action", for the purpose of Article 226(2) of the Constitution of India, for all intent and purport, must be assigned the same meaning as envisaged under Section 20(c) of the Code of Civil Procedure. It means a bundle of facts which are required to be proved. The entire bundle of facts pleaded, however, need not constitute a cause of action as what is necessary to be proved is material facts whereupon a writ petition can be allowed.*

8. *The question to some extent was considered by a three-Judge Bench of this Court in Kusum Ingots & Alloys Ltd. v. Union of India stating: (SCC p. 261, para 18)*

"18. The facts pleaded in the writ petition must have a nexus on the basis whereof a prayer can be granted. Those facts which have nothing to do with the prayer made therein cannot be said to give rise to a cause of action which would confer jurisdiction on the Court."

9. *As regards the question as to whether situs of office of the appellant would be relevant, this Court noticed decisions of this Court in Nasiruddin v. STAT*[4] *and U.P. Rashtriya Chini Mill Adhikari Parishad v. State of U.P. to hold: (Kusum Ingots case, SCC p. 263, paras 26-27)*

"26. The view taken by this Court in U.P. Rashtriya Chini Mill Adhikari Parishad that the situs of issue of an order or notification by the Government would come within the meaning of the expression 'cases arising' in Clause 14 of the (Amalgamation) Order is not a correct view of law for the reason hereafter stated and to that extent the said decision is overruled. In fact, a legislation, it is trite, is not confined to a statute enacted by Parliament or the legislature of a State, which would include delegated legislation and subordinate legislation or an executive order made by the Union of India, State or any other statutory authority. In a case where the field is not covered by any statutory rule, executive instructions issued in this behalf shall also come within the purview thereof. Situs of office of Parliament, legislature of a State or authorities empowered to make subordinate legislation would not by itself constitute any cause of action or cases arising. In other words, framing of a statute, statutory rule or issue of an executive order or instruction would not confer jurisdiction upon a court only because of the situs of the office of the maker thereof.

27. When an order, however, is passed by a court or tribunal or an executive authority whether under provisions of a statute or otherwise, a part of cause of action arises at that place. Even in a given case, when the original authority is constituted at one place and the appellate authority is constituted at another, a writ petition would be maintainable at both the places. In other words, as order of the appellate authority constitutes a part of cause of action, a writ petition would be maintainable in the High Court within whose jurisdiction it is situate having regard to the fact that the order of the appellate authority is also required to be set aside and as the order of the original authority merges with that of the appellate authority."

10. Kusum Ingots & Alloys Ltd. has been followed by this Court in Mosaraf Hossain Khan v. Bhagheeratha Engg. Ltd. stating: (SCC p. 669, para 26)

"26. In Kusum Ingots & Alloys Ltd. v. Union of India a three-Judge Bench of this Court clearly held that with a view to determine the jurisdiction of one High Court vis-à-vis the other the facts pleaded in the writ petition must have a nexus on the basis whereof a prayer can be made and the facts which have nothing to do therewith cannot give rise to a cause of action to invoke the jurisdiction of a court. In that case it was clearly held that only because the High Court within whose jurisdiction a legislation is passed, it would not have the sole territorial jurisdiction but all the High Courts where cause of action arises, will have jurisdiction."

11. In Om Prakash Srivastava v. Union of India[7] this Court held: (SCC p. 211, para 12)

> *"12. The expression 'cause of action' has acquired a judicially settled meaning. In the restricted sense 'cause of action' means the circumstances forming the infraction of the right or the immediate occasion for the reaction. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but also the infraction coupled with the right itself. Compendiously, as noted above, the expression means every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove each fact, comprises in 'cause of action'. (See Rajasthan High Court Advocates' Assn. v. Union of India.)"*

From the judgments, referred to above, it follows that the question whether a High Court has territorial jurisdiction to entertain a writ petition must be answered on the basis of the averments made in the petition. To put it differently, the question of territorial jurisdiction must be decided on the facts pleaded in the petition. Therefore, the question whether in the instant case this High Court has jurisdiction to entertain and decide the writ petition in question even on the facts alleged must depend upon whether the averments made are sufficient in law to establish that a part of the cause of action had arisen within the jurisdiction of this High Court.

7. In our view, merely because the medical advice for an employee of the Medical Officer not to stay alone and be with the near and dear ones at the native place, would not mean that it is the command from employer to go to her native place. It is just an advice of the Medical Officer and the same cannot be treated as the appellant being on duty or in service within the territorial jurisdiction of Odisha so as to mean that any part of cause of action has arisen.

8. ***M/s. Sterling Agro Industries Ltd.*** (supra) is a Special Bench judgment of the Delhi High Court, relied upon by the learned Senior Counsel appearing for the petitioner, which deals with concept of "Forum Conveniens", which fundamentally means that it is obligatory on the part of the Court to see the convenience of all the parties before it. The convenience, in its ambit and sweep, would include the existence of more appropriate forum, expenses involved, the law relation to the lis, verification of certain facts which are necessitous for just adjudication of the controversy and such other ancillary aspects. The balance of convenience is also to be taken note of. The principle of 'Forum Conveniens' in its ambit and sweep encapsulates

the concept that a cause of action arising within the jurisdiction of the Court would not itself constitute to be the determining factor compelling the Court to entertain the matter. While exercising jurisdiction under Articles 226 and 227 of the Constitution of India, the Court cannot be totally oblivious of the concept of "Forum Conveniens". But coming to the fact of the said case, it is seen that the industry of the petitioner therein was situate at Bhind, Malanpur in the State of Madhya Pradesh. The initial order was passed by the Asst. Commissioner of Customs ICD, Malanpur, Dist- Bhind(M.P.). The appellate order was passed by the Commissioner (appeals)-I, Customs and Central Excise and Service Tax at Indore (M.P.). Being dissatisfied with the order passed by the revisional authority, the petitioner therein invoked the inherent jurisdiction of the Delhi High Court under Article 226 of the Constitution of India solely on the foundation that the revisional authority, namely, the office of the Joint Secretary to the Government of India, was in Delhi and, therefore, the Delhi High Court had got jurisdiction to deal with the lis in question. Thus, relying upon the various judgments, referred to in the said judgment, the Delhi High Court held that where an order is passed by an appellate authority or a revisional authority, a part of cause of action arises at that place. When the original authority is situated at one place and the appellate authority is situated at another, a writ petition would be maintainable at both the places. As the order of appellate authority constitutes a part of cause of action, a writ petition would be maintainable in the High Court within whose jurisdiction it is situate, having regard to the fact that the petitioner therein is dominus litis to choose his forum, and that since the original order merges into the appellate order, the place where the appellate authority is located is also "Forum Conveniens." There is no dispute with regard to the proposition laid down by the Delhi High Court while considering the concept of "Forum Conveniens" in the aforementioned judgment, but such is not the position in the present case.

Similarly, in ***P.K. Pani*** (supra) it was contended that the petitioner, while serving as Senior Manger in Parel Branch, Mumbai for commission and omission, proceedings were initiated against him and while he was posted at Regional Office, Bilaspur as Senior Manager (Inspection), proceedings were continuing against him and therefore, no part of cause of action would arise within the State of Odisha. Merely because, after removal from service, the petitioner was staying at Bhubaneswar in his permanent address and all correspondences had been made to the said address, that ipso facto could not confer the jurisdiction on this Court to adjudicate the matter

and as such, this Court lacked territorial jurisdiction to entertain the writ application. Considering such contention and relying upon the judgment of the apex Court in ***Eastern Coal Fields Ltd.*** and ***Navinchandra N. Majithia*** (supra) the learned Single Judge of this Court held that since after removal from service all correspondences by the employer of the petitioner in that case had been made in the permanent address of the petitioner, in view of the provisions contained in Article 226(2) of the Constitution of India if cause of action had arisen in more than one Court, any of the Courts where part of cause of action had arisen, would have jurisdiction to entertain the application. The said judgment of the learned Single Judge was assailed before the Division Bench in W.A. No 543 of 2015 and confirmed by judgment dated 17.10.2016 holding that this Court has jurisdiction to entertain the application. But such are not the facts in the present case.

Consequentially, in view of the discussions made above, it is evident that the judgments referred to by the learned senior counsel are factually distinguishable from the present case and, as such, the same are not applicable.

9. In our considered view, in the facts of the present case, no cause of action has arisen within the territorial jurisdiction of this Court. The head office of the respondent bank, where representations have been sent by the appellant, is in Mumbai. The appellant has last served in Guwahati (Assam) where she fell ill and thereafter since the year 2014 she has been residing in Cuttack, Odisha. Merely because she is residing in Odisha or may have sent representations to the authorities in Mumbai or Assam from Odisha would not mean that any cause of action has arisen within the territorial jurisdiction of this Court.

10. In such view of the matter, we agree with the view taken by the learned Single Judge that the writ application would not be maintainable on the ground that this Court has no territorial jurisdiction, because no cause of action has arisen within the State of Odisha.

11. The writ appeal is accordingly dismissed.

Appeal dismissed.

2018 (I) ILR - CUT- 254

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

W.P.(C) NO. 12375 OF 2017
WITH BATCH

UNITED CONTRACTORS ASSOCIATION ……..Petitioner

.Vrs.

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

TENDER – O.P.No.3 issued tender call notice on 04.05.2017 for 380 number of works fixing 03.06.2017 as the last date for on line bidding and to open the technical bid on 05.06.2017 – During such process 1st corrigendum issued on 16.05.2017 extending the last date from 03.06.2017 to 17.06.2017 and 2nd and 3rd corrigendum issued making necessary corrections in the tender stipulation – While the matter stood thus with the intervention of local MLA, O.P.3 issued 4th corrigendum on 13.06.2017 cancelling part of the tender items i.e. serial No. 1 to 168 – When the above action challenged in writ petition fresh tender call notice issued on 21.08.2017 which was challenged in the said writ petition by way of amendment.

4th corrigendum Dt. 13.06.2017 issued on the ground of unavoidable circumstances which could not be inferred from the circumstances mentioned there in – Therefore, the cancellation of tenders is a cryptic one and no reason having been assigned it shows that the authority has not applied his mind to the subject matter – Held, the impugned 4th corrigendum notice Dt. 13.06.2017 cancelling tenders for the works from serial Nos. 1 to 168 and fresh tender call notice Dt. 21.08.2017 are quashed. (Paras 12,13)

Case Laws Referred to : -

1. (1968) 1 All E.R. 694 : Padfield v. Minister of Agriculture, Fisheries &Food
2. AIR 1974 SC 87 : Union of India v. Mohan Lal Capoor.
3. AIR 1981 SC 1915 : Uma Charan v. State of Madhya Pradesh.
4. AIR 1971 SC 862 : Travancore Rayons Ltd. v. The Union of India.
5. AIR 1978 SC 597 : Maneka Gandhi v. Union of India.
6. 1979 LAB IC 1165 : Kuttanecherry Quseph Antony v. P.V. Kumaran.

For Petitioner : M/s.S.K.Dalai, P.Swain & S.Mohapatra

For Opp.Parties: Mr. B.P.Pradhan, A.G.A.

Date of judgment : 10.01.2017

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner in W.P.(C) No. 12375 of 2017, being an association of contractors of Super Class, Special Class, Class-'A' and Class-'B' registered under the provisions of law having registration no.KPT2070-39/94-95, seeks to challenge the action of opposite party no.3 in cancelling the tenders at the behest of local MLA for the works from serial no. 1 to 168 by way of 4th corrigendum dated 13.06.2017 without assigning any reasons.

Similarly, the petitioners in W.P.(C) No. 12650 of 2017 and W.P.(C) No. 12652 of 2017, who are 'A' Class contractors as per the revised classification prescribed under the Registration Rules, 1969, seek to challenge the very same 4th corrigendum dated 13.06.2017 on the ground that the tenders for the work from serial no.1 to 168 have been cancelled without assigning any reason.

The above three writ applications, having common cause of action, have been heard together and disposed of by this common judgment.

2. For better appreciation, the factual matrix of W.P.(C) No. 12357 of 2017 has been taken into consideration, which is also applicable to W.P.(C) No. 12650 of 2017 and W.P.(C) No. 12652 of 2017.

2.1 The Superintending Engineer, Southern Circle, (RW), Sunabeda-opposite party no.3 issued tender call notice dated 04.05.2017 in Annexure-1 through e-procurement for 380 numbers of works in three categories, i.e., (a) Estimated cost more than Rs.40.00 lakhs up to Rs.1.50 crores for 'B' Class contractors and 'A' Class contractors; (b) Estimated cost more than Rs.1.50 crores up to Rs.4.00 crores for 'A' Class and Special Class contractors; and (c) Estimated cost more than Rs.4.00 crores up to Rs.10.00 crores for Special Class and Super Class contractors fixing 03.06.2017 as last date for online bidding. The technical bid was to be opened on 05.06.2017. The bidders in the undivided Koraput district participated in the same at their suitability. During process of online bidding, at the midsession, i.e., on 16.05.2017, the Superintending Engineer-opposite party no.3 issued 1st corrigendum in extending the last date of participation from 03.06.2017 to 17.06.2017 and, thereafter, issued 2nd and 3rd corrigendum in making necessary correction to the tender stipulations. Though the issuance of 1st and 2nd corrigendum was within the notice of the petitioner, the 3rd corrigendum was not known to the petitioner.

At that point of time, the local MLA-opposite party no.4 on 10.06.2017 wrote a letter to opposite party no.1- Commissioner-cum-Secretary, Rural Development Department, Government of Odisha with a proposal for merging small works relating to 'B' Class to 'A' Class, Special Class and Super Class and, accordingly, gave his opinion that if 'B' Class contractors would enter into PMGSY works, then quality or standard of work would decrease and requested for merger of 'B' Class contractor's items to the Super Class, Special Class and 'A' Class contractors. Considering the recommendation of the local MLA, the Addl. Secretary to Government wrote a letter to the Chief Engineer, PMGSY, Government of Odisha- opposite party no.2 for discussion and in view of the communication dated 13.06.2017 issued by opposite party no.1 for discussion, on 16.06.2017, the opposite party no.2 directed to the tender inviting authority i.e. opposite party no.3 to give suggestion on the recommendation of the local MLA for needful action. While this was the position and the decision making authorities were on the process to think over about the suggestion of the local MLA and called for suggestions from Superintending Engineer- opposite party no.3, all on a sudden on 13.06.2017 opposite party no.3 issued 4th corrigendum in a selective manner in cancelling part of the tender items i.e. serial nos. 1 to 168. During pendency of the writ applications, a fresh tender call notice was issued on 21.08.2017 in Annexure-6, which has been brought on record by way of amendment to the writ application. Therefore, the petitioner seeks to quash the fourth corrigendum dated 13.06.2017 in Annexure-5 and consequential action taken in issuing fresh tender call notice dated 21.08.2017 in Annexure-6.

3. Sri S.K. Dalai, learned counsel for the petitioners in all the writ petitions strenuously urged before this Court that the 4th corrigendum notice dated 13.06.2017 cancelling the tenders for the works from serial no. 1 to 168 of annexure to NIT No. 974 dated 07.04.2017 vide bid identification no. SERWSCSBD online 01/2017-18, has been issued without assigning any reason. It is further contended that the only reason has been assigned that "due to unavoidable circumstances" and what is unavoidable circumstances has not been indicated in such cancellation notice dated 13.06.2017 issued by way of 4th corrigendum. As such, the consequential tender call notice issued during pendency of the writ petition before this Court also amounts to overreaching the orders of this Court. Therefore, it is contended that both the 4th corrigendum dated 13.06.2017 and consequential fresh tender call notice dated 21.08.2017 cannot sustain in the eye of law and the same are liable to

be quashed. It is further contended that the cancellation of works from serial no. 1 to 168 has been done as per instruction of the higher authorities of the Orissa State Rural Road Agency (OSRRA), who is not the competent authority and, as such, it has no jurisdiction to suggest for cancellation of tender. Thereby, the cancellation of tender, having been made at the best of the authority, who has no jurisdiction, cannot sustain in the eye of law.

4. Sri B.P. Pradhan, learned Addl. Government Advocate contended that the Superintending Engineer-opposite party no.3 is the designated officer to invite tenders for Pradhan Mantri Gram Sadak Yojana (PMGSY). As such, he is competent to issue the 4th corrigendum notice dated 13.06.2017, during commencement of the process, by cancelling the works from serial no.1 to 168, out of 380 tendered items of the original tender call notice, as per Clause 14 of the notice inviting tender. As per the said tender call notice, as many as 80 numbers of packages were available for bidding for 'B' class contractors, out of total number of 168 packages relating to Koraput district. There was consideration at the level of OSRRA to combine the nearby packages as per feasibility so as to make it to bigger size for participation of more number of higher class contractors having more expertise and more sophisticated machineries required for these works for smooth execution of the work maintaining better quality and workmanship. Therefore, as per instruction of higher authority from OSRRA, tenders for packages relating to Koraput district from serial no.1 to 168 were cancelled so as to go for fresh tender after re-packaging of work as per feasibility.Thereby, no illegality or irregularity has been committed by the authority concerned in issuing the 4th corrigendum dated 13.06.2017 in cancelling the works from serial no.1 to 168. The consequential tender notice issued in Annexure-6 dated 21.08.2017 is well within its competency and, as such, the same does not warrant interference of this Court at this stage.

5. We have heard Mr. S.K. Dalei, learned counsel for the petitioners, and Mr. B.P. Pradhan, learned Addl. Government Advocate for the State opposite parties. The pleadings between the parties having been exchanged, with their consent the writ petition is finally disposed of at the stage of admission.

6. The fact delineated above are undisputed and a perusal of 4th corrigendum dated 13.06.2017 would go to show that it is a cryptic one and no reason has been assigned for cancelling the tenders for the works from serial no.1 to 168 of notice inviting tender dated 07.04.2017. As a matter of

fact, the cancellation of tenders has been made only "due to unavoidable circumstances". Therefore, no reasons have been assigned while issuing such corrigendum cancelling the works from serial no.1 to 168 of annexure to NIT No. 974 dated 07.04.2017.

7. ***Franz Schubert*** said-

"*Reason is nothing but analysis of belief*."

In ***Black's Law Dictionary***, reason has been defined as a-

"faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions."

It means the faculty of rational thought rather than some abstract relationship between propositions and by this faculty, it is meant the capacity to make correct inferences from propositions, to size up facts for what they are and what they imply, and to identify the best means to some end, and, in general, to distinguish what we should believe from what we merely do believe.

Therefore, reasons being a necessary concomitant to passing an order allowing the authority to discharge its duty in a meaningful manner either furnishing the same expressly or by necessary reference.

8. "***Nihil quod est contra rationem est licitum***"means as follows:

"nothing is permitted which is contrary to reason. It is the life of the law. Law is nothing but experience developed by reason and applied continually to further experience. What is inconsistent with and contrary to reason is not permitted in law and reason alone can make the laws obligatory and lasting."

Therefore, recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is pertinent to note that a decision is apt to be better if the reasons for it are set out in writing because the reasons are then more likely to have been properly thought out. It is vital for the purpose of showing a person that he is receiving justice.

In *Re*: ***Racal Communications Ltd. (1980)2 All ER 634 (HL)***, it has been held that the giving of reasons facilitates the detection of errors of law by the court.

In ***Padfield v. Minister of Agriculture, Fisheries and Food*** (1968) 1 All E.R. 694, it has been held that a failure to give reasons may permit the Court to infer that the decision was reached by the reasons of an error in law.

9. In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87 it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken in ***Uma Charan v. State of Madhya Pradesh***, AIR 1981 SC 1915.

10. In ***Travancore Rayons Ltd. v. The Union of India,*** AIR 1971 SC 862 it is observed by the apex Court that the necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental process by which the conclusion is reached in cases where a non-judicial authority exercises judicial functions is obvious. When judicial power is exercised by an authority normally performing executive or administrative functions, the Supreme Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency. The court insists upon disclosure of reasons in support of the order on two grounds: one, that the party aggrieved in a proceeding before the court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.

11. In ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597, the apex Court held that the reasons, if disclosed, being open to judicial scrutiny for ascertaining their nexus with the order, the refusal to disclose the reasons would equally be open to the scrutiny of the Court; or else, the wholesome power of a dispassionate judicial examination of executive orders could with impunity be set at naught by an obdurate determination to suppress the reasons.

12. Taking into consideration the principles laid down by the apex Court, as discussed above, to the present context, it is only indicated in the 4th Corrigendum that cancellation of tenders for the works from serial no.1 to 168 has been done "due to unavoidable circumstances". While considering the provisions contained in Section 25-FFF of Industrial Disputes Act in ***Kuttanecherry Quseph Antony v. P.V. Kumaran***, 1979 LAB IC 1165, it has been held as follows:

> *"Legislative intent is to limit the scope of the expression 'unavoidable circumstances' to such cases where closure was for reasons connected with the business. If the closure of the undertaking was on account of unavoidable circumstances beyond the control of an employer, but those circumstances are not connected with the functioning of the undertaking, although such reasons are personal to him, the closure cannot come within the ambit of the Section 25-FFF(1) proviso."*

13. In view of the above mentioned factual and legal discussion, there is no iota of doubt that 4th corrigendum dated 13.06.2017 has been issued without assigning any reason and, as such, the meaning of unavoidable circumstances cannot and could not be inferred from the circumstances mentioned in the said letter. Therefore, the cancellation of tenders so made with regard to the works from serial no.1 to 168 of annexure to NIT No.974 dated 07.04.2017 cannot sustain in the eye of law. Consequentially, the National Competitive Bidding through e-procurement issued under Annexure-6 dated 21.08.2017 during pendency of the writ application also cannot sustain and is liable to be quashed. Accordingly, 4th corrigendum notice dated 13.06.2017 cancelling tenders for the works from serial no.1 to 168 of annexure to NIT No.974 dated 07.04.2017 and consequential National Competitive Bidding through e-procurement dated 21.08.2017 vide Annexure-5 and 6 respectively are hereby quashed.

14. The writ petitions are allowed to the extent indicated above. No order to cost.

Writ petitions allowed

2018 (I) ILR - CUT- 261

INDRAJIT MAHANTY, J. & BISWAJIT MOHANTY, J.

JCRLA NO. 06 OF 2005

SADAN GOUDA ……..Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

PENAL CODE, 1860 – S.302

Murder – No eye witness to the occurrence – Conviction solely based on circumstantial evidence – Circumstances must/should be established beyond reasonable doubt.

In this case, the appellant has not led the police for recovery of the weapon of offence i.e. tangia (M.O.1) but the I.O. (P.W.12) seized the same with blood from the roof of the house of the appellant which was showed to him by persons present there but he has not pin pointed who were such persons – On the other hand P.Ws. 2 and 8 who have stated to have overpowered the appellant and snatched the tangia have not stated to have kept the same in the roof of the house of the appellant – Neither P.Ws. 2 & 8 nor P.Ws. 1, 2, 3, 4, 5, 7, 8 and 11 who were at the spot, have stated to have seen the appellant holding a tangia, stained with blood – P.Ws. 4 and 8 spoke of the appellant striking at different trees but strangely the chemical report is silent about presence of any botanical materials on M.O.1 – P.W.13 the doctor who opined that the wound of the deceased was possible with the help of M.O.1 said in the cross-examination that the tangia produced by the police was not sealed – This gives rise to a doubt about the veracity of the prosecution case – Moreover, the extra judicial confession was made while the appellant tied by many people surrounding him which cannot be said to be voluntary rather under the threat of a mob – Held, the prosecution failed to prove extra judicial confession made by the appellant and it gives rise a suspicion about the involvement of the appellant, hence the impugned judgment is liable to be set aside.

(Paras 11,12,13)

Case Law Referred to :-

1. (1984) 4 SCC 116 : Sharad Birdhichand Sarda -V- State of Maharashtra

For Appellant : Mr. Devasis Panda, (Amicus Curiae)

For Respondent: Mrs.Saswata Pattnaik, A.G.A.

Date of Judgment: 17.01.2018

JUDGMENT

BISWAJIT MOHANTY, J.

The appellant-Sadan Gouda has preferred this Jail Criminal Appeal challenging the judgment and order dated 12.10.2004 passed in Sessions Case No.17 of 2002 by the learned Addl. Sessions Judge, Nabarangapur convicting him under Section 302 IPC and sentencing him to undergo imprisonment for life.

2. The case of the prosecution as revealed from the F.I.R. (Ext.2) is as follows:-

On 20.01.2002 at about noon, the informant (P.W.4), his brother (P.W.1) and another were carrying manure to the field. At that point of time, P.W.3, who is the mother of the informant (P.W.4) informed them that the appellant holding a tangi was shouting that he had killed his wife. In such background, the informant came to the house of the appellant and saw the appellant brandishing an axe was giving blows to nearby trees. Accordingly, P.W.4 (informant) did not go near him but informed the Grama Rakhi. P.W.2 and P.W.11, who are the co-villagers along with others tried to overpower the appellant but the appellant rushed towards them brandishing the axe. Therefore, they could not go near him and also could not know about his wife. In such background, they sent two persons to the police station. Later, the appellant was overpowered by P.W.8 with the help of others and when the informant and others went inside, they saw the deadbody of the wife of the appellant infront of the kitchen. They also saw cut injuries on the neck of the deceased and when they asked the appellant, he disclosed that he has killed his wife. Information was lodged at about 8.00 P.M. before P.W.12. Accordingly, formal F.I.R. was drawn up and investigation was taken up. During investigation, P.W.12 visited the spot, examined the complaint and witnesses, he seized one axe (M.O.I) with wooden handle stained with blood kept in the roof of the house of the appellant. Accordingly, seizure list under Ext.3 was prepared. He also seized one necklace, piece of broken red colour bangle, some blood stained earth and some sample earth and prepared seizure list (Ext.4). He conducted inquest over the deadbody of Sanai Gouda and prepared inquest report under Ext.1. He also seized one banyan, one lungi and one napkin from the appellant vide seizure list under Ext.5. He arrested the appellant and forwarded him to the court. He received the post-mortem report and sent the weapon of offence to the doctor (P.W.13) for his opinion. Ext.8/2 is the opinion of the doctor (P.W.13). He sent the seized articles for chemical examination to the Reigional Forenscic Science Laboratory,

Berhampur vide Ext. 10 and Ext. 11 is the chemical examination report. Inspector-U.C. Nayak took charge of the investigation from him and submitted charge sheet. Accordingly, the appellant stood trial for committing the offence punishable under Section 302 IPC.

3. Prosecution in order to bring home the charges, examined as many as 13 witnesses and exhibited 11 documents. P.W.4 is the informant and P.W.1 happens to be the brother of P.W.4 and nephew of the appellant. P.Ws.2,6,8,9 and 10 are the co-villagers. P.W.3 is the sister-in-law of the appellant. P.Ws.5 and 11 are the sons of the appellant. P.W.7 is the father of the appellant. P.W.12 is the I.O. P.W.13 is the doctor who conducted autopsy. As indicated in the judgment, five material objects were admitted to the evidence.

4. None has been examined from the side of the appellant and no exhibits has been marked on his behalf. However, the plea of the appellant was complete denial.

5. Learned trial court after scanning the evidence on record came to hold that the prosecution has succeeded in bringing home the charges and accordingly found the appellant guilty under Section 302 IPC and convicted him thereunder.

6. Mr. Debasis Panda as learned Amicus Curiae appearing for the appellant submitted that present is a case where there is no eye-witness to the occurrence and chain of circumstances being incomplete, the learned trial court has gone wrong in convicting the appellant on the basis of conjectures and surmises. Secondly, he submitted that the impugned judgment suffers from grave illegality inasmuch as the learned court below has accepted the testimonies of P.Ws.1,3,4,5,7 and 11 as proving extra judicial confession made by the appellant. He was critical of such approach of learned trial court as in coming to such a conclusion the learned trial court has ignored the contradictions in the evidence of the above noted prosecution witnesses and the fact that such confession was never voluntary. He also submitted that the evidence of P.Ws.1,5,7 and 11 would show that such confession being made before police was legally inadmissible. Therefore, the learned trial court should not have acted upon such testimony. With regard to the evidence of P.Ws.3 and 4, he submitted that their versions relating to extra judicial confession have been demolished in their cross-examination. Therefore, the learned trial court should have totally ignored their versions relating to extra judicial confession. Having not done that, the impugned judgment suffers

from serious legal infirmities and is liable to be set aside. According to him, once the story of extra judicial confession is disbelieved, the basic foundation of the prosecution story is knocked out, and, therefore, the evidence relating to holding of tangia by the appellant and incised wound on neck of the deceased cannot connect the appellant with the crime. Lastly, he submitted that though the banyan, blue check lungi and yellow silk napkin were seized from the appellant vide Ext.5 on the date of incident and were forwarded vide Ext.10 to the Reigional Forenscic Science Laboratory, Berhampur for chemical examination, however, the chemical examination report under Ext.11 does not show that there were any blood stain in the above noted wearing apparels of the appellant. In such background, Mr. Panda, learned Amicus Curiae submitted that the chain of circumstances remain incomplete and thus the proseuciton has not been able to prove its case beyond reasonable doubt. Therefore, the present appeal ought to be allowed and the appeallant should be set free.

7. Ms. Saswata Pattnaik, learned Addl. Government Advocate, on the other hand, defended the impugned judgment and submitted that there exists enough material on record for convicting the appellant under Section 302 IPC and the prosecution has proved its case beyond reasonable doubt.

8. In order to appreciate the rival contentions of both the sides, we have to scan the evidence on record. But before scanning the evidence, since since the present case involves circumstantial evidence, we have to remind ourselves about the parameters for appreciating circumstantial evidence as laid down by Supreme Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra*** as reported in (1984) 4 SCC 116. In that case, it has been laid down that before a case against an accused can be said to be fully established, the following conditins must be fulfilled:

> "(*1*) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

> "Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (*2*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (*3*) the circumstances should be of a conclusive nature and tendency,
>
> (*4*) they should exclude every possible hypothesis except the one to be proved, and
>
> (*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

9. At the outset, it may be noted here that homicidal nature of death of Sanai Gouda remains undisputed. In the impugned judgment, the learned trial court has accepted the extra judicial confession made by the appellant as has been proved. In order to examine as to whether the prosecution has been able to prove such extra judicial confession stated to have been made by the appellant, we have to scan the testimonies of P.Ws.1,3,4,5,7 and 11. As indicated earlier, P.W.1 is the nephew of the appellant. On being informed by his mother (P.W.3) about the incident, he went to the spot and saw the deadbody of the deceased lying in the cow- shed. On being asked the appellant made a confession that he has killed his wife by dealing tangia blow. In his examination-in-chief he has further stated that his elder brother-P.W.4 went to the police station to lodge the report and police visited the spot in course of investigation. In cross-examination, he admitted that P.W.3 has not seen the incident and he went to the spot at 4 p.m. and at that point of time, the police had already reached the spot and police asked the appellant regarding the cause of death of the deceased. This statement of P.W.1 makes one thing clear that the so-called confession by the appellant was obviously made before the police and accordingly such confession is rendered useless from evidentiary point of view. Further, his statement that he was informed by his mother-P.W.3 about the appellant killing his wife cannot be accepted as P.W.3 in her cross-examination has admitted that she had never talked

with the appellant and the appellant had not told her anything. Similarly, though P.W.1 has stated that P.W.4, who is the elder brother of the appellant has gone to the police station to lodge the report, P.W.4 in his cross-examination has stated that he has not gone to the police station after getting information about the incident from his mother, i.e., P.W.3.

Now coming to the evidence of P.W.3. It can be seen that in her examination-in-chief, she stated that while she was going towards 'Bedha' (agricultural field), the appellant holding a tangia came and informed her that he had killed his wife but she did not go near him out of fear and went away on her own business. In cross-examination, however, she admitted that she had not talked with the appellant and the appellant had not told her anything. This demolishes the version of P.W.3 with regard to the appellant making extra judicial confession before her.

Similarly, the informant (P.W.4) in his examination-in-chief has stated that while he was going to his field carrying manure; his mother-P.W.3 came and informed him that the appellant holding a tangia was wondering here and there and saying that he had killed his wife. On receipt of such information, he came near the house of the appellant and found him moving with a tangia in his hand. Later on, the appellant was overpowered by P.Ws.6 and 8. When he went inside the house he found the deceased lying in the kitchen with severe cut wounds on her scapula shoulder and on the other parts of her body. The appellant on being asked confessed the guilt and admitted to have killed his wife by tangia. He further testified that he personally went to the police station and lodged the FIR marked as Ext.2. However, in the cross-examination, he admitted that police and many other persons have already reached the spot by the time he came there from his field and the appellant was all through out confessing his guilt prior to and after the arrival of the police at the spot. He has further stated that he had not asked anything to the appellant as regard to the cause of death of his wife and he has never gone to the police station. An analysis of his evidence makes it clear that though he testified that P.W.3 came and informed him about the appellant moving with a tangia and saying that he has killed his wife, however, as indicated (supra) P.W.3 in her cross-examination has admitted that she had never talked with the appellant and he has not told him anything. Besides such contradictions, the version of P.W.4 that on being asked by him and others, the appellant confessed his guilt is not of much consequence as in the cross-examination he has admitted that he has not asked anything to the appellant as regards cause of death of his wife. Further, he has stated by the

time he reached the spot, the police and many other persons were already there. Therefore, in all probability others had asked the appellant as to the cause of death in presence of the police. In such background, the so-called extra judicial confession loses its credibility. Further, though P.W.4 admitted in his cross-examination that he reached the spot after police had reached the spot, however, strangely he has testified that the appellant was confessing his guilt prior to arrival of police. This version of the appellant cannot be believed as admittedly he reached the spot after arrival of police. Another serious contradiction in his evidence is that though in examination-in-chief he has stated that he personally went to the police station and lodged FIR however, in the cross-examination he has admitted that he has never gone to the police station.

P.W.5 is the son of the appellant. Though in his examination-in-chief he stated that in the afternoon on the date of occurrence, when he returned to his house, he found his father tied in presence of a big crowd and that he confessed his guilt about killing of his wife and that sometime thereafter the police came, however, in the cross-examination, he admitted that only when the police came, he went near his father (appellant) and the police asked the appellant regarding cause of death of his wife. A holistic reading of the evidence of P.W.5 would show that when he returned to the house in the afternoon, he found the appellant, in a tied condition in presence of a big crowd and he came near to his father after the police came and in all probability on being questioned by police, the appellant confessed his guilty. His version again makes out a case of confession in presence of the police. Further from the fact that he found the appellant tied with many people surrounding him, it would not be unreasonable to infer that the confession was not voluntary and was done under a threat in presence of a mob.

P.W.7 happens to be the father of the appellant. In his examination-in-chief he has stated that on return to his house he saw a gathering infront of his house and found the hands of the appellant tied. When he asked the appellant, he told him that he has killed his wife. But in cross-examination, he has stated that he has not asked anything to the appellant and the police came and asked his son as to the cause of the death of the deceased. This also demolishes the prosecution theory relating to extra judicial confession being made by the appellant as such confession in all probability was made before the police.

P.W.11 is another son of the appellant. In his examination-in-chief he stated that while returning home in the evening, he found his mother dead and the villagers had detained his father and his father told that he has killed his mother. However, in the cross-examination he has stated that when he was returning to home in the evening, on hearing the incident, out of fear, he did not go home and he went to his house only after the police came. Further, he stated that he never asked anything to his father and upon questioning by the police, the appellant told them that he could not know how he had killed his wife. He has also stated that he has not heard about villagers asking about the incident to the appellant. An analysis of the entire evidence of P.W.11 makes it clear that the so-called extra judicial confession, once again, in all probability was made before the police. Therefore, such confession has no evidentiary value.

The above analysis would show that the prosecution has completely failed to prove extra judicial confession to nail the appellant, on which the learned trial court has heavily relied. In this context, we must say that the learned trial court while coming to a conclusion that the extra judicial confession made by the appellant has been proved; has not dissected the evidence of P.Ws.1,3,4,5, 7 and 11 with due care and caution. Further, none amongst P.Ws.1,4,5,7 and 11 speaks of having seen appellant with a blood stained tangia.

10. P.Ws 2 and 8 were co-villagers who overpowered the appellant and snatched the tangia from his hand. They have nowhere deposed that after snatching the tangia from appellant, they kept it in the roof of the house of the appellant that is the place from which it was seized by the P.W.12. They also do not say that the tangia snatched by them was stained with blood.

P.W.6 is another co-villager and has been declared hostile.

P.W.9, a co-villager is mainly a witness to the seizure of tangia vide Ext.3 and seizure of blood stained and sample earth vide Ext.4 and seizure of wearing apparels of the appellant, namely, one banyan, one check lungi and one silk gamuchha as per seizure list vide Ext.5.

P.W.10 is a similar witness to the seizures under Exhibits-3,4 and 5. In his cross-examination, P.W.10 has stated that he found the axe (M.O.I) placed below the roof of the house.

P.W.12 is the I.O., who in his testimony stated about visiting the spot, examined the witnesses and seizing one axe with wooden handle stained with blood. He has also stated about seizure of one banyan, one napkin and one lungi from the appellant vide seizure list under Ext.5. He also proved chemical examination report vide Ext.11. In his cross-examination, he has stated that on being informed at 6.20 P.M. on 20.1.2002 by Grama Rakhi-Brundaban Harijan (who has not been examined in this case), he reached the spot at 8.00 P.M. and received the F.I.R. near the house of the appellant. He found the appellant tied with a napkin at his courtyard. He found an axe at 10.00 P.M., which was shown to him by the persons present there. Accordingly, he brought out the axe from the roof. But, he does not specify who were/are those persons who showed him the axe. It may be noted here that the P.Ws.1, 2, 3, 4, 5, 7, 8, 11, who were at the spot do not speak of a blood stained tangia.

P.W.13 is the doctor, who conducted the autopsy, who in his testimony has stated that the cause of death of the deceased was due to homicidal assault by a middle sharp cutting weapon on the back of the neck. He has also stated that P.W.12 produced a tangia for his examination and he examined the same and opined that the wound of the deceased was possible with the help of such weapon. In his cross-examination, he admitted that the tangia produced by the police was not sealed.

The axe seized by the police along with banyan, check lungi and silk napkin seized from the appellant and other materials were sent to the Reigional Forenscic Science Laboratory, Berhampur vide Ext.10 in order to obtain the chemical examination report. The chemical examination report has been marked as Ext.11. A perusal of the same would show that though the axe has been found stained with blood, however, no blood stain was detected on the banyan, check lungi and silk napkin seized from the appellant on 21.1.2002, i.e., the date of occurrence vide Ext.5.

11. Thus, a cumulative analysis of evidence shows as indicated earlier, the prosecution has not been able to prove extra judicial confession made by the appellant. P.Ws 1 to 5, 7, 8 and 11 who were at the spot have not deposed about seeing the appellant holding a blood stained tangia. Most importantly, despite snatching tangia from the appellant, P.Ws.2 and 8 have not deposed about the tangia being stained with blood. P.Ws 4 and 8 also spoke of the appellant striking at different trees. But strangely the chemical report is silent about presence of any bontanical materials on the same. Though P.W.12

spoke of seizing blood stained tangia from the roof of the house, which was showed to him by persons present there but he has not pinpointed who such persons were. P.W.13, the doctor in his cross-examination has admitted that the tangia produced by the police before him was not sealed. In such background, there exists a great deal of suspicion as to whether the tangia seized by the I.O. (P.W.12) was the tangia which other P.Ws. like P.Ws.1,2,3,4 and 8 have seen, which the appellant was holding. Further, it may be noted here that in the present case the appellant never gave recovery of the tangia (M.O.I). Morever as noted earlier, the chemical examination report under Ext.11 indicates that no blood stain has been detected in the wearing apparels of the appellant which were seized on the date of occurrence. Such absence of blood stain is rather strange considering the nature of injuries inflicted on the deceased by a tangia. This gives rise to a doubt about the veracity of prosecution story.

Though while being examined under Sections 313 Cr.P.C., the appellant has answered the question No.7 in the negative; still nothing much can be read into the same. No doubt, the appellant has given an incorrect answer with regard to deadbody being found lying inside the house, but there is no evidence to show that the appellant was last seen with the deceased immediately prior to the occurrence. None of P.Ws has deposed having seen him inside the house or that he was the only person present in the house when they saw him. Further with regard to the spot from where the deadbody was found, there exists contradiction in the version of prosecution witnesses. While P.W.1 indicates the spot to be the cowshed, which obviously is a place with public access; P.Ws.4 and 5 state the kitchen to be the spot. Other P.Ws, namely, P.Ws.7,9,10 and 11 state that they found the deadbody inside the house. Such contradictions also give rise to doubts.

12. For all these reasons, one can not safely conclude that in the present case keeping in mind the ratio of ***Sharad Birdhichand Sarda (supra)***, the chain of circumstances is complete. The only things which have been proved are that the appellant was found holding a tangia as stated by some witnesses and presence of cut injuries on the deceased as corroborated by the doctor, i.e., P.W.13. In our considered view, in a case of present nature based on circumstantial evidence, the above noted circumstances are not enough to conclude that it was the appellant and appellant alone who was the author of crime. At best, these facts/cicumstances can give rise to a suspicion about the involvement of the appellant, but law is well-settled that suspicioun cannot take place of proof and that higher the gravity of offence, higher would be the

standard of proof. Here there exists no such proof. In view of such analysis, we are not able to accept the submission of Ms. Pattnaik, leaned Addl. Government Advocate that the prosecution has been able to prove the guilt of the appellant beyond reasonable doubt.

13. For all these reasons, the Jail Criminal Appeal succeeds and the impugned judgment is set aside and it is directed that the appellant shall be set at liberty forthwith, if his incarceration is not required in connection with any other case. Accordingly, the JCRLA is allowed and disposed of as such.

Appeal allowed.

2018 (I) ILR - CUT- 271

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

CRLA NO. 63 OF 1999

NARA PUJHARI & ORS. ……..Appellants

.Vrs.

STATE OF ORISSA ……Respondent

EVIDENCE ACT, 1872 – S.3

Appreciation of evidence – Appellants convicted U/ss. 144, 148, 302 and 149 I.P.C – Their plea is that the learned trial Court illegally convicted them only relying on the evidence of P.W.1, who is the mother of the deceased and not an eye witness.

Evidence on record shows that P.W.1 is the pre-occurrence as well as the post occurrence witness – She deposed about the threatening given by Dharam Sing to her son for which she followed her son and was obstructed by the accused persons and when she reached the spot alongwith her husband found her son with bleeding injuries on his head and legs – The facts stated in the F.I.R. corroborates her evidence – She has also explained the motive of the accused persons due to previous land dispute and pendency of civil suits – Moreover there was discovery of the weapon of offence and the prosecution case gets support from the evidence of P.Ws. 9 and 10 – This Court is of the opinion that the learned trial court on considering the proved facts convicted the appellants – Held, the impugned conviction and sentence passed by the learned trial Court is confirmed.

(Paras 8 to15)

Case Law Referred to :-

1. (1997) 13 OCR 204 : Das Marandi -V- State of Orissa

For Appellants :Miss Sonita Biswal on behalf of M/s.Saktidhar Das, A.K.Nayak, L.Samantaray, D.R.Bhokta, M.Dash, B.N.Udgata, H.S.Satpathy, B.Patnaik, B.K.Sinha, A.Mohanty & D.Dhar

For Respondent : Addl. Standing Counsel.

Date of Judgment: 20.02.2018

JUDGMENT

S. PANDA, J.

This Criminal Appeal is directed against the judgment dated 27.02.1999 passed by Sri B.K.Nayak, Addl. Sessions Judge, Balangir, in Sessions Case No. 12/7(B) of 1998 in convicting the appellants for commission of offences under Sections 144, 148, 302 and 149 of the Indian Penal Code and sentencing each of them to undergo imprisonment for life under Section 302/149 IPC, to undergo rigorous imprisonment for six months under Section 144 IPC and also to undergo further rigorous imprisonment for one year under Section 148 IPC. All the sentences are directed to run concurrently.

During pendency of the appeal, it is submitted at the bar that appellant No.5-Dharamsingh Pujhari died. Thus, the Criminal Appeal is confined as against the other five appellants.

2. The prosecution case in brief is that on 01.09.1997 at about noon, accused Dharmsingh Puta came in front of the house of the informant and abused Rama Pujhari (deceased) and his parents in filthy languages and also threatened that they would not be allowed to celebrate the Nuakhai festival that year, saying so he went away. The deceased apprehending danger, set out by cycle to the police station to lodge a report, however his father dissuaded him. The deceased without listening to the advice of his father went on by cycle. While he was so going, all the accused persons chased him being armed with *Tangia* and *lathies*. The mother of the deceased followed him apprehending danger to his life. But on the way she was restrained by accused Paramananda Pujhari and Haribandhu Pujhari. Then she returned back and went along with her husband towards Gountiapada of the village. In front of the house of one Kunja Naik, they found the deceased was lying on the street with bleeding injuries on his head and leg and one Pankaj Majhi was administering water to

the deceased. On the advice of the said Pankaj Majhi that the deceased has already breathed his last, the mother of the deceased went to the police station to lodge an oral report which was reduced to writing.

3. On the basis of such FIR the OIC investigated the matter. Shortly after the registration of the FIR, accused Chandra Pujhari, Gadan @ Brundaban Pujhari and Liku Pujhari came to the police station and voluntarily surrendered confessing to have committed the murder of Rama Pujhari. The I.O held inquest over the dead body and sent the same for post mortem examination, seized the blood stained earth and sample earth. On the basis of the discovery statement of accused Luku Pujhari, the I.O. seized the *tangia* and two *lathies*. Before completion of investigation accused Luku Pujhari died. Therefore, after completion of the investigation charge sheet was submitted against other six accused persons-present appellants under Sections 144, 148 and 302 / 149 of the I.P.C.

The defence plea was one of complete denial. They submitted that they would examine the defence witnesses. However, no witness on behalf of the defence was examined by them during trial.

4. In order to bring home the charge, during trial the prosecution examined as many as 14 witnesses, out of whom P.W.1 is the mother of the deceased and informant in this case. P.W.9 and 10 are the co-villagers and eye witnesses to the occurrence. P.W.13 is the doctor, who conducted post-mortem over the deceased. P.W.14 is the Investigating Officer. The Prosecution also exhibited many documents including the oral report of P.W.1 under Ext.13 and the Post Mortem Report under Ext.8. The prosecution proved seven material objects, which have been marked as M.O.I to M.O.VII. On the other hand the defence exhibited the spot map as Ext. A.

5. The learned Addl. Sessions Judge after threadbare discussion of the materials available on record, came to a conclusion that the death of the deceased is homicide and the prosecution has successfully proved its case against the appellants for commission of offences under Sections 144, 148, 302 / 149 IPC. He found them guilty and convicted them with the sentences as indicated above.

6. Learned counsel for the appellant submitted that the impugned judgment is against the weight of evidence on record. The Court below convicted the appellants only relying on the evidence of P.W.1, who is the mother of the deceased and was not the eye witness to the occurrence. P.Ws.

9 and 10 though did not support the prosecution case, but were examined under Section 154 of the Evidence Act and the Trial Court relied on some part of their evidence and treated the same to be chain of circumstantial evidence. She further submitted that due to discrepancies in the statements of P.Ws. 9, 10 and 14, such evidences should have been discarded in toto. Therefore, according to her, the impugned judgment of conviction and sentences are not sustainable and liable to be interfered with.

7. Per contra, the learned Additional Standing counsel submitted that the Court below had arrived at the finding basing on the evidence of the eye witness to the occurrence, the Post Mortem Report. The statement of the informant corroborates with the evidence of P.Ws.1, 2, 9 and 10.Their evidence also corroborates with the medical report. Thus, the impugned judgment of conviction and order of sentence warrant no interference in this appeal. The criminal appeal, therefore, being devoid of merit liable to be dismissed.

8. Perused the L.C.R. and went through the evidence on record carefully.

The informant-P.W.1 is the pre-occurrence and post occurrence witness. According to her after threatening was given by one Dharmsingh Puta apprehending danger to the life of her son, she followed her son. Two of the accused persons namely, Paramananda and Haribandu obstructed her. Immediately thereafter she proceeded to the spot along with her husband and found the deceased on the street with bleeding injuries on his head and legs. The facts stated in the FIR also corroborates her evidence. She has also explained the motive of the accused persons due to previous land dispute and pending civil suits.

9. P.W.2 in his evidence has stated that when he returned from his land, he found Rama Pujhari lying on the street injured near the house of Kunja Naik. In his present the police held inquest over the dead body. In his presence accused Luku Pujhari led to discovery of the *tangia*. He also stated that he had administered water to the deceased and on his asking the Rama Pujhari told the assault made by the accused-appellants. He also stated that a little later, Benu and P.W.1 came to the spot and after a little while Rama breathed his last. He also corroborated the statement of P.W.1.

10. P.W.9 in his deposition has stated that at the time of occurrence, he along with one Khusiram Manhira (P.W.10) and others were sitting at the

Bhagabatgudi along with some persons. At that time Rama Pujhari came by cycle and told them that Luku Pujhari and Nara Pujhari are chasing him to kill. He put his cycle on the stand and stood near them. At that time, Luku Pujhari and Nara Pujhari arrived there with *lathies* in their hands. Luku dragged Rama out from the Bhagabatgudi and assaulted him by a *lathi*. Nara Pujhari then assaulted Rama by means of his *lathi*. He had seen Gadan Pujhari came with a *Tangia*. He had also seen Chandra Pujhari, Nara Pujhari, Parama Pujhari, Gadan Pujhari, Haribandhu Pujhari were assaulting Rama by means of *Tangia*. Dharmsingh Puta was instigating them. In his cross examination nothing substantially brought out by the defence.

11. P.W.10 in his chief has stated that he along with P.W.9 and some others were present at the Baithak-khana which is also the Bhagabatgudi. One utensils hawker was also present. The deceased came to them on cycle and stated that the accused persons are chasing him to kill. He also begged them to save him. At that time the accused persons asked the deceased to come out of Bhagabatgudi. Thereafter the prosecution has put him leading questions under Section 154 of the Evidence Act.

12. The I.O. recorded the statements of P.Ws. 9 and 10 under Section 161 Cr.P.C. at a belated stage. However the Court below has taken into consideration the social back ground of the witness and the failure of the defence to put questions to the I.O. regarding the cause of delay in examination of such witnesses and held that the delay in the examination of witnesses would not affect the veracity of the evidence of such witnesses, relying on the decision in the case of ***Das Marandi v. State of Orissa,*** reported in ***(1997) 13 OCR 204***. Such witnesses were cross examined by the prosecution as provided under Section 154 of the Evidence Act and they corroborated with regard to the assault made by the appellants. They are also cross examined by the defence, but nothing substantially brought out from them by the defence.

13. The Doctor, P.W.13 who conducted autopsy over the dead body reported the following injuries over the dead body:-

1. Incised would 2 x 1 ½ " x bone deep transversely on anterior portion of right leg 8" above the right ankle joint and 3" below the right tuberosity;
2. Multiple fracture of right tibia below the injury No.1.

3. Incised would 2 ½ " x 1 ½ x bone deep transversely 1 " away from injury No.1.
4. Fracture of right fibula below the injury No.3.
5. Incised would 1 ½ " x 1 x bone deep longitudinally on the shin of right tibia 1 ½" below injury No.1.
6. Incised would 1 ½" x ½" x bone deep on the shin of right tibia longitudinally 1 1/2" below injury No.2.
7. Incised would 1 ½ x ½" x bone deep longitudinally on the shin of left tibia, 5 " left ankle joint and 7" left tibial tuberosity.
8. Incised wound 1" x ¼" x ¼" on the shin of left tibia longitudinally ½ away from injury No.7.
9. Incised would 1" x ½" x bone depth obliqually on the fore-head 2" above right eye brow.
10. Incised would 1" x ½" bone depth obliqually on the fore-head adjacent to injury No.9.
11. Contusion 1" x 1" on the back 2" away from shoulder joint.
12. Incised would of muscles of right paronial group of muscles below the injury No.3 of size 2" x 1".
13. Contusion on the dorsum of left hand.

The Doctor opined that the incised wounds were caused due to sharp cutting weapons and the contusions were caused by blunt weapons. The injuries were ante mortem in nature and were also homicidal.

14. P.W.14, the Investigating Officer in his examination in chief stated that on receipt of the oral report from P.W.1 he reduced the same into writing and on the same day, the accused Chandra Pujhari, Gadan alias Brundaban Pujhari and Luku Pujhari voluntarily surrendered at the Police Station and confessed their guilt of having committed murder of Rama Pujhari. Luku Pujhari while in custody gave recovery of the weapon of offence. He examined the witnesses and after investigation submitted the charge sheet. According to him almost all the witnesses examined by him corroborate about the overt act performed by the accused appellants.

15. As discussed in the above paragraphs and on close scrutiny of the evidences on record, this Court is of the opinion that the Trial Court

considering the proved facts has convicted the appellants and passed the sentence. In such background, this Court is not inclined to interfere with the impugned judgment. The conviction and sentence passed by the Trial Court is hereby confirmed. The Criminal Appeal stands dismissed accordingly.

Appeal dismissed.

2018 (I) ILR - CUT- 277

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

W.P.(C) NO. 3742 OF 2014

NARAYAN PRASAD MOHANTY .....Petitioner

Vrs.

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

SERVICE LAW – Promotion – Petitioner claims that he was senior to 15 Revenue Inspectors, who were given promotion as Revenue Supervisors in between 01.07.1989 and 21.07.1992 – Admittedly petitioner had not worked in the promotional post as he was superannuated from service by the learned Tribunal directing to convene a review D.P.C. to consider the suitability of the petitioner for promotion – Further the petitioner has not made out a case that he was suitable to be promoted to the post but he has only pleaded discrimination.

Held, the petitioner is entitled to arrear salary which can only be examined by the competent authority but not by this Court in exercise of power of Judicial review – The finding of the learned Tribunal that the petitioner is not entitled to arrear salary for the period for which he has not discharged his duties in the promotional cadre is set aside – Direction issued to the opposite parties to consider the entitlement of the petitioner for arrear salary in view of his promotion to the post of Revenue Supervisor within four months and if the petitioner is held to be entitled to the arrear salary the actual financial benefit shall be released within two months from the date of taking such decision.

(Paras 6 to 9)

Case Laws Referred to : -

1. AIR 1974 SC 460 : State of Maysore -v- C. R. Seshadri.
2. 81 (1996) CLT 393 : Amarendera Kumar Dash -v- Orissa Forest Development Corporation and ors.
3. W.P.(C) No. 18497 of 2015: State of Orissa & ors. -v- Gadadhar Parida & Anr.
4. AIR 1991 SC 2010 : Union of India etc. -v- K.V.Jankiraman & ors.

5. (2007) 11 SCC 632 : Union of India -v- B.M.Jha.
6. AIR 1993 SC 1165 : State of Madhya Pradesh & anr.-v- Syed Naseem Zahir & Ors.
7. 1996 (7) SCC 533 and : A.K. State of Haryana and others -v- G.P. Gupta & ors.
8. JT 2003 (8) SC 35 : Soumini –v- State Bank of Travancore & another

For Petitioner : M/s. Bimal Prasad Tripathy & K.K.Pradhan
For Opp.Parties: Mr. M.S.Sahu, A.G.A.

Date of Judgment: 09.02.2018

JUDGMENT

K.R. MOHAPATRA, J.

Petitioner, in this writ petition, assails the order dated 22.01.2013 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack (for short, 'the Tribunal') in O.A. No. 2872(C) of 1999 (Annexure-1), whereby the learned Tribunal while allowing the Original Application filed by the petitioner, directed the Collector, Cuttack-opposite party No.2 to convene a review DPC to consider the suitability of the petitioner for promotion to the post of Revenue Supervisor on the basis of his service record till 01.07.1989. It has been further directed that the petitioner, if found suitable for promotion, shall be deemed to have been promoted with effect from the date from which the first promotion order was issued during 01.07.1989 to 21.07.1992. As the petitioner was superannuated by the time of disposal of the Original Application, it was directed that his pay be notionally fixed in the promotional cadre and his pension should be revised accordingly. He has also been held to be entitled to arrears of pension and other retiral benefits. However, the petitioner, being aggrieved by the observation of the learned Tribunal to the effect that he shall not be entitled to the arrear salary for the period for which he has not discharged his duty in the promotional cadre, has filed this writ petition.

2. It is the contention of Mr. Tripathy, learned counsel for the petitioner that opposite party No.2-Collector, Cuttack gave promotion to 15 numbers of Revenue Inspectors in between 01.07.1989 and 21.07.1992 to the cadre of Revenue Supervisor ignoring the case of the petitioner. The Revenue Inspectors, who got promotion, were not eligible to be considered for promotion, as they had not passed preliminary accounts examination as required under Rule-12 of the Orissa District Revenue Service (Method of Recruitment and Conditions of Service) Rules, 1983. However, the petitioner by then had completed R.I. training from the Training Institute at Khalikote

and passed the final examination as per the Board of Revenue notification dated 26.11.1983. He had also passed Preliminary Accounts Examination (Group-A) as per the Board of Revenue notification dated 30.10.1990. Learned Tribunal, taking into consideration the rival contentions of the parties, has rightly held that non-consideration of the case of the petitioner for promotion to the cadre of Revenue Supervisor was not proper and justified. Hence, the learned Tribunal directed the Collector, Cuttack to convene a review DPC to consider suitability of the petitioner for promotion to the cadre of Revenue Supervisor on the basis of his service record till 01.07.1989, i.e., the initial date on which some Revenue Inspectors were given promotion to the cadre of Revenue Supervisor. Learned Tribunal further directed the opposite parties to promote the petitioner with effect from the date from which first promotion order was issued during the period from 01.07.1989 to 21.07.1992, if found suitable. Since the petitioner had retired from government service by the date of pronouncement of the impugned order, his pay was directed to be notionally fixed in the promotional cadre and his pension be accordingly revised and arrears of pension and other retiral benefits be released in his favour. However, learned Tribunal most erroneously directed that the petitioner would not be entitled to arrears of salary for the period for which he had not discharged his duties in the promotional post.

Learned counsel for the petitioner submitted that the case of the petitioner was ignored by the authorities and he was not given promotion for no fault of his. He was illegally deprived from discharging his duties in the promotional cadre, although he was ready and willing for the same. When learned Tribunal deprecated the action of the opposite parties in ignoring the case of the petitioner for promotion and directed to consider the case of the petitioner for promotion with effect from the date his counterparts were given promotion, he should not have been deprived of getting financial benefits. In support of his case, learned counsel for the petitioner relied upon a decision of the Hon'ble Supreme Court in the case of ***State of Maysore -v- C. R. Seshadri***, reported in AIR 1974 SC 460 and a decision of this Court in the case of ***Amarendera Kumar Dash -v- Orissa Forest Development Corporation and others***, reported in 81 (1996) CLT 393. He further relied upon an un-reported decision of this Court passed in ***W.P.(C) No. 18497 of 2015 (State of Orissa and others –v- Gadadhar Parida and another)***, in which this Court considering the fact that the petitioner was deprived of his promotional benefit illegally, granted the same with consequential financial benefits.

Learned counsel for the petitioner further placing reliance on a decision of the Hon'ble Supreme Court in the case of ***Union of India etc. – v- K.V.Jankiraman and others***, reported in AIR 1991 SC 2010 submitted that whether an employee will be entitled to actual monetary benefit or not depends upon the facts and circumstances of each case. It has been held therein that the normal rule is "no work no pay" and hence, a person cannot be allowed to draw the financial benefit of the post, in which he has not discharged his duty. To allow him to draw the financial benefit is against the elementary rule that the person is to be paid only for the work he has done and not otherwise. But the same has been negatived by the Hon'ble Supreme Court in ***Jankiraman (supra***) holding therein that the normal rule of "no work no pay", is not applicable to the case, where the employee although wiling to work is kept away from the work by the authorities for no fault of his. This is not a case where the employee remained away from work for his own reason although the work was offered to him, but he was deprived of the same although he was entitled to. Hence, he prayed for setting aside the impugned finding to the extent of refusing actual financial benefits and for a direction to release the same in favour of the petitioner.

3. Per contra, Mr. Sahu, learned Additional Government Advocate for the State-opposite parties stoutly refuted the submissions of learned counsel for the petitioner. It is his submission that the ratio decided by the Hon'ble Supreme Court in the case of ***Jankiraman (supra)*** and by this Court in the case of ***Amarendra Kumar Dash (supra)*** and the un-reported decision in the case of ***Gadadhar Parida (supra)*** are in a different context. In those cases, promotion of the employees were held up either due to the criminal proceeding or disciplinary proceeding pending against them although their results were kept in sealed cover. Further, in the case of ***Jankiraman (supra)***, the employee had worked in the promotional post after being promoted pursuant to the direction of the Court. He, however, relied upon the decision in the case of ***Union of India -v- B.M.Jha,*** reported in (2007) 11 SCC 632 and in the case of ***Nirmal Chandra Sinha Vs. Union of India***, reported in (2008) 14 SCC 29 and submitted that in case of notional promotion from retrospective date, the employee cannot be entitled to the arrears of salary automatically, particularly when the incumbent has not worked in the promotional post. He, therefore, submitted that learned Tribunal has taken a correct view, which is supported by the rule of law. Hence, he prayed for dismissal of the writ petition.

4. The factual aspect as narrated herein above is not disputed. Whether an employee is entitled to the arrears of salary, in case he was notionally promoted from a retrospective date, is the question to be adjudicated in this writ petition. In the case of ***C. R. Seshadri (supra),*** Hon'ble Supreme Court held as follows:-

> "8. The length of this litigation has really disappointed the petitioner by denying him the enjoyment of likely promotion. He retired the day before the judgment of the High Court. No one in service would be affected by the allowance of the petitioner's claim and what was a service issue has now been reduced to one of money payment. A retired government official is sensitive to delay in drawing monetary benefits. And to avoid posthumous satisfaction of the pecuniary expectation of the superannuated public servant-not unusual in government-we direct the appellant to consider promptly the claim of the petitioner in the light of our directions and make payment of what is his due-if so found-on or before April 15, 1974. The government's inexplicable indifference in not placing before the Court the relevant rule regarding promotion to the post of Deputy Secretary merits the order that the appellant pay the costs of the petitioner first respondent, for, the wages of winner's sloth is denial of costs, and something more."
>
> *(emphasis supplied)*

In the case of ***Jankiraman (supra),*** it is held as under:-

> "3. The normal rule of "no work no pay" is not applicable to cases where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him."

In the case of ***Jankiraman (supra)***, the Hon'ble Supreme Court was considering a situation "when an employee is due for promotion, increment etc. but disciplinary/criminal proceedings are pending against him at the relevant time and hence, the findings of his entitlement to the benefit are kept in a sealed cover to be opened after the proceedings in question are over." Such is not the case at hand. In ***Jankiraman (supra)***, it is however held as follows:-

> "…..An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circum- stances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other

> employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently…."

Further, the case ***Amarendra Kumar Dash (supra)*** is also a case where the case of the petitioner for promotion was not considered due to pendency of disciplinary proceeding. This Court took into consideration the case of ***Jankiraman (supra)*** and the case of ***State of Madhya Pradesh and another -v- Syed Naseem Zahir and Others***, reported in AIR 1993 SC 1165 and held as follows:

> "10. When an employee eager to work in a promotional post, is denied or deprived to do so because of pendency of a proceeding he faces humiliation and ultimately when he is given promotion on being totally exonerated, his grievance is mitigated and reputation restored. But the mitigation and restoration are not complete if he is denied the financial benefits-The agony of the employee subsists, the humiliation continues and the penury pursues. …. From the aforesaid analysis, it becomes absolutely clear that once an employee is promoted with effect from a retrospective date on being completely exonerated, he cannot be deprived of the pay and other benefits to which he would have been entitled had he in fact been promoted to the said post on the date on which he has been subsequently promoted. Any condition imposed to the effect that the said employee would not be entitled to pay and allowances as a result of the promotion, is illegal and unsustainable. …. Grant of back wages is not intrinsically inherent when retrospective promotion is granted….. We may hasten to add that in cases where promotion is denied illegally and later on notional promotion is given, with retrospective effect, without financial benefits the same would be arbitrary. The principle behind this is that no one can be penalised for no fault of his and the employer cannot take advantage of an illegal action."

Resultantly, this Court held that the petitioner was entitled to financial benefits although he had retired by the time, the case was decided. The same is the position in the un-reported decision of ***Gadadhar Parida(supra***).

5. Denial of promotion due to pendency of disciplinary/ criminal proceeding and non-consideration of promotion of an employee, albeit having eligibility and suitability, are two different circumstances and eventualities in service. In the former eventuality, normally the result of the DPC is kept in a sealed cover till finalization of the disciplinary/criminal proceedings and the promotion of the employee depends upon the said disciplinary/criminal proceeding. But in the latter eventuality, the employee stands in a better footing. The employer has no legal constraint when refuses

to consider the case of the eligible and suitable employee for promotion. Such an action is depreciable being arbitrary and unreasonable. Thus, the ratio decided in ***Jankiraman (supra), Syed Naseem Zahir (supra) and C.R.Seshadri (supra)*** by the Hon'ble Supreme Court as well as in ***Amarendra Kumar Dash (supra)*** by this Court, are applicable to the case at hand.

6. Admittedly, the petitioner has not worked in the promotional post, as by the time the impugned judgment was passed by learned Tribunal he was superannuated from service. The Hon'ble Supreme Court in the case of ***B.M. Jha (supra),*** taking into consideration the case of ***State of Haryana and others –v- G.P. Gupta and others***, reported in 1996 (7) SCC 533 and ***A.K. Soumini –v- State Bank of Travancore & another***, reported in JT 2003 (8) SC 35, held that in the case of a notional promotion from a retrospective date, it cannot entitle an employee to the arrear salary as the incumbent has not worked in the promotional post. The said observation was made applying the principle of "No Work No Pay". In the case of ***A.K. Soumini (supra)***, the Hon'ble Supreme Court relying upon the case of ***G.P. Gupta (supra)*** came to hold that "*notional promotion given to the employee with suitable revision of such pay scales itself is more than sufficient to meet the requirements, be it either in law or in equity. The further claim for payment of arrears as well, is farfetched and can have no basis in law*". In neither of the above three cases, the case of ***Janakiraman (supra)*** nor the case of ***Syed Naseem Zahir (supra)*** have not been taken into consideration. In the case of ***B.M. Jha (supra)***, the Hon'ble Supreme Court has not discussed and decided any law. It onlyh followed the ratio decided in ***A.K. Soumini (supra)***, which was in a different context altogether. In the said case, the employee while challenging her non-selection for promotion, had also incidentally questioned the provision in the promotional policy which required the candidates to get at least a minimum 6½ qualifying marks in the interview. But, in the instant case, the petitioner appears to have the eligibility and suitability for promotion, as pursuant to the direction of learned Tribunal in the impugned judgment, a review D.P.C. was held and he was given notional promotion with retrospective effect. In the case of Nirmal Chandra Sinha (supra), the Hon'ble Apex Court held that an employee has no right to the promotional post from the date it falls vacant.

7. The normal rule of service jurisprudence is "no work no pay". Hence, a person cannot be allowed to draw the benefits of a post in which he has not discharged his duties. Discharging the duties in a post is the *sine qua non* for

drawing the salary in that post. Further, an employee has no right of promotion. He has only right to be considered for promotion. Seniority-cum-merit is the basic principle in the case at hand for promotion to the post of Revenue Supervisor. Mr. Sahu, learned Additional Government Advocate submitted that the Revenue Inspectors who were promoted to the cadre of Revenue Supervisor in between 01.07.1989 and 21.07.1992 were senior to the petitioner. Several factors are to be considered to determine the suitability of an employee for promotion by the Departmental Promotion Committee. Each case has to be examined on its own merit while considering promotion. Thus, the direction of learned Tribunal to give notional promotion to the petitioner from a retrospective date, does not entitle him to the arrear salary automatically. It has to be considered on its own merit.

In the case of ***C. R. Seshadri (supra)***, the Hon'ble Supreme Court while discussion the scope of judicial review in the matter of promotion held as follows:-

> "7. While we agree that the High Court has been impelled by a right judicial instinct to undo injustice to an individual, we feel that a finer perception of the limits of judicial review would have forbidden it from going beyond-directing the Executive to reconsider and doing it on its own, venturing into an area of surmise and speculation in regard to the possibilities of escalation in service of the appellant. Judicial expansionism, like allowing the judicial sword to rust in its armoury where it needs to be used, can upset the constitutional symmetry and damage the constitutional design of our founding document. "

In the case at hand, there is no material on record to come to a conclusion as to whether the petitioner was senior to those 15 Revenue Inspectors, who were given promotion in between 01.07.1989 and 21.07.1992. He has also not made out any case whether he was suitable to be promoted to the post of Revenue Supervisor ahead of others. He has only pleaded a case of discrimination.

8. In the light of the discussions made above, entitlement of the petitioner for arrear salary is a matter of consideration by the authorities. We refrain ourselves to intrude into the domain of the Executive at the cost of judicial review. As such, we are constrained to disagree with the finding of the learned Tribunal and set aside the finding to the extent that the petitioner is not entitled to arrear salary for the period for which he has not discharged his duties in the promotional cadre. Entitlement of the petitioner to the arrear salary depends upon various factors which can only be examined by the competent authority.

9. The writ petition therefore succeeds. The opposite parties are directed to consider the entitlement of the petitioner for the arrear salary in view of his promotion to the post of Revenue Supervisor in the light of the discussions made above and take a decision and communicate the same to the petitioner as expeditiously as possible, preferably within a period of four months from today. If the petitioner is held to be entitled to the arrear salary, the actual financial benefit shall be released in his favour within a period of two months from the date of taking such decision. The writ petition is allowed to the extent stated above.

Writ petition allowed.

2018 (I) ILR - CUT- 285

S. C. PARIJA, J.

W.P.(C) NOs. 2870 & 3025 OF 2013

MADHUMITA DAS ……..Petitioner

.Vrs.

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

SERVICE LAW – Whether after fixing minimum qualifying marks in the written examination, the High Court was justified in fixing minimum qualifying marks for the interview and whether such fixation was in accordance with the direction of the Apex Court contained in paragraph 207.9 of the judgment in the case of Brij Mohanlal reported in (2012) 6 SCC 502 ?

There is no ambiguity in the directions of the Hon'ble Supreme Court that the qualifying marks for the persons working as First Track Court Judges would be 40% in aggregate for general candidates and 35% for SC/ST/OBC candidates, both the written examination and interview combined – So the Reference Bench agreed with the views expressed by Hon'ble Justice B.K.Nayak. (Para 13)

Case Law Referred to : -

1. (2012) 6 SCC 502 : Brij Mohanlal -V- Union of India & Ors.

For Petitioner : Dr. Ashok Ku. Mohapatra, Sr. Adv.
Mr. Ramakant Mohanty, Sr. Adv.

For Opp.Parties: Mr. Prasanna Ku. Parhi,
Mr. Amiya Ku. Mohanty,
Mr. Bibhu Prasad Tripathy, A.G.A.

Date of Judgment: 07.02.2018

JUDGMENT

S.C. PARIJA, J.

These two writ petitions have come up before me by way of a reference, in view of the difference of opinion between the two learned Judges of the Division Bench. The question which needs to be answered in this reference is whether after fixing minimum qualifying marks in the written examination, the High Court was justified in fixing minimum qualifying marks for the interview and whether such fixation was in accordance with the direction of the Hon'ble Supreme Court contained in paragraph 207.9 of the judgment in ***Brij Mohanlal v. Union of India and others*** (2012) 6 SCC 502.

2. Paragraph 207.9 of the judgment in *Brij Mohanlal* (supra) reads as under:-

> "207.9. All the persons who have been appointed by way of direct recruitment from the Bar as Judges to preside over FTCs under the FTC Scheme shall be entitled to be appointed to the regular cadre of the Higher Judicial Services of the respective States only in the following manner:
>
> (a) The direct recruits to FTCs who opt for regularization shall take a written examination to be conducted by the High Courts of the respective States for determining their suitability for absorption in the regular cadre of Additional District Judges.
>
> (b) Therefore, they shall be subjected to an interview by a Selection Committee consisting of the Chief Justice and four senior most Judges of that High Court.
>
> (c) There shall be 150 marks for the written examination and 100 marks for the interview. The qualifying marks shall be 40% aggregate for general candidates and 35% for SC/ST/OBC candidates. The examination and interview shall be held in accordance with the relevant Rules enacted by the States for direct appointment to Higher Judicial Services.
>
> (d) Each of the appointees shall be entitled to one mark per year of service in the FTCs, which shall form part of the interview marks.
>
> (e) Needless to point out that this examination and interview should be conducted by the respective High Courts keeping in mind that all these applicants have put in a number of years as FTC Judges and have served the country by administering justice in accordance with law. The written examination and interview module, should, thus, be framed keeping in mind the peculiar facts and circumstances of these cases.

(f) The candidates who qualify the written examination and obtain consolidated percentage as aforeindicated shall be appointed to the post of Additional District Judge in the regular cadre of the State.

(g) If, for any reason, vacancies are not available in the regular cadre, we hereby direct the State Governments to create such additional vacancies as may be necessary keeping in view the number of candidates selected.

(h) All sitting and/or former FTC Judges who were directly appointed from the Bar and are desirous of taking the examination and interview for regular appointment shall be given age relaxation. No application shall be rejected on the ground of age of the applicant being in excess of the prescribed age."

3. The challenge in these two writ petitions before the Division Bench was with regard to the notice dated 06.12.2012, issued by the High Court of Orissa as an addendum, indicating therein that the written examination shall consist of two papers of 150 marks, each carrying 75 marks, and that the qualifying marks shall be 40% aggregate for general candidates and 35% for SC/ST & OBC candidates in each paper, and that the interview shall carry 100 marks and the qualifying marks in the interview for both the general and SC/ST and OBC candidates shall be 40% and each of the appointees shall be entitled to one mark per year of service in Fast Tract Courts, which shall be added to the interview mark. The written examination was scheduled to be held on 16.12.2012.

4. The grievance of the writ petitioners was that the impugned notice fixing qualifying marks of 40% for general candidates and 35% for SC/ST/OBC candidates in each paper of the written examination and the qualifying mark of 40% in the interview for both the categories of candidates are contrary guidelines laid down by the Hon'ble Supreme Court in paragraph 207.9 of its judgment in *Brij Mohanlal* (supra).

5. Considering the guidelines prescribed by the Hon'ble Supreme Court in paragraph 207.9 of the judgment in *Brij Mohanlal* (supra), as detailed above, Hon'ble Justice B.K. Nayak has come to find as under:-

"(i) In the matter of written test and viva voce test, the High Court is competent to follow the relevant Rules governing the procedure for direct recruitment to Higher Judicial Service (District Judge Cadre) to the extent the Rule is not inconsistent with the directions contained in paragraph-207.9 of the said judgment;

Therefore, the High Court is competent to specify qualifying marks for the written examination. This is clear from clause (f) of paragraph-207.9 of the judgment, which signifies that a candidate shall be called to interview only if he secures qualifying marks in the written examination and shall be given appointment only if he secures the consolidated aggregate percentage of marks, in both the written test and interview taken together as indicated in clause (c) of the said paragraph of the judgment depending on his caste;

(ii) Once a particular percentage of qualifying mark is prescribed for the written test, the High Court cannot prescribe a minimum percentage of qualifying mark for the interview, which taken together with the qualifying marks prescribed for the written test would be more than the aggregate percentage of marks which has been indicated in clause (c) of paragraph-207.9 of the judgment; and

(iii) Fixing qualifying marks for the written test as well as viva voce test, which together works out to an aggregate of more than 40% or 35% as the case may be depending upon the caste of the candidate, would run contrary to the direction of the Hon'ble Supreme Court."

6. On the basis of the above analysis, Hon'ble Justice B.K. Nayak has come to hold as under:-

"13. Once the minimum aggregate qualifying marks in the written papers have been prescribed at 40% or 35% as the case may be depending upon the caste of the candidate, a further direction in clause (iii) of the notice under Annexure-7 that the candidate must secure 40% of marks out of 100 in the interview is wholly contrary to the direction of the Hon'ble Supreme Court in clause (c) of paragraph-207.9 of the judgment in ***Brij Mohan Lal-(2)*** (supra). The Hon'ble Court's direction that a general candidate securing aggregate marks of 40% and SC/ST/OBC candidate securing 35% of marks in aggregate both in written test and interview shall be selected, cannot be followed where prescription in the advertisement is of minimum qualifying marks for both the written test as well as the interview taken together exceeds the minimum aggregate qualifying marks stipulated by the Hon'ble Supreme Court for selection. Therefore, fixing of 40% of qualifying marks in the interview in the notice under Annexure-7 is bad and illegal and the same is hereby quashed. In case the aggregate qualifying marks fixed for written test in the advertisement added with whatever marks secured in the interview aggregates to 40% for general candidates and 35% for SC/ST/OBC candidates, such candidates are bound to be selected."

7. On a perusal of the judgment under reference it is seen that Hon'ble Justice D.P. Choudhury has differed with the views expressed by Hon'ble Justice B.K.Nayak with regard to the fixing of minimum qualifying marks of 40%, which is required to be secured by a candidate in the interview, in order to be eligible for selection. Findings of his Lordship in this regard is extracted below:-

> "28. From the aforesaid OSJS & OJS Rule, it is clear that there are 200 marks in written examination and 30 marks in interview. The candidate who has secured 50% of marks in each of the written paper shall be called for the interview and a minimum 40% of marks shall be secured in the interview to be included in the merit list. As per the directive of the Hon'ble Supreme Court 200 marks for the written examination have been reduced to 150 marks and the interview marks have been raised to 100 marks. Moreover, there is no any aggregate marks to be secured in the written examination under the Rules whereas the aggregate marks of 40% for General candidates and 35% for SC/ST/OBC candidates have been prescribed by the directive of the Hon'ble Supreme Court. Without prescribing any mark for the interview specifically their Lordships directed to follow the OSJS & OJS Rule so far as the interview and the written examination are concerned for direct recruitment to the post of District Judges. Where the minimum mark for interview is not specifically mentioned but directive is made to follow the OSJS & OJS Rule, obviously their Lordships have directed to follow the Recruitment Rules by keeping the minimum marks in the interview for the candidates who qualify in the written examination by keeping such consolidated aggregate marks in both the papers. The directive in this regard is clearly inferred from the directive of the Hon'ble Supreme Court in Clauses (a) (b) (c) and (e) of para 207.9."

8. Accordingly, Hon'ble Justice D.P. Choudhury has proceeded to hold as under:-

> "36. From the aforesaid discussions, I am of the view that Clause (ii) of Annexure-7 being not in compliance to the directive of the Hon'ble Apex Court in Brij Mohan case (supra), asking 40% in aggregate for general candidates and 35% for SC/ST/OBC candidates in each paper is illegal and improper in part. Hence, same is liable to be quashed by deleting the words "in each paper" and the Court do so. It is further directed that both the petitioners in W.P.(C) No.2870 of 2013 and W.P.(C) NO.3025 of 2013 having obtained the minimum aggregate written examination marks are allowed to appear in the interview. But Clause (iii) of Annexure-7 being in consonance with the directive of the Hon'ble Supreme Court and the OSJS

> & OJS Rule issued for direct recruitment to the cadre of District Judges is legal and proper and same cannot be interfered. Even if Clause (ii) of Annexure-7 is quashed by this order, it shall not affect the District Judges who have already been appointed."

9. From the above, it is apparent that Hon'ble Justice D.P. Choudhury has differed with the views of Hon'ble Justice B.K. Nayak only with regard to the fixation of minimum qualifying marks of 40% for the interview, on the ground that the Hon'ble Supreme Court has not prescribed any mark for the interview and the Hon'ble Court having directed to follow the relevant recruitment Rules, which in this case is the Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 ("the Rules" for short), a candidate is required to secure the minimum 40% marks in the interview, as has been prescribed under the said Rules, in order to be eligible for selection.

10. It is surprising that the Rule with regard to the necessity of a candidate securing 40% in each of the written papers, as per the impugned notice, having been found to be not in conformity with the guidelines laid down by the Hon'ble Supreme Court in paragraph 207.9 of its judgment in *Brij Mohanlal* (supra), how the other part of the same notice, prescribing minimum 40% marks in the interview can be upheld. This is more so, when the Hon'ble Supreme Court has clearly indicated in sub-para (c) of paragraph 207.9 that there shall be 150 marks for written examination and 100 marks for the interview and the qualifying mark will be 40% aggregate for general candidates and 35% for SC/ST/OBC candidates. The observation of the Hon'ble Supreme Court in sub-para (c) of paragraph 207.9 that the examination and the interview shall be held in accordance with the relevant Rules would only imply that the procedure for holding the written examination and interview is required to be conducted in accordance with the relevant Rules and not the minimum qualifying marks prescribed under the said Rules. Further, in sub-para (f) of paragraph 207.9 of the judgment, Hon'ble Supreme Court has directed that candidates who qualify in the written examination and obtain consolidated percentage of 40% and 35%, as the case may be, shall be appointed as Additional District Judge in the regular cadre of the State.

11. The aforesaid directions of the Hon'ble Supreme Court is amply clear that a candidate working as Judge under the FTC Scheme who secures the qualifying marks in aggregate, both in the written examination and interview taken together, shall be appointed to the regular cadre of Higher Judicial

Service. The words "aggregate" and "consolidated" means taken as one unit or combined and therefore, there is no scope for any doubt or ambiguity with regard to the usage of said two words in sub-paras (c) and (f) of paragraph 207.9 of judgment as indicated above, which needs any interpretation.

12. Moreover, the very object and purpose of the Hon'ble Supreme Court in prescribing a specific guidelines for recruitment of persons working as Judges under the FTC Scheme to be appointed to the regular cadre of Higher Judicial Service was laid down keeping in mind the fact that the said Judges have put in several years of service as FTC Judges and have served the country by administering justice in accordance with law. Accordingly, Hon'ble Supreme Court had directed that while framing written examination and interview module, the aforesaid facts be borne in mind. Therefore, Hon'ble Supreme Court intended that the existing recruitment Rules for appointment to Higher Judicial Service is not to be made applicable to the FTC Judges and a separate module be framed for them, keeping in view the guidelines and directions laid down in paragraph 207.9 of the judgment in *Brij Mohanlal* (supra).

13. For the reasons as indicated above and in view of the clear guidelines and directions contained in sub-paras (c) and (f) of paragraph 207.9 of the judgment in *Brij Mohanlal* (supra), I am of the considered view that there is no ambiguity in the directions of the Hon'ble Supreme Court that the qualifying marks for persons working as FTC Judges would be 40% in aggregate for general candidates and 35% for SC/ST/OBC candidates, both in the written examination and interview combined. Therefore, I am in respectful agreement with the views expressed by Hon'ble Justice B.K. Nayak. The reference is answered accordingly.

Reference answered.

2018 (I) ILR - CUT- 291

B. K. NAYAK, J.

CRLMC NO. 1210 OF 2017

M/S. SMS ASIA PVT. LTD. & ANR. ……..Petitioners

.Vrs.

M/S. TRL KROSAKI REFRACTORIES LTD. …….Opp.Party

NEGOTIABLE INSTRUMENTS ACT, 1851 – Ss. 138, 142

Complaint Petition by company – Board of Directors of the Complainant-company authorised the Managing Director, who in turn delegated the power to General Manager (Accounting) to present the complaint petition – Cognizance taken against the petitioners – Order challenged on the ground of locus standi of the person filed the complaint petition.

There is neither any resolution of the Board of Directors nor any authorization of the company but only an authorization letter of the Managing Director in favour of the General Manager (Accounting) to file the complaint case – The authorization letter does not indicate whether the Board of Directors authorised the Managing Director to re-delegate his power to the G.M. (Accounting) to file the complaint on behalf of the company – Held, the complaint case is not maintainable being filed by an incompetent person – The impugned order taking cognizance against the petitioner is quashed.

(Paras 14,15)

Case Laws Referred to :-

1. 2011 (1) ILR-Cut-833: EIMCO Elecon (India) Ltd. -V- Mahanadi Coal Fields Ltd. & Ors.
2. 2014 (I) OLR-211 : Kailash Chandra Mishra -V- Shri Ajitsinh Ulhasrao Babar & Ors.
3. 2013 (II) OLR-318 : L.P.Electronics (Orissa) Pvt.Ltd. & Ors. -V- Tirupati Electro Marketing Pvt. Ltd.
4. AIR 2014 SC 630 : A.C.Narayan -V- State of Maharashtra & Anr.

For Petitioners: Mr. Sanjeev Udgata, Sr. Adv.
For Opp.Party : Mr. Lalatendu Samantaray

Date of hearing : 29.08.2017
Date of judgment: 14.12.2017

JUDGMENT

B.K.NAYAK, J.

In this application under Section 482, Cr.P.C., the petitioners challenge the order dated 05.11.2015 passed by the learned S.D.J.M., Jharsuguda in I.C.C. Case No.422 of 2015 taking cognizance of the offence under Section 138 of the N.I. Act and directing the complainant to take steps for issuance of process for appearance of the accused persons.

2. The opposite party as complainant filed aforesaid complaint case against the petitioners and one Smt. Anita Chowdhary. Petitioner no.1 is the

company, which is the principal accused and petitioner no.2 is the Managing Director of petitioner no.1. One Mrs. Anita Chowdhary, a Director of petitioner no.1-company had been arrayed as an accused but the impugned order of cognizance qua her has been quashed in CRLMC NO.2403 of 2016.

The complaint petition was initially filed in the court of the learned Sub-Divisional Judicial Magistrate, Panposh, Rourkela where the Bank on which the cheques were drawn was located and registered as I.C.C. No.458 of 2015, but subsequently in view of promulgation of Negotiable Instruments (Amendment) Ordinance, 2015, by the Government of India, the learned S.D.J.M., Rourkela passed order returning the complaint to opposite party no.1 (complainant company) for presentation before the appropriate court having jurisdiction, and accordingly the complaint petition was filed in the court of learned S.D.J.M., Jharsuguda and registered as I.C.C. Case No.422 of 2015.

3. As per the averments made in the complaint petition, the accused company (petitioner no.1) by virtue of an agreement entered into with the complainant-company (opposite party) acted as a stockist of the products manufactured by the complainant-company and in order to discharge some outstanding debt, the accused-company had given seven number of cheques totally amounting to Rs.,1,10,00,000.00 (Rupees one crore ten lakhs) on 13.03.2015 and that on presentation, the said cheques were dishonoured for the reason "account closed" as informed by the Banker of the complainant-company. Thereafter, notice was issued in terms of the proviso under Section 138 of the N.I. Act demanding payment and that the accused company having failed to make payment, the complaint was filed. By the impugned order, the learned S.D.J.M. Jharsuguda took cognizance of the offence against all the accused persons.

4. Learned counsel for the petitioners submits that the complaint of the complainant company has been filed by an incompetent person without requisite averments, in violation of the mandatory requirement of Section 142 of the N.I. Act. It is stated that the complaint has been filed through one Subhasis Kumar Das, the General Manager (Accounting) of the complainant company, who is not competent to file the complaint on behalf of the company. It was also submitted that the said Subhasis Kumar Das did not issue the cheques in question and, therefore, had no knowledge about the alleged transaction, nor he witnessed the same. It was also urged that he was not authorised by the Board of Directors of the complainant company to file the complaint.

5. A counter affidavit has been filed by the opposite party-complainant stating that the agreement for transaction with the accused company was signed by the General Manager (Commercial) of the complainant's company as Power of Attorney Holder. It is also stated that an account reconciliation proceeding was done between the petitioners and opposite party-company on 28.10.2014 and Sri Subhasis Kumar Das was a party to the same reconciliation on behalf of the complainant-company and as such the reconciliation proceeding is a proof regarding the admission of balance dues as on 30.09.2014 payable by the accused-company to the complainant company. It was also submitted that the Board of Directors of the complainant company authorised its Managing Director to authorise any other officer of the company to file the complaint on behalf of the company and in accordance with the authorisation of the Board of Directors to its Managing Director, the latter has delegated the power and authorised Subhasis Kumar Das to institute criminal proceeding on behalf of the company against the accused company by his letter of authorisation dated 23rd May,2015 and, therefore, the complaint filed through Mr. Subhasis Kumar Das, is quite competent and maintainable.

6. In the present case, admittedly the General Manager (Accounting) of the complainant company has filed the complaint on behalf of the company, but no resolution of the Board of the Directors of the complainant company authorising the General Manager (Accounting) to represent the company or constituting himself the Power of Attorney Holder for filing complaint was filed with the complaint petition before the court below. Also no resolution of the Board authorising the Managing Director to authorise any other officer to file complaint was produced.

7. A division Bench of this Court in ***EIMCO ELECON (INDIA) LTD V. MAHANADI COAL FIELDS LTD. & ORS. : 2011 (1) ILR-CUT-833*** have held as follows :

> "**6.** This writ petition has been filed by a Company being represented by its Sales Manager on the basis of Power of Attorney given by the Director. The Board of Directors of the petitioner-company passed resolution authorizing the Director to represent the Company to institute the proceedings on behalf of the Company. Therefore, the Director has no further authority to execute the power of attorney in favour of the Sales Manager to act on his behalf in the Court proceedings. The power can only be given by the Board of Directors of the company in exercise of its statutory power by passing the resolution under the provisions of Section 291 of the Companies Act in

favour of a Director of Principal Officer of a Company who is well versed with facts to speak, sign and verify the same in the pleadings. Therefore, the documents, namely, Power of Attorney and the Resolution passed by the Board of Directors of the company giving Authority to its Director to sue in the Court of Law on its behalf, produced by Mr. Das, learned Senior Counsel will not support the case of the petitioner. Hence, the contention urged in this regard by the learned counsel for the petitioner is wholly untenable in law. Further, the Constitution Bench decisions of the Supreme Court cited by the learned counsel for opposite party no.4 in the case of Chiranjit Lal Chowdhury (supra); Madan Gopal Rungta (supra) & Calcutta Gas Company Ltd. (supra) are aptly applicable to the fact situation of the case."

8. Another Division Bench of this Court in the case of ***Sri Kailash Chandra Mishra v. Shri Ajitsinh Ulhasrao Babar and others: 2014 (I) OLR-211*** came to consider the maintainability of a complaint under Section 138 of the N.I. Act. filed by a company through the Power of Attorney holder of the Managing Director of the Company and held in the following words that the complaint was not maintainable.

"**7.** Mr. J. Patnaik, learned Senior Counsel placing strong reliance upon Section 292 of the Companies Act submitted that the Managing Director of the company, who is a Principal Officer of the Company and has been authorised by the Board of Directors to represent on behalf of the company in the Court, he has no authority to re-delegate his power by executing the Power of Attorney in favour of the opposite party no.1 for filing the complaint under the N.I. Act. Therefore, the complaint petition filed under Section 138 of the N.I. Act is incompetent for the reason that Section 138 and Section 142 (a) of the N.I. Act states that no Court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque. In the case in hand, the company is the payee and opposite party no.1 is only the power of attorney holder of the Managing Director of the company-opposite party no.2. Therefore, the complaint petition filed against the petitioner at Daman cannot be maintained."

In the said decision, in paragraph-12 it was further held as follows :

"**12.** On the first point, we do not want to discuss in details for the reason that it is well settled in law that the Principal Officer of the company who has been delegated with the power by the Board of Directors cannot re-delegate his power to his subordinate to represent the company on his behalf. … …"

9. Relying on the aforesaid two Division Bench decisions, this Court in the case of ***L.P. Electronics (Orissa) Pvt. Ltd. & others v. Tirupati Electro Marketing Pvt. Ltd : 2013 (II) OLR 318,*** where a complaint under Section 138 of the N.I. Act was filed by the Law Officer of the company who was not authorised or given Power of Attorney by the Board of Directors of the complainant company, it was held that the complaint was not maintainable.

10. A three Judge Bench of the Hon'ble Supreme Court in a reference in the case of ***A.C. Narayanan v. State of Maharashtra & Anr. : AIR 2014 Supreme Court 630*** have held as follows:

> "**15.** In terms of the reference order, the following questions have to be decided by this Bench :
>
> (i) Whether a Power of Attorney holder can sign and file a complaint petition on behalf of the complainant?/ Whether the eligibility criteria prescribed by Section 142 (a) of NI Act would stand satisfied if the complaint petition itself is filed in the name of the payee or the holder in due course of the cheque?
>
> (ii) Whether a Power of Attorney holder can be verified on oath under Section 200 of the Code ?
>
> (iii) Whether specific averments as to the knowledge of the Power of Attorney holder in the impugned transaction must be ex-plicitly asserted in the complaint ?
>
> (iv) If the Power of Attorney holder fails to assert explicitly his knowledge in the complaint then can the Power of Attorney holder verify the complaint on oath on such presumption of knowledge ?
>
> (v) Whether the proceedings contemplated under section 200 of the Code can be dispensed with in the light of Section 145 of the N.I. Act which was introduced by an amendment in the year 2002?"
>
> In the said decision, in paragraph-23 it was further held as follows :
>
> "**23.** In the light of the discussion, we are of the view that the power of attorney holder may be allowed to file, appear and depose for the purpose of issue of process for the offence punishable under Section 138 of the N.I. Act. An exception to the above is when the power of attorney holder of the complainant does not have a personal knowledge about the transactions then he cannot be examined. However, where the attorney holder of the complainant is in charge of the business of the complainant-payee and the attorney holder alone is personally aware of the transactions, there is no

reason why the attorney holder cannot depose as a witness. Nevertheless, an ex-plicit assertion as to the knowledge of the Power of Attorney holder about the transaction in question must be specified in the complaint. On this count, the forth question becomes infructuous."

11. With regard to the question whether the Power of Attorney Holder will have the power to further delegate his function to another person, it was held in paragraph-25 of the aforesaid decision as follows:

"**25.** Similar substantial questions were raised in the appeal arising out of S.L.P (Cri.) No. 2724 of 2008, which stand answered as above. Apart from the above questions, one distinct query was raised as to whether a person authorized by a Company or Statue or Institution can delegate powers to their subordinate/others for filing a criminal complaint? The issue raised is in reference to validity of sub-delegation of functions of the power of attorney. We have already clarified to the extent that the attorney holder can sign and file a complaint on behalf of the complainant-payee. However, whether the power of attorney holder will have the power to further delegate the functions to another person will completely depend on the terms of the general power of attorney. As a result, the authority to sub-delegate the functions must be explicitly mentioned in the general power of attorney. Otherwise, the sub-delegation will be inconsistent with the general power of attorney and thereby will be invalid in law. Nevertheless, the general power of attorney itself can be cancelled and be given to another person."

Lastly in paragraph-26 of the aforesaid judgment, the Hon'ble Supreme Court held as follows :

"**26.** While holding that there is no serious conflict between the decisions in MMTC (AIR 2002 SC 182: 2001 AIR SCW 4793) (supra) and Janki Vashdeo Bhojwani (AIR 2005 SC 439: 2004 AIR SCW 7064) (supra), we clarify the position and answer the questions in the following manner:

(i) Filing of complaint petition under Section 138 of N.I. Act through power of attorney is perfectly legal and competent.

(ii) The Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaints. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transaction.

(iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly

in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

(iv) In the light of section 145 of N.I Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the N.I Act.

(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person."

12. In ***A.C. Narayanan*** (supra) after the three Judge Bench answered the reference, the Supreme Court held in ***AIR 2015 SC 1198*** as follows:

> "**16.** In this case Magistrate had taken cognizance of the complaint without prima facie establishing the fact as to whether the Power of Attorney existed in first place and whether it was in order. It is not in dispute that the complaint against the appellant was not preferred by the payee or the holder in due course and the statement on oath of the person who filed the complaint has also not stated that he filed the complaint having been instructed by the payee or holder in due course of the cheque. Since the complaint was not filed abiding with the provisions of the Act, it was not open to the Magistrate to take cognizance."
>
> **17.** From the bare perusal of the said complaint, it can be seen that except mentioning in the cause title there is no mention of, or a reference to the Power of Attorney in the body of the said complaint nor was it exhibited as part of the said complaint. Further, in the list of evidence there is just a mere mention of the words at Serial No. 6 viz. "Power of Attorney", however there is no date or any other particulars of the Power of Attorney mentioned in the complaint. Even in the verification statement made by the respondent No. 2, there is not even a whisper that she is filing the complaint as the Power of Attorney holder of the complainant. Even the order of issue of process dated 20th February, 1998 does not mention that the Magistrate had perused any Power of Attorney for issuing process."

13. In the instant case, in the complaint it is merely asserted that the complainant company is represented through its General Manager (Accounting), Sri Subhasis Kumar Das authorised by the company to file this

complaint. There is no mention in the complaint with affidavit as to when and in what manner the company has authorised its General Manager (Accounting) to represent the company in filing the complaint. There is also no averment in the complaint petition as to whether the General Manager (Accounting) had any knowledge about the transaction or he was a witness to the transaction. Neither any resolution of the Board of Directors of the complainant company nor any authorisation of the company in favour of the person representing it in the complaint was filed for perusal of the Magistrate, but only an authorisation letter by the Managing Director of the complainant company in favour of the General Manager (Accounting) to file the complainant was produced. The said authorisation does not indicate whether the Board of Directors authorised the Managing Director to re-delegate his power to the General Manager (Accounting) to file the complaint on behalf of the company.

In the aforesaid circumstances, having regard to the decision of the Hon'ble Supreme Court in the case ***A.C. Narayanan*** (supra) the complaint against the petitioners (accused persons) must be held to be not maintainable being filed by an incompetent person.

14. The learned counsel for opposite party-complainant has relied on a decision of the Supreme Court in the case of United Bank of India v. Naresh Kumar and others : (1996) 6 SCC 660**,** which deals with the question as to who can sign and verify a plaint on behalf of the company under the C.P.C. Similarly reliance has also been placed on the decision of the Hon'ble Supreme Court in SLP (Civil) No.18347 of 2013 with regard to the scope of delegation of power under the Major Ports Trust Act,1963. These decisions do not deal with the question of competency of a person to represent a company in filing a complaint under Section 138 of the N.I. Act in terms of Section 142 of the said Act, and, therefore, they are not applicable to the facts and circumstances of the present case.

15. In the light of the aforesaid discussion, it is held that I.C.C. Case No.422 of 2015 filed against the petitioners is not maintainable and accordingly the impugned order taking cognizance therein is unsustainable in the eye of law. Therefore, the impugned order of cognizance is quashed. The CRLMC is accordingly disposed of.

Application disposed of.

2018 (I) ILR - CUT- 300

DR. A.K. RATH, J.

S.A. NO. 286 OF 1986

KESHABA CHARAN NAYAK & ANR. ……..Appellants

.Vrs.

BISWANATH SWAIN & ORS. ……Respondents

PARTITION ACT, 1893 – S.4

Whether the sister's son of deceased defendant No.1 can be treated as stranger to the family for the purpose of section 4 of the Partition Act, 1893 ? – Held, No.

Merely because a person is related by blood through common ancestor cannot be considered as a member of the family within the meaning of the term as used in section 4 of the Partition Act – Learned Courts below fell into patent error of law in allowing the prayer of the plaintiffs U/s. 4 of the Act – Held, impugned judgments and decrees of the Courts below with regard to the prayer U/s. 4 of the Partition Act, is set aside. (Paras 13,14,15)

Case Laws Referred to :-

1. AIR 1997 SC 471 : Ghantesher Ghosh -V- Madan Mohan Ghosh & Ors.
2. AIR 2000 SC 2684 : Babulal -V- Habibnoor Khan (dead) by L.Rs.& Ors.
3. AIR 2001 SC 61 : Gautam Paul -V- Debi Rani Paul & Ors.
4. 2008(I) OLR 863 : Prahallad Ch. Mohanty & Anr. -V- Surendra Nath Mohanty & Ors.

For Appellants : Mr. D.P.Mohanty

For Respondents: None

Date of hearing : 25.10.2017

Date of Judgment: 01.11.2017

JUDGMENT

DR. A.K.RATH, J.

Defendant nos.2 and 3 are the appellants against an affirming judgment.

02. Respondent nos.1 and 2 as plaintiffs instituted T.S. No. 161 of 1977 in the court of the learned Additional Sub-Judge, Cuttack for partition along with a prayer under Sec. 4 of the Partition Act. The case of the plaintiffs is that Kartika Swain had two sons, namely Bhikari and Lokanath, defendant

no.1. The plaintiffs and defendant no.4 are the sons of Bhikari. Bhikari died 32 years back. The Schedule-A property is the ancestral joint family properties of the parties. The Schedule-B property has been acquired out of the joint family funds. There was no partition between the parties by metes and bounds. While matter stood thus, Bansidhar, youngest son-in-law of Lokanath-defendant no.1, taking advantage of his old age, blindness and illiteracy had managed to obtain a sale deed on 02.05.1977 in favour of defendant nos. 2 and 3 in respect of lot no.2 of Schedule-B without consideration. The recitals of sale deed were not read over and explained to defendant no.1.

03. Defendant nos.2 and 3 filed joint written statement denying the assertions made in the plaint. The specific case of the defendants is that there was an amicable partition of the suit properties between the parties. Defendant no.1 purchased Lot no.2 of Schedule-B property from the recorded owners by means of a registered sale deed dated 23.05.1951. The same was exclusive property of defendant no.1. He sold the said properties to defendant nos.2 and 3 by means of a sale deed dated 02.05.1977 for a valid consideration and delivered possession thereof. They are in possession of the said properties. They are not strangers to the family.

04. Stemming on the pleadings of the parties, learned trial court struck eleven issues. Parties led evidence. The learned trial court came to hold that Schedule-A and B properties are the joint family properties. There was no previous partition of the properties. Lot no.2 of Schedule-B is homestead. Defendant nos.2 and 3 are strangers to the family. They are bona fide purchasers for value. The sale deed, Ext.A is a genuine document. The plaintiffs and defendant no.4 are entitled to repurchase the property. Held so, it decreed the suit. Felt aggrieved, defendant nos.2 and 3 filed T.A. No. 103 of 1982 before the learned 2nd Additional District Judge, Cuttack. Contention raised by the appellants that they are sister's son of Lokanath, defendant no.1 and not strangers to the family was negatived. The appeal was eventually dismissed.

05. The appeal was admitted on the following substantial question of law:-

> "Whether the appellants being sister's sons of deceased defendant no.1, Lokanath can be treated as strangers to the family for the purpose of Sec.4 of the Partition Act ?"

06. Heard Mr. D.P. Mohanty, learned counsel for the appellants. None appeared for the respondents.

07. Mr. Mohanty, learned counsel for the appellants submitted that the courts below fell into patent error of law in allowing the prayer of the plaintiffs under Sec.4 of the Partition Act. According to Mr. Mohanty, when a stranger purchaser files a suit for partition, then only the relief under Sec.4 of the Partition Act is available to the co-sharers. Elaborating the submission, he submitted that the suit was filed by co-sharers for partition and relief under Sec.4 of the Partition Act. At the behest of the co-sharers, Sec.4 of the Partition Act cannot be pressed into service. He relied upon the decisions of the apex court in the cases of Ghantesher Ghosh v. Madan Mohan Ghosh and others, AIR 1997 SC 471, Babulal v. Habibnoor Khan (Dead) by L.Rs. and others, AIR 2000 SC 2684 and Gautam Paul v. Debi Rani Paul and others, AIR 2001 SC 61.

08. Mr. Mohanty, learned counsel further contended that a Bench of this Court in the case of Prahallad Ch. Mohanty and another v. Surendra Nath Mohanty and others, 2008(I) OLR-863 took a contrary view. The decision is contrary to the decision of the apex Court in the case of Ghantesher Ghosh (supra).

09. In Alekha Mantri vs. Jagabandhu Mantri and others, AIR 1971 Orissa 127, this Court held that Sec.4 of the Partition Act would also be applicable where the suit for partition was brought by a member of the undivided family against the stranger transferee and it is not necessary that the latter should have filed the suit.

10. There were divergent views of different High Courts including this Court in the case of Alekha Mantri (supra) with regard to scope and ambit of Sec. 4 of the Partition Act. The same has been set at rest by the apex Court in the case of Ghantesher Ghosh (supra). The apex Court held thus:-

> "A mere look at the aforesaid provision shows that for its applicability at any stage of the proceedings between the contesting parties, the following conditions must be satisfied:
>
> (1) A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;
>
> (2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;

(3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the concerned co-owner;

(4) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and

(5) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house".

11. In Babulal v Habibnoor Khan (Dead) by L.Rs. and others, AIR 2000 SC 2684, the apex Court taking a cue from Ghantesher Ghosh (supra) held that one of the basic conditions for applicability of Sec. 4 as laid down by the aforesaid decision and also as expressly mentioned in the Section is that the stranger/transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned. Before Sec. 4 of the Partition Act can be pressed in service by any of the other co-owners of the dwelling house, it has to be shown that the occasion had arisen for him to move under Sec.4 of the Act because of the stranger transferee himself moving for partition and separate possession of the share of the other co-owner which he would have purchased. It was further held that if the ratio of Alekha Mantri (supra) is held to take the view that a stranger purchaser who does not move for partition of joint property against the remaining co-owners either as a plaintiff or even as a defendant in the partition suit claiming to be as good as the plaintiff nor even as a successor of the decree holder seeks execution of partition decree, can still be subjected to Sec.4 of the Partition Act proceedings, then the said view would directly conflict with the decision of this Court in Ghantesher Ghosh's case (supra) and to that extent it must be treated to be overruled.

12. In Gautam Paul (supra), the apex Court held that Sec. 4 of the Partition Act should be given a liberal interpretation. However, giving a liberal interpretation does not mean that the wordings of the Section and the

clear interpretation thereof be ignored. The relevant wordings are "dwelling-house belonging to an undivided family". Thus it must be dwelling house belonging to an undivided family. The further requirement is that the transfer must be to a person who is not a member of "such family". The words "such family" necessarily refers to the undivided family to whom the dwelling house belongs. It was further held that merely because a person is related by blood through common ancestor, does not make him a member of the family within the meaning of the term as used in Sec.4 of the Partition Act.

13. Both the courts below concurrently held that the Lot no.2 of Schedule-B property is homestead. There was no partition by metes and bounds. Merely because defendant nos.2 and 3 are related by blood through a common ancestor, does not make them a member of the family within the meaning of the term as used in Sec. 4 of the Partition Act as held by the apex court in the case of Gautam Paul (supra). The courts below fell into the patent error of law in allowing the prayer under Sec.4 of the Partition Act. They are strangers to the family. The substantial question of law is answered accordingly.

14. Learned Single Judge of this Court in Prahallad Ch. Mohanty (supra) held that in a suit filed by one of the members of the joint family for partition where the stranger purchaser has been arrayed as defendant, the plaintiff can ask for relief of repurchase of the property from the stranger purchaser. Such inference is legally acceptable as it is in consonance with the benevolent legislative scheme behind enactment of Sec.4 of the Partition Act, which is for insulating the domestic peace of members of undivided family occupying a common dwelling house from the encroachment of a stranger transferee of the share of one undivided co-owner as a stranger-outsider to the family may obviously be having different outlook and mode of life than the members of the joint family. Though decision of the apex Court in the case of Ghantesher Ghosh (supra) was drawn to the attention of the Court, but then a contrary view was taken. The observation in Prahallad Ch. Mohanty (supra) runs contrary to the decisions of the apex Court in the cases of Ghantesher Ghosh and Babulal (supra).The judgment also suffers from internal inconsistencies. In view of the authoritative pronouncement of the apex Court in the case of Ghantesher Ghosh Babulal (supra), the decision is impliedly overruled.

15. A priori, the judgments and decrees of the courts below with regard to prayer under Sec.4 of the Partition Act is set aside. The appeal is allowed in part. No costs. Appeal allowed.

2018 (I) ILR - CUT- 305

DR. A.K. RATH, J.

S.A. NO. 121 OF 1993

STATE OF ORISSA & ANR. ……..Appellants

.Vrs.

SRI SRI RADHA GOVINDA SWAMI ……Respondent

ODISHA PREVENTION OF LAND ENCROACHMENT ACT,1972 –S.3(a-1)

"Landless person" – Whether the plaintiff-deity can be said to be a "landless person" as defined U/s. 3(a-1) of the OPLE Act, 1972 ? – Held, No.

On a bare perusal of the provision it is evident that the words "Landless Person" relate to a natural person but not a juristic person – Held, the deity being a juristic person can never be said to be a "Landless person". (Paras 10,11)

Case Laws Referred to :-

1. AIR 1970 SC 439 : Kalanka Devi Sansthan -V- The Maharashtra Revenue, Tribunal Nagpur & Ors.
2. AIR 2012 SC 559 : State of Haryana -V- Mukesh Kumar & Ors.
3. 1996 (I) OLR 460 : State of Orissa -V- Bhanu Mali (Dead) Nurpa Bewa & Ors.

For Appellants : Mr. P.C.Panda, AGA

For Respondent : Mr. Budhiram Das

Date of hearing : 06.07.2017

Date of judgment:14.07. 2017

JUDGMENT

DR. A.K.RATH, J.

This is a defendants' appeal in a reversing judgment.

2. Respondent as plaintiff instituted Title Suit No.7 of 1985 in the court of the learned Munsif, Chatrapur for declaration of right, title and interest over the suit land, orders passed by the Revenue Authorities under the Orissa Prevention of Land Encroachment Act (hereinafter referred to as "OPLE Act") are not valid and binding and permanent injunction impleading the appellants as defendants. The case of the plaintiff is that Sri Sri Radha Govinda Swamy Bije, Biripur is in peaceful possession and enjoyment of Ac.1.25 dec. of land appertaining to Survey No.232/2 of village Alliabad

since 40 years. The suit land was lying fallow shrouded with bushes and trees. The plaintiff reclaimed the suit land and made the same arable. The land has been erroneously recorded as "Rasta Paramboke" in the revenue records. The usufructs of the suit land are utilised for Seba Puja and Niti Kranti of the deity. The deity is in peaceful and continuous possession over the suit land with hostile animus to the defendants for more than the statutory period and as such, perfected title by way of adverse possession. The proceeding under the OPLE Act was initiated against it. The deity was in continuous possession and enjoyment over the suit land and a landless person owning less than one acre of land and no source of income. The Tahasildar, Chatrapur visited the spot, made an enquiry and recommended for declassification of the suit land from 'Rasta' to "Abada Jogya Anabadi" to the defendants on 7.6.1982 in RLC No.50 of 1982. Despite the same in RLC No.50 of 1982 the Tahasildar directed the R.I on 8.11.1983 to seize the standing crops and put the same into auction. Aggrieved by the same, the plaintiff filed OPLE Appeal No.20 of 1983 before the Sub-Divisional Officer, Chatrapur. The same having been dismissed, it filed revision before the Additional District Magistrate, Chatrapur. The revision met with same fate and also dismissed. The revisional authority directed the Tahasildar to evict the plaintiff from the suit land. The orders passed by the OPLE Authorities are illegal. Pursuant to the orders passed by the A.D.M., Chatrapur, the R.I served a notice of eviction on 2.5.1985 on the plaintiff. It is further pleaded that the plaintiff used to pay land assessment charges to the Government from time to time. The occupation of the plaintiff over the suit land is unobjectionable. The occupation relates back to the year 1945 in the ROR. There is no objection from the villagers for occupation of the suit land by the deity. Since the local inspector threatened the plaintiff to evict from the suit land, the suit was filed after issuing notice seeking relief supra.

3. The defendants filed a written statement denying assertions made in the plaint. According to the defendants, the land stood recorded as "Rasta Paramboke" in the ROR. The plaintiff illegally encroached upon the suit land, cultivated the same and reduced the communal utility illegally without permission of the State. The plaintiff has not acquired title by way of adverse possession. The action taken by the defendants for eviction of the plaintiff from the suit land and seizure of paddy crop is legal and valid. The order passed by the previous Tahasildar had not been acted upon either by the defendant no.2 or appellate or Revisional authority under the OPLE Act. The said order is illegal since the suit land is communal poromboke and could not

be assigned. The plaintiff is in illegal possession over the suit land. The plaintiff used to pay taram assessment admitting title of the State over the suit land.

4. On the inter se pleadings of the parties, learned trial court struck as many as four issues. To prove the case, the plaintiff had examined two witnesses and on its behalf, five documents had been exhibited. No evidence was adduced by the defendants. Learned trial court came to hold that encroachment made by the plaintiff is highly objectionable since the land has been recorded in "Sarba Sadharana Khata" as "Gramya Rasta" in the ROR. The plea taken by the plaintiff that the plaintiff has perfected title by way of adverse possession has been negatived. Held so, it dismissed the suit. The plaintiff filed Title Appeal No.27 of 1989 in the court of learned Subordinate Judge, Chatrapur. Learned lower appellate court came to hold that the State has not evicted the plaintiff from the suit land within 30 years. The encroachment was not objectionable. The plaintiff is in possession of the land and raised paddy crops since 1949. Despite recording of land as "Sarba Sadharana" in the current ROR, the plaintiff is in possession of the land since 1949. It further held that the plaintiff has been able to prove that it has prescribed title by way of adverse possession. The order of the revisional authority under the OPLE Act cannot take away the right of the plaintiff over the suit land. It came to a finding that the suit for declaration of title is not maintainable and dismissed the appeal. It directed the authorities under the OPLE Act for settlement of the land under Sec. 8-A of the OPLE Act holding that the plaintiff is entitled to possess the land.

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

> "1. Whether the suit is maintainable in absence of the appellate authority under the Orissa Prevision of Land Encroachment Act being a party to the suit ?
>
> 2. Whether the plaintiff-deity can claim ownership by adverse possession ?
>
> 3. Whether the plaintiff-deity can take the plea that it is a landless person so as to settle the land in its favour in a proceeding under the Orissa Prevention of Land Encroachment Act, 1972 ?
>
> 4. Whether the learned lower appellate court is justified in decreeing the suit when the date of entry into the suit land by the plaintiff has not been mentioned ?"

6. Heard Mr. P.C Panda, learned Addl. Government Advocate and Mr. Budhhiram Das, learned counsel for the respondent.

7. Mr. Panda, learned Addl. Government Advocate submitted that the land belongs to the Government. The marfatdar of the deity has made unauthorised encroachment of the land. In a proceeding under the OPLE Act, the order of eviction has been passed. The plaintiff-deity used to pay taram. The deity cannot maintain a suit for declaration of title on the basis of possessory title. Learned lower appellate court has no jurisdiction to direct the OPLE authorities to settle the land under Sec. 8-A of the OPLE Act. To buttress his submissions, he relied on the decisions of the apex Court in the case of Kalanka Devi Sansthan v. The Maharashtra Revenue, Tribunal Nagpur and others, AIR 1970 SC 439 and State of Haryana v. Mukesh Kumar and others, AIR 2012 SC 559.

8. Per contra, Mr. Das, learned counsel for the respondent, submitted that the marfatdar of the deity is in possession of the suit land peacefully, continuously and with hostile animus to the defendants for more than the statutory period and as such, perfected title by adverse possession. The proceeding initiated under the OPLE Act is bad in law. The plaintiff is not bound by it. Though the land has been wrongly recorded as "Rasta Paramboke" in the ROR, the plaintiff used to raise paddy crops and utilised the self-proceed for the deity. Learned lower appellate court has rightly directed the OPLE Authorities to settle the land.

9. Learned lower appellate court held that the deity has perfected title by way of adverse possession. It further held that the OPLE authorities has not enquired into the matter under Sec. 8-A of the OPLE Act. The land ought to have been settled in favour of the deity under the OPLE Act. Though it has held that the suit for declaration of title is not maintainable, but directed the OPLE authorities to settle the land in accordance with Sec. 8-A of the OPLE Act and the plaintiff is entitled to possess the land till settlement is made.

10. Landless person is defined in Sec. 3(a-1) of the OPLE Act. It reads thus :

> "3(a-1) "Landless person" means a person, the total extent of whose land excluding homestead together with lands of all the members of his family who are living with him in common mess, is less than one standard acre and whose total annual income of all the members of his family who are living with him in common mess, does not exceed rupees six thousand and four hundred or an amount which the State Government may, by notification from time to time, specify in that behalf."

11. On a bare perusal of the said section, it is evident that the words "landless person" relate to a natural person, not a juristic person. Had it been the intention of the legislature to include the juristic person as a landless person, the words "the members of the family who are living with him in common mess, total annual income of all the members of his family who are living with him in common mess" would not have been there. The deity is a juristic person. By no stretch of imagination the deity can be said to be a "landless person".

12. In Kalanka Devi Sansthan (supra), the appellant is a private religious trust and managed by a marfatdar. Respondent no.4 was the tenant. On 30.1.1961, a notice was served on behalf of the appellant on respondent no.4 under Sec. 38 of the Bombay Tenancy and Agricultural Lands (Vidarbha Religion) Act, 1958 to terminate the tenancy without prejudice to the previous proceedings. As the notice was not complied with, an application was filed on behalf of the appellant under Sec. 36 of the Act for possession of the land. The Naib Tahasildar rejected the application on the ground that Sansthan was not a land-holder who could cultivate the land personally. His order was confirmed by the Sub-Divisional Officer and by the Maharashtra Revenue Tribunal to whom appeals were taken. Ultimately the appellant filed a petition under Article 227 of the Constitution before the High Court of Bombay which was dismissed. The question arose before the apex Court as to whether the appellant-Sansthan could take advantage of the provisions contained in the Act by which possession can be claimed from the tenant on the ground that it is required for personal cultivation. The apex Court held that when property is given absolutely for the worship of an idol it vests in the idol itself as a juristic person. Placing reliance on Mukherjee's Hindu Law of Religious and Charitable Trust, it was held that the view is in accordance with the Hindu ideas and has been uniformly accepted in a long series of judicial decisions. The apex Court further held that cultivation of the land must be by natural persons and not by legal persons. The distinction between a manager or a Shebait of an idol and a trustee where a trust has been created is well recognised. The properties of the trust in law vest in the trustee whereas in the case of an idol or a Sansthan they do not vest in the manager or the Shebait. It is the deity or the Sansthan which owns and holds the properties. It is only the possession and the management which vest in the manager.

13. In Mukesh Kumar (supra), the apex Court came down heavily on the Government instrumentalities, including the police, attempting to possess

land adversely. The apex Court held that this is a testament to the absurdity of the law and a black mark upon the justice system's legitimacy. The Government should protect the property of a citizen and not steal it. The apex Court further held that if the protectors of law become the grabbers of the property then people will be left with no protection and there would be a total anarchy in the entire country. No Government Department, Public Undertaking, and much less the Police Department should be permitted to perfect the title of the land or building by invoking the provisions of adverse possession and grab the property of its own citizens in the manner that has been done in the case. The deity is no exception.

14. It is highly inconceivable that the deity would file a suit for declaration of title by way of adverse possession. The people used to visit the temple to offer prayer. If the deity files a suit by encroaching upon the others land, then nobody would be safe. Romans say “who will guard the Praetorian Guard”?

15. Mere possession of the suit land for long time is not suffice to hold that the plaintiff had perfected title by way of adverse possession, unless the classical requirements of adverse possession nec vi, nec clam, nec precario are pleaded and proved. The date of entry into the suit land had not been mentioned.

16. In Karnataka Board of Wakf v. Govt. of India (2004) 10 SCC 779, the apex Court observed as under :-

> "In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."

The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into

possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession." (Emphasis laid)

17. Undoubtedly the civil court has jurisdiction to entertain the suit for declaration of title even if order of eviction is passed under the OPLE Act as held by this Court in the case of State of Orissa v. Bhanu Mali (Dead) Nurpa Bewa and others, 1996 (I) OLR 460. The question arose in Bhanu Mali (supra) that whether the decision of the Revenue Officer in the proceeding under the Orissa Prevention of Land Encroachment Act will operate as res judicata in the subsequent suit filed by the plaintiff for declaration of title and recovery of possession. This Court held that the decision of the Revenue Officer in the proceeding under the Orissa Prevention of Land Encroachment Act can neither operate as res judicata nor Sec.16 thereof can stand as a bar relating to the question of title in the subsequent civil suit by the plaintiffs. 18. The civil court dehors its jurisdiction in directing the authorities to settle the authorities under Sec. 8-A of the OPLE Act. The same is not in domain of the civil court. The learned lower appellate court has travelled beyond its jurisdiction in directing the OPLE authorities for settlement of the land under Sec. 8-A of the OPLE Act. The substantial questions of law are answered accordingly.

19. In the wake of aforesaid, the appeal is allowed. The impugned judgment is set aside, resulting in dismissal of the suit. No costs.

Appeal allowed.

2018 (I) ILR - CUT- 311

DR. A.K. RATH, J.

S.A. NO. 183 OF 1990

BENU BEHERA .....Appellant

.Vrs.

GOURAHARI PRADHAN .....Respondent

ODISHA MONEY LENDERS' ACT, 1939 – Ss. 2(i), 8

Plaintiff was carrying on money lending business without license – During 1970-73 three transactions had been established so inference can be drawn that there was continuity in transaction and not casual act representing occasional loans to relations etc. – Held, the alleged transaction is hit U/s. 8 of the Act – Findings of the learned Courts below are not correct, hence the impugned judgments are set aside and the suit filed by the plaintiff is dismissed.

(Paras 10 to13)

Case Law Referred to :-

1. ILR 1974 CUT.1082 : Gajendra Sahu -V- Rama Rout

For Appellant : Mr. Sidhartha Mishra

For Respondent: Mr. Byomakesh Sahoo

Date of Hearing :03.11. 2017
Date of Judgment:10.11.2017

JUDGMENT

Dr.A.K.RATH, J.

The defendant is in appeal against the affirming decision of the learned Subordinate Judge, Chatrapur.

2. The plaintiff-respondent instituted the suit for recovery of Rs.3800/- with pendente lite and future interest @9% per annum from the defendant. The case of the plaintiff is that on 9.4.1973 the defendant had executed a registered simple mortgage deed in his favour for a loan of Rs.3000/-. The defendant agreed to pay the interest @Rs.2/- percent per month. He further agreed to pay the interest at the end of every year and pay the entire amount within three years. It was stipulated that in the event the amount is not paid within the time stipulated, the plaintiff shall be at liberty to realize the same. While the matter stood thus, the defendant paid an amount of Rs.500/- on 7.3.1976, which was endorsed on the back side of the mortgage deed. All the persuasions made by the plaintiff to pay the rest amount ended in a fiasco. With this factual scenario, he instituted the suit.

3. The defendant filed a written statement denying the assertions made in the plaint. The specific case of the defendant is that the plaintiff was a regular money lender. He had no licence to carry on money lending business. It was further pleaded that the suit land belongs to his wife. He was not

pulling on well with her. She intended to sell the property to the outsiders. At this juncture, the plaintiff persuaded him to execute a mortgage deed. He executed the deed in good faith. He had not received any money.

4. Stemming on the pleadings of the parties, the learned trial court struck four issues. Both parties led evidence. The learned trial court held that the plaintiff was not having a regular business in money lending. The mortgage deed dated 9.4.1973, Ext.1 is real one. The defendant had received the amount. He had paid Rs.500/-. Held so, it decreed the suit. The unsuccessful defendant filed Title Appeal No.18 of 1985 before the learned Subordinate Judge, Chatrapur, which was eventually dismissed.

5. The appeal was admitted on 19.3.1991 on the following substantial questions of law. The same are :

> "(1) Whether the suit is hit by the provisions of Sections 8 and 18 of the Orissa Money Lenders Act ?
>
> (2) Whether the courts below are correct in ignoring Exts.A and B though the originals have been called for in this case ?"

6. Mr. Sidhartha Mishra, learned Advocate on behalf of Mr.B.B.Ratho, learned Senior Advocate for the appellant submitted that the plaintiff was a regular money lender. He had no money lending licence. The alleged transaction is hit by Sec. 8 of the Orissa Money Lenders Act.

7. Per contra, Mr. Byomakesh Sahoo on behalf of Mr.A.K.Dalai, learned Advocate for the respondent contended that both the courts below concurrently held that the plaintiff was not a regular money lender. The mortgage deed was executed by the defendant in favour of the plaintiff. The plaintiff had received an amount of Rs.3000/-. He paid an amount of Rs.500/-. Since the rest amount was not paid, the plaintiff instituted a suit. The defendant is liable to pay the balance amount with interest.

8. Before adverting to the contentions raised by the learned Advocate for both the parties, it will necessary to set out some of the provisions of Money Lenders Act. Section 2(i) of the Act defines 'loan' as follows:

> " 'loan' means an advance whether of money or in kind or interest made by a moneylender and shall include a transaction on a document bearing interest executed in respect of a past liability and any transaction which in substance, is a loan, but shall not include,--

(1) a loan advanced by the State Government or by any local body authorised by the State Government or by a Co-operative Society;

(2) a deposit of money in a Post Office Savings Bank or a deposit of money or other property in any other Bank or in a company or with a Co-operative Society;

(3) the amount or the proportionate amount, as the case may be, payable under a mortgage by the purchaser at a sale in execution of a decree of a Court or otherwise of the whole or part of the properties subject to a mortgage, the purchase having been made, prior to the coming into force of this Act;

(4) any loan or loans due to a widow on the 1st February, 1930, who on that date did not own any other property; provided that the principal amount of the loan or loans does not exceed rupees two thousand;"

xxx xxx xxx

Section 4 of the Act provides as follows:

"No person to carry on money lending business without being registered.-- No person shall carry on the business of money lending after the 22nd day of November, 1975 unless he is registered as a money lender under this Act".

xxx xxx xxx

Section 8 of the Act provides as follows :

"8. Suit of recovery of loan maintainable by registered money lenders only-- A money lender shall not be entitled to institute a suit for the recovery of a loan advanced by him after the date on which this section comes into force, unless he was registered under this Act at the time when such loan was advanced :

Provided that a money lender shall be entitled to institute a suit to recover a loan advanced by him at any time in the course of two years after the date on which this section comes into force, if he is granted a certificate of registration under Section 5 at any time before the expiration of the said year."

9. The defendant admits that he had executed the mortgaged deed, Ext.1. The plea taken by the defendant that he had not received any amount of Rs.3000/-, had been negative by both the courts. Both the courts below held that the defendant paid amount of Rs.500/- on 7.3.1976. Further if the plaintiff had not received the said amount, he could not have paid the said amount. Thus the alleged transaction is a loan within the meaning and ambit of Sec. 2(i) of the Orissa Money Lenders Act.

10. Thus the question arises as to whether the plaintiff is entitled to recover the said amount ? The specific plea of the defendant was that the plaintiff was carrying on business of money lending. He had no licence. Ext.A is a registered mortgage deed dated 30.12.1970. The same was executed by one Padma Charan Tripathy in favour of the plaintiff for advancing money. Ext.B is another registered mortgage deed dated 1.8.1973 executed by Bauribandu Padhi and Kailash Chandra Padhi in favour of the plaintiff. On a cursory perusal of Exts.A & B, it is evident that the plaintiff lent money to the mortgagers. Those mortgage deeds had been marked as exhibits without objection. From 1970-73 at least three transactions had been established. Some of these appear to be in quick succession. From these the only available inference would be that there was continuity in the transaction and the business of money lending was a part and parcel of a system adopted by the plaintiff. Transactions are not sporadic or casual. The findings of the courts below that the transaction lack element of continuity and the transaction in question cannot be a part and parcel of a regular system of money lending business of the plaintiff is difficult to fathom.

11. In Gajendra Sahu Vrs. Rama Rout, ILR 1974 CUT. 1082, there were five transactions in 1961 to 1966. This Court held that inference would be that there was continuity in transactions.Those are not casual act representing occasional loans to relations friends or acquaintances. The ratio in the said act applies proprio vigore to the instant case as well.

12. In view of the discussions made above, the irresistible conclusion is that the plaintiff was a regular money lender.The alleged transaction is hit under Sec.8 of the Orissa Money Lenders Act. The findings of the courts below are perverse.The substantial questions of law are answered accordingly.

13. A priori, the impugned judgments are set aside. Consequently, the suit is dismissed. The appeal is allowed. No costs.

Appeal allowed.

2018 (I) ILR - CUT- 316

DR. B.R. SARANGI, J.

W.P.(C) NO. 1544 OF 2003

BHABANI SHANKAR PANDIT & ORS. …….Petitioners

.Vrs.

REGISTRAR OF CO-OPERATIVE SOCIETIES, ORISSA & ORS. ……..Opp.Parties

SERVICE LAW – Compassionate appointment – Petitioners were appointed during 06.04.1994 to 26.03.1997 – Circular issued on 24.03.1998 stating removal of employees appointed after 01.01.1990 and there shall be no fresh appointment on the ground of economic measures – Action challenged – Petitioners continued in service due to interim protection by the Court – Subsequent letter issued on 01.02.2003 removing the petitioners from service – Hence the present writ petition.

Compassionate appointment cannot be frustrated by issuing a circular, specially when the institution is running with dearth of staff – Moreover the petitioners have been appointed against sanctioned posts and discharging their duties sincerely – Held, the impugned letter Dt. 01.02.2003 issued by the General Manager, CARD Bank, Berhampur to the Secretary CARD Bank, Berhampur advising to remove the petitioners from service is quashed – As the petitioners have been given compassionate appointment, they should be allowed to continue in service as before and they are entitled to all consequential service benefits admissible to them.

(Paras 13,14)

Case Laws Referred to :-

1. (1997) 8 SCC 85 : Haryana State Electricity Board -V- Hakim Singh.
2. (1998) 2 SCC 412 : State of U.P. -V- Paras Nath.
3. (2005) 7 SCC 206 : Commissioner of Public Instructions -V- K.R. Viswanath.
4. (1989) 4 SCC 468 : Sushama Gosain -V- Union of India.
5. (1998) 5 SCC 192 : Director of Education -V- Pushpendra Kumar.
6. AIR 2000 SC 1596 : Balbir Kaur & Anr. -V- S.A.I.L. & Ors.
7. (1994) 4 SCC 138 : Umesh Ku.Nagpal -V- State of Haryana.
8. (2005) 10 SCC 289 : Govind Prakash Verma -V- LIC of India.

For Petitioners : M/s. N.C.Mishra & S.K.Behera.

For Opp.Parties :Mr. Prasanta Ku. Panda.
Mr. D.K.Pani, A.S.C.

Date of hearing : 05.01.2018
Date of Judgment: 09.01.2018

JUDGMENT

DR. B.R. SARANGI, J.

The petitioners were appointed as Peon, Junior Assistant and Night Watcher on 06.04.1994, 25.10.1995 and 26.03.1997 respectively in the establishment of Orissa State Co-operative Agricultural and Rural Development Bank Limited (in short "CARD Bank") against existing vacancies under the Rehabilitation Assistance Scheme and are discharging their duties sincerely without any disturbances. The appointment of petitioner no.2 was regularized by the authority, vide order dated 12.01.1995. When petitioners no.1 and 3 were awaiting for their regularization, in the meantime the Registrar of Co-operative Societies, Orissa, Bhubaneswar-opposite party no.1 issued a circular on 24.03.1998 indicating therein that due to economic measures, it is necessary to prevent from giving any fresh appointment and employees appointed after 01.01.1990 should be removed and CARD Banks are advised to implement the same forthwith. On 31.08.2001, the Secretary of CARD Bank, Berhampur, due to dearth of staff, intimated to the General Manager, CARD Bank, Berhampur that in comparison to staff position as on 01.01.1990 there is 25% less staff working and, therefore, in the event of implementation of the circular of dated 24.03.1998, it will cause dislocation to the day to day to management of the bank. Further, the proceeding of Management of Berhampur CARD Bank held on 04.06.2002, which was communicated vide letter dated 08.06.2002, indicates that removal of employees would add fuel to the discontentment and further their removal will have pressure on the financial position of the Bank and sought for clarification from the opposite parties. However, in respect of a similar employee, who had approached this Court by filing OJC No. 2212 of 199, this Court passed an interim order on 18.02.1999 stating inter alia that in case the petitioner therein is continuing in the existing post as asserted, he shall not be removed without leave of the Court. In spite of such interim order passed by this Court in respect of similarly situated employees, the General Manager, CARD Bank, Berhampur issued a letter dated 01.02.2003 to the Secretary, Berhampur, CARD Bank advising him to take steps for removal of services of the petitioners along with other persons those who have been appointed after 01.01.1990. But, while issuing such direction, the General Manager, CARD Bank lost sight of the fact that the petitioners have been appointed under Rehabilitation Assistance Scheme applicable to them.

Hence, the petitioners have filed the instant writ petition challenging the circular dated 24.03.1998 in Annexure-3 issued by Registrar, Cooperative Societies, Orissa, Bhubaneswar and consequential letter dated 01.02.2003 in Annexure-6 issued by General Manager, CARD Bank, Berhampur addressed to the Secretary, CARD Bank, Berhampur directing removal of petitioners from service.

2. Mr. N.C. Mishra, learned counsel for the petitioners urged with vehemence that the petitioners have been appointed under the Rehabilitation Assistance Scheme. The circular issued by the Registrar, Cooperative Society dated 24.03.1998 in Annexure-3 may not apply to them because they stand altogether on a different footing than that of the employees those who have been appointed after 01.01.1990. Further, it is contended that in view of such circular any direction given by the Secretary for removal of petitioners from services, who have been appointed after 01.01.1990 including the rehabilitation assistance appointees, is an outcome of non-application of mind and amounts to frustrating the purpose of giving compassionate appointment, therefore, the same should be quashed.

3. Mr. D.K. Pani, learned Addl. Standing Counsel appearing for opposite party no.1 has contended that by following austerity measure, the circular has been issued by the Registrar of the CARD Bank and as such, the Registrar has got the authority to issue such a circular for smooth management of the Bank.

4. This Court issued notice on 31.03.2003 and passed an interim order that the petitioners will not be removed from service under CARD Bank Ltd. On receipt of notice, Mr. P.K. Panda, learned counsel had entered appearance for opposite parties no. 2 and 3 on 16.10.2003, but did no choose to file any counter affidavit, though in the meantime 14 years have elapsed. When the matter was listed on 24.11.2017, none appeared for the opposite parties. Therefore, to afford an opportunity to the opposite parties, the matter was directed to be listed after two weeks. When the matter listed on 05.01.2018, none appeared for opposite parties no. 2 and 3-Bank, nor any counter affidavit has been filed on behalf of the said opposite parties, Therefore, applying the principle of doctrine of non-traverse, on the basis of the pleadings available on record, this matter is being disposed of at this stage as it is an old case of the year 2003.

5. On the basis of the facts pleaded and materials available on record, there is no dispute that the petitioners were appointed under Rehabilitation

Assistance Scheme under compassionate ground. Once the petitioners have been given compassionate appointment, they cannot be equated with the persons those who have been appointed otherwise. The basis of compassionate appointment has been considered by the apex Court in various decisions and reasons for such compassionate appointment is well established under various pronouncements of the apex Court.

6. In ***Haryana State Electricity Board v. Hakim Singh***, (1997) 8 SCC 85, the apex Court explained the rationale of the rule relating to compassionate appointment, which is reproduced below:

> *"The rule of appointments to public service is that they should be on merits and through open invitation. It is the normal route through which one can get into a public employment. However, as every rule can have exceptions, there are a few exceptions to the said rule also which have been evolved to meet certain contingencies As per one such exception relief is provided to the bereaved family of a deceased employee by accommodating one of his dependants in a vacancy. The object is to give succor to the family which has been suddenly plunged into penury due to the untimely death of its sole breadwinner. This Court has observed time and again that the object of providing such ameliorating relief should not be taken as opening an alternative mode of recruitment to public employment."*

Similar view has also been taken by the apex Court in ***State of U.P. v. Paras Nath,*** (1998) 2 SCC 412, and ***Commissioner of Public Instructions v. K.R. Vishwanath,*** (2005) 7 SCC 206.

7. In ***Sushma Gosain v. Union of India***, (1989) 4 SCC 468, the apex Court pointed out that the purpose of providing appointment on compassionate grounds is to mitigate the hardship due to death of the bread earner in the family and that such appointment should, therefore, be provided immediately to redeem the family in distress.

8. In ***Director of Education v. Pushpendra Kumar***, (1998) 5 SCC 192, the apex Court explained the purpose of compassionate appointment and pointed out its exceptional nature and the need to take care that its application did not interfere with the right of other persons who are eligible to seek employment.

9. In ***Balbir Kaur and another v. Steel Authority of India Ltd. and others,*** AIR 2000 SC 1596 it is categorically held that sudden jerk in the family by reason of the death of the bread earner can only be absorbed by some lump sum amount being made available to the family. This is rather

unfortunate but this is a reality. The feeling of security drops to zero on the death of the bread earner and insecurity thereafter reigns and it is at that juncture if some lump sum amount is made available with a compassionate appointment, the grief stricken family may find some solace to the mental agony and manage its affairs in the normal course of events. This being the reasons assigned, compassionate appointment can be granted to a member of the deceased family.

10. In ***Umesh Kumar Nagpal v. State of Haryana***, (1994) 4 SCC 138, the apex Court laid down the principles relating to compassionate appointment in clear and emphatic language, which is reproduced below:-

> *"The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependents of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependents of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Class III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is*

> *justifiable and valid since it is not discriminatory. The favourable treatment given to such dependent of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule make in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."*

11. In ***Govind Prakash Verma v. LIC of India,*** (2005) 10 SCC 289, the apex Court held that compassionate appointment is recompense over and above whatever is admissible to the legal representatives of deceased employee as benefits of service which they get on death of the employee.

12. This being the purpose of giving compassionate appointment, the same cannot be frustrated in any manner by issuing a circular by the Registrar, Cooperative Societies, Orissa stating that the appointment made after 01.01.1990 should be removed and relying upon such circular the consequential communication made to the Secretary, CARD Bank, Berhampur by the General Manager, CARD Bank, Berhapur, vide Annexure-6, directing for removal of service of the petitioners cannot and should not be sustained in the eye of law, especially when the institution is running with dearth of staff, and as such the petitioners have been appointed against the sanctioned post and discharging their duties assigned to them sincerely.

13. On perusal of Annexure-6 dated 01.02.2003 only ground taken in the said letter is that pursuant to the circular issued by the Registrar, Cooperative Societies, Orissa dated 24.03.1998 directing to limit the management cost to 2.5% of the working capital and the bank should not incur expenditure more than the management cost released every month and, therefore, the action has been taken for removal of 5 staff those who have been appointed after 01.01.1990, including the petitioners, those who have been given benefit of compassionate appointment. On perusal of the circular dated 24.03.1998 in Annexure-3, it does not say about the removal of employees those who have been given compassionate appointment. Though fact remains that the petitioners have been appointment after 01.01.1990, but that *ipso facto* cannot deny them to continue in service pursuant to circular dated 4.03.1998 issued by the Registrar, Cooperative Societies, Orissa. As such, the

consequential letter issued by the General Manager, CARD Bank to the Secretary, Berhampur CARD Bank dated 01.02.2003 in Annexure-6, relying upon circular of the Registrar, Cooperative Societies dated 24.03.1998, directing to remove the petitioners from service who are continuing on compassionate appointment basis, cannot sustain in the eye of law, in view of the fact that the same will amount to frustrate the very purpose of compassionate appointment.

14. Needless to say that by virtue of the interim order dated 31.03.2003 passed by this Court, the petitioners are continuing in service and in the meantime more than 14 years have elapsed.Therefore, at this stage, this Court does not wish to unsettle the settled position. Therefore, in the interest of justice, equity and fair play, the letter dated 01.02.2003 in Annexure-6 issued by the General Manager, CARD Bank, Berhampur to the Secretary, CARD Bank, Berhampur advising to remove the petitioners from service, having not considered the nature of their appointment, merits no consideration and the same is hereby quashed. As the petitioners have been given compassionate appointment, they should be allowed to continue in service as before and all consequential service benefits admissible to them in accordance with law should be extended.

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

Writ petition allowed.

2018 (I) ILR - CUT- 322

DR. B.R. SARANGI, J.

W.P.(CRL.) NO. 385 OF 2009

CHITTARANJAN BEHERA ……..Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.21

Custodial torture – Compensation – Petitioner was called time and again to the police station, even though he was not named in the F.I.R./Chargesheet and there was no allegation against him – He was arrested as Tukuna Behera but the learned SDJM, Kendrapara on verification of his identity discharged him asking the police to arrest

the proper man – Petitioner had undergone mental, physical and psychological torture in the hands of insensible police officer and suffered humiliation in the society – The very conduct of the police authority has destroyed the brightness and will power of the petitioner – Deliberate and willful violation of the fundamental right of the petitioner to live with dignity – Held, in order to restore the human dignity of the petitioner, this Court directed the State authority to pay Rs. 2,00,000/- as compensation which shall be realized from the erring officers from their salary in equal proportion as thought appropriate by the competent authority of the State. (Para 21)

Case Laws Relied on :-

1. 2012 (5) SUPREME 370 : Dr. Mehmood Nayyar Azam -V- State of Chattisgarh
2. AIR 1983 SC 1086 : Rudul Sah -V- State of Bihar
3. (2012) 1 SCC 748 : Hardeep Singh -V- State of M.P.

Case Laws Referred to :-

1. 2003 (II) OLR 151 : Manibhadra Biswal -V- State of Orissa & Ors.
2. AIR 1997 SC 610 : D.K. Basu v. State of West Bengal.
3. (1994) 4 SCC 260 : Joginder Kumar v. State of U.P.
4. AIR 2001 SC 2124 : Arvind v. State of Bihar.
5. (1983) 1 SCC 124 : Board of Trustees of the Port of Bombay v. Dilip Kumar Raghavendranath Nadkarni and Ors.
6. (1995) 4 SCC 262 : State of M.P. v. Shyam Sunder Trivedi.
7. (1997) 1SCC 416 : D.K. Basu v. State of W.B.
8. AIR 2005 SC 402 : Munshi Singh Gautam v. State of M.P.
9. AIR 2005 SC 2277 : Ranjitsing Brahmajeeting Sharma v. State of Maharashtra
10 AIR 2004 SC 3249 : Narendra Singh v. State of M.P.
11. (1991) 4 SCC 406 : Delhi Judicial Services Association v. State of Gujarat
12. AIR 1983 SC 1086: Rudul Sah v. State of Bihar.
14. (2012) 1 SCC 748 : Hardeep Singh v. State of M.P.

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For Petitioners : M/s. Ajit Kumar Choudhury & K.K.Das

For Opp.Parties : Miss. Savitri Ratho, A.G.A

Date of hearing : 19.01.2018
Date of judgment : 25.01.2018

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner, having been allegedly subjected to harassment, torture and humiliation by the Officer-in-Charge, Mahakalpada Police Station in connection with Mahakalpada P.S. Case No.57 of 1992 corresponding to

G.R. Case No.558 of 1992 pending in the Court of the learned S.D.J.M., Kendrapara, even though his name was neither found placed in the FIR nor in the charge sheet, has approached this Court by filing the present application claiming for compensation.

2. The factual matrix of the case in hand is that on 03.06.1992, the then Presiding Officer of Ward No.11 and 12 (Bankichhanda) of Deulapara Gram Panchayat, who was on election duty, submitted a written information to the Election Officer, Mahakalapada stating inter alia that some people came inside the booth and forcibly took away the ballot papers etc., while the election was going on. Due to the said act, the election was affected and the same was postponed. On the basis of the said information, the Addl. Tahasildar, Marshaghai-cum-Election Officer, vide letter no.1668 dated 03.06.1992, lodged a written report before the OIC, Mahakalpada P.S. requesting to take necessary steps against the mischievous persons as per law. The said written report was treated as FIR and registered as Mahakalpada P.S. Case No.57 of 1992 under Sections 448/171-F/34, IPC. Accordingly, the prosecuting agency, after completion of investigation, submitted charge sheet on 30.06.1992, from which it reveals that Ranjit Samal, son of Raju Samal; Kumar Behera, son of Krutibash Behera; and Tukuna Behera son of Ekadasi Behera were involved in the said activities. On receipt of the charge-sheet, which was filed on 16.07.1992, the learned SDJM issued summons to the accused persons named in the charge sheet on 22.09.1992.

2.1 The OIC, Mahakalpada P.S. on four occasions called the petitioner to the police station and threatened to arrest him in connection with the aforesaid case disclosing that NBW has been issued against him. The petitioner tried to convince the OIC, Mahakalpada P.S. that he was no way connected with the case, as he is not Tukuna Behera son of Ekadasi Behera against whom the charge sheet has been submitted. On being threatened and as advised/suggested by the local police, the petitioner surrendered before the SDJM, Kendrapara in connection with the aforesaid case on 04.10.1997 and moved for bail. The learned SDJM, on perusal of the case record, came to the finding that the name of the petitioner did not find place in the charge sheet and his application seeking bail bears no consideration. Despite the order passed by learned SDJM on 04.10.1997 holding that the petitioner was no way connected in the aforesaid G.R. case, the local police arrested the petitioner in connection with the very same case and produced him before the learned SDJM on 16.12.1998 by showing him as Tukuna Behera. The

learned SDJM, on perusal of the photo identity card, school leaving certificate and the admit card of Board of Secondary Education, Odisha, came to the conclusion that the name of the petitioner was Chittaranjan Behera, son of Niranjan Behera, but the local police failed to file any document to show that the petitioner is Tukuna Behera, and, accordingly, discharged the petitioner from the case directing the police to arrest the proper accused Tukuna Behera.

2.2 From order dated 10.08.2000 of the learned SDJM it reveals that the local police had clearly admitted before the court that no such accused Tukuna Behera, as per the charge sheet, was available and the said case was adjourned from time to time. When the matter stood thus, the local police, on the basis of the NBW issued by the learned SDJM, Kendrapara in the aforesaid case, again called the petitioner to the police station and threatened him to surrender before the learned SDJM by posing/identifying himself as Tukuna Behera keeping, in view the last Legislative Assembly Election which was scheduled to be held in the month of April, 2009, as the Investigating Officer failed to apprehend accused Tukuna Behera as per the direction of the learned SDJM and other authorities. It is contended that by this process the local police has harassed the petitioner by causing custodial torture mentally, physically and psychologically, which violates the fundamental right to live with dignity, which is a valuable right guaranteed under Article 21 of the Constitution of India. Since the petitioner was neither an accused nor his name was found placed in the charge sheet, nor was he connected with the aforesaid case in any manner, but the police authorities were harassing and torturing him in connection with Mahakalpada P.S. Case No.57 of 1992 corresponding to G.R. Case No.558 of 1992 pending in the court of the learned SDJM, Kendrapada. Therefore, the petitioner has filed this application claiming for adequate compensation, as the police authorities have violated the fundamental rights of the petitioner as enshrined under Article 21 of the Constitution of India.

3. Mr. A.K. Choudhury, learned counsel for the petitioner strenuously urged before this Court that such callous action of the police authorities against the petitioner time and again has affected the fundamental rights of the petitioner with regard to his right to live with dignity as enshrined under Article 21 of the Constitution of India, as neither the petitioner was an accused nor was he in any way connected with the aforementioned case. More particularly, on the basis of the documents placed before the learned S.D.J.M., Kendrapara, namely, photo identity card, school leaving certificate

and admit card issued by the Board of Secondary Education, Odisha, although it was clearly revealed that the petitioner is Chitta Ranjan Behera, son of Niranjan Behera, but the police all the times has harassed the petitioner by impersonating him as Tukuna Behera, son of Ekadasi Behera, even though actually he was not an accused in the charge-sheet submitted by the police during investigation. It is further contended that the mental agony and the torture, which the petitioner sustained, cannot be compensated in any manner. Furthermore, the reputation of the petitioner in the public, which has been tarnished for callous and irrational action of the police authority, amounts to violation of the fundamental rights as enshrined in the Constitution of India, for which the petitioner has to be compensated for the harassment, custodial torture and humiliation done to him by the local police. To substantiate his contention, he has relied upon the judgments of the apex Court in ***Dr. Mehmood Nayyar Azam v. State of Chattisgarh***, 2012 (5) SUPREME 370 and of this Court in ***Manibhadra Biswal v. State of Orissa and others***, 2003(II) OLR 151.

4. Miss. Savitri Ratho, learned Additional Government Advocate argued with vehemence justifying the action taken by the police and she has relied upon the affidavit filed by opposite party no.3, especially paragraphs 6 and 7 thereof, which read thus:

> *"6. However, there is no cases nor NBWs are pending at P.S. against the petitioner and there is no chance to harass him. It is humbly submitted that Chitaranjan Behera @ Tukuna Behera, S/o-Niranjan Behera @ Ekadasi Behera is are(sic one) person i.e. the petitioner. The then I.O. executed the NBW and produced the petitioner before the learned court below. Unfortunately, the learned court below without verifying the proper identification of the petitioner was pleased to pass an order on 16.12.1998. Since the present petitioner is an accused in Mahakalapada P.S. No.57 of 1992, he was produced by the then I.O. before the court below. As such the plea of petitioner is quite false and hereby strictly denied by the deponent.*
>
> *7. That on verified locally the petitioner is the actual accused of the case and he is involved in Mahakalapada P.S. Case No.57 of 1992. The fact of the case is the petitioner along with Ranjit Samal and Kumar Behera are involved in booth snatching case in 1992 Election. But the then I.O. did not mention the actual name and address of the petitioner. The actual name of the petitioner is Chittaranjan @ Tukuna Behera, S/o- Niranjan @ Ekadasi Behera of village Amirabad, PS-Mahakalapada, Dist-Kendrapara, but the name of the petitioner in all the record is Chittaranjan Behera, S/o-Niranjan Behera. However, there is no cases nor NBWs are pending at P.S.*

against the petitioner and he is not call to P.S. neither for harassing nor threatening to him".

It is thus contended that the petitioner is not entitled to get any compensation, in view of the contentions raised in paragraphs-6 and 7 mentioned above and, as such, the writ petition is liable to be dismissed.

5. This Court heard Mr. A.K. Choudhury, learned counsel for the petitioner and Miss. Savitri Ratho, learned Additional Government Advocate. Since pleadings have been exchanged and this is an old case of the year 2009, with the consent of learned counsel for the parties, the matter is being disposed of at the stage of admission.

6. The undisputed fact being that the charge-sheet was submitted by the police on 30.06.1992 in connection with Mahakalapada P.S. Case No.57 of 1992 corresponding to G.R. Case No.558 of 1992 pending in the Court of learned S.D.J.M., Kendrapara naming three persons, such as, Ranjit Samal, son of Raju Samal; Kumar Behera, son of Krutibash Behera; and Tukuna Behera, son of Ekadesi Behera, as accused persons. The O.I.C. Mahakalapada Police Station called the petitioner to the Police Station on four occasions and threatened him to arrest in connection with the said case disclosing that NBW was issued against him. Not only that, the petitioner was also taken to custody, tortured and forwarded to the court of learned S.D.J.M., Kendrapara, even though he was not involved in the alleged crime mentioned in the F.I.R. itself. When the petitioner was produced before the learned S.D.J.M., he moved an application for bail on 04.10.1997, but the learned SDJM, on perusal of the case record, came to the finding that the name of the petitioner did not find place in the charge sheet and his application seeking bail bears no consideration. Subsequently on 16.12.1998, the petitioner was again produced before the learned S.D.J.M., Kendrapara showing him as Tukuna Behera, although actually he is Chittaranjan Behera. To substantiate the same, the petitioner produced his photo identity card, school leaving certificate and admit card of Board Of Secondary Education, Odisha by which learned S.D.J.M., Kendrapara came to a conclusion that the name of the petitioner is Chittaranjan Behera, son of Niranjan Behera, and that the police authority has not been able to prove, by producing any cogent document, that the petitioner is Tukuna Behera, named in the charge-sheet. In this factual backdrop of the case, if the petitioner is not an accused in the aforesaid case, he could not have been harassed by the local police, by impersonating him as Tukuna Behera, and subjected to mental and physical torture, which violates Article 21 of the Constitution of India.

7. In ***Dr. Mehmood Nayyar Azam v. State of Chattisgarh***, 2012 (5) SUPREME 370, the Hon'ble Dipak Misra, J. (as His Lordship then was), in the opening paragraph-2 of the judgment has observed as follows:-

> *"2. Albert Schweitzer, highlighting on Glory of Life, pronounced with conviction and humility, "the reverence of life offers me my fundamental principle on morality". The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands. The reverence of life is insegragably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, 'a brief candle', or 'a hollow bubble'. The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence". When a dent is created in the reputation, humanism is paralysed. There are some megalomaniac officers who conceive the perverse notion that they are the `Law' forgetting that law is the science of what is good and just and, in very nature of things, protective of a civilized society. Reverence for the nobility of a human being has to be the corner stone of a body polity that believes in orderly progress. But, some, the incurable ones, become totally oblivious of the fact that living with dignity has been enshrined in our Constitutional philosophy and it has its ubiquitous presence, and the majesty and sacrosanctity dignity cannot be allowed to be crucified in the name of some kind of police action."*

8. The very expression in paragraph-2 of the aforesaid judgment persuaded this Court to examine the factual matrix of the present case vis-à-vis the law laid down by the apex Court and, as such, the factual matrix clearly indicates that there was deliberate and willful violation of fundamental rights of the petitioner as enshrined under Article 21 of the Constitution of India.

9. Article 5 of the Universal Declaration of Human Rights, 1948 provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". The apex Court, while construing Article 21 of the Constitution of India which guarantees "life or personal liberty", held that it includes right to live with human dignity and it also

includes within itself a guarantee against torture and assault by the State or its functionaries. Similarly, Article 20 (3) of the Constitution of India postulates that a person accused of an offence shall not be compelled to be a witness against himself. It is profitable to refer the judgment of the apex Court in ***D.K. Basu v. State of West Bengal***, AIR 1997 SC 610, in paragraphs-10, 11 and 12 whereof, it has been held thus:

> *"10. "Torture" has not been defined in the Constitution or in other penal laws. "Torture" of a human being by another human being is essentially an instrument to impose the will of the "strong" over the "weak" by suffering. The word torture today has become synonymous with the darker side of human civilization.*
>
> *"Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone, paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."*
>
> *- Adriana P. Bartow*
>
> *11. No violation of any one of the human rights has been the subject of so many Conventions and Declarations as "torture" – all aiming at total banning of it in all forms, but in spite of the commitments made to eliminate torture, the fact remains that torture is more widespread now than ever before. "Custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilization takes a step backward – flag of humanity must on each such occasion fly half- mast.*
>
> *12. In all custodial crimes what is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma, a person experiences is beyond the purview of law."*

Similarly, in ***Joginder Kumar v. State of U.P.,*** (1994) 4 SCC 260, the apex Court held as follows:

> *"The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violations of human rights because of indiscriminate arrests. How are we to strike a balance between the two?*

A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first – the criminal or society, the law violator or the law abider…"

While dealing with various facets of Article 21 of the Constitution of India in **Joginder Kumar** (supra), it has been held that any form of torture or cruel, inhuman or degrading treatment would fall within the ambit of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilized nation can permit that to happen, for a citizen does not shed off his fundamental right to life, the moment a policeman arrests him. The right to life of a citizen cannot put in abeyance on his arrest. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

10. The factual backdrop of the case in hand is that the petitioner was called upon to the police station time and against even though he was not involved in any of the allegations made in the FIR and his name was not found placed in the charge sheet.

11. In ***D.K. Basu*** supra, the apex Court held that custodial torture is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity. In all custodial crimes what is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock up. Whether it is physical assault or rape in police custody, the extent of trauma, a person experiences is beyond the purview of law. The fact that custodial violence occurs and this is not peculiar, it was precisely for this reason, the Universal Declaration of Human Rights in 1948 was quoted. Article 5 of the said declaration makes mention of the fact that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

12. The very action of the police authority is to harass the petitioner. Meaning of "harass" has been explained in Fourth Edition of ***P. Ramanatha Aiyar's*** Advanced Law Lexicon, which reads as follows:-

> *"Injure and injury are words having numerous and comprehensive popular meanings, as well as having a legal import. A line may be drawn between these words and the word "harass" excluding the latter from being comprehended within the word "injure" or "injury". The synonyms of "harass" are: To weary, tire, perplex, distress tease, vex, molest, trouble, disturb. They all have relation to mental annoyance."*

In **Oxford Dictionary of New Words**, the meaning of word "harassment" has been explained, which reads as follows:

> ***"The subjection of a person to aggressive pressure or intimidation through unwanted sexual advances.***

In ***Gatley on Libel and Slander***, 9th Edition, 1998, it states as follows:-

> *"There is no definition of "harassment" but the concept would seem to involve tormenting or intolerably troubling a person by continuing attacks or accusations or by intrusions such as following him about or "watching and besetting" his home.*
>
> *"Harassment" should be interpreted as potentially producing some unreasonably adverse impact on the victim. The conduct should produce more than "worry", "trouble", "discomfort" or "unease", unless perhaps these are experienced to an extreme degree."*

13. Similarly, the meaning of torture has been explained in ***Black Law Dictionary***, 7th Edition, p-1498 that the infliction of intense pain to body or mind to punish; to extract a confession or information, or to obtain sadistic pleasure.

In ***Arvind v. State of Bihar***, AIR 2001 SC 2124, the apex Court held that under British rule torture is universally acknowledged to have been a most unsatisfactory mode or getting the truth, often leading the innocent through weakness to plead guilty to crime they had not committed.

Similarly, in ***D.K. Basu*** supra, the apex Court held that 'torture' is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering.

14. The cumulative meaning of the word 'torture' and 'harassment' as mentioned supra clearly indicates that it brings down the reputation of a man,

who actually not involved in any of the allegations of crime so made. In ***Board of Trustees of the Port of Bombay v. Dilip Kumar Raghavendranath Nadkarni and others***, (1983) 1 SCC 124, it has been held that right to reputation is a facet of right to life of a citizen under Article 21 of the Constitution.

15. Torture in custody flouts the basic rights of the citizens recognized by the Constitution and is an affront to human dignity. In ***State of M.P. v. Shyam Sunder Trivedi***, (1995) 4 SCC 262 and ***D.K. Basu v. State of W.B.,*** (1997) 1 SCC 416, the apex Court held that compensation could be awarded under public law, adjustable against damages awarded in civil suit.

In ***Dr. Mehmood Nayyar Azam*** (supra), the apex Court held that it is the sacrosanct duty of the police authorities to remember that a citizen while in custody is not denuded of his fundamental right under Article 21 of the Constitution. The restrictions imposed have the sanction of law by which his enjoyment of fundamental right is curtailed but his basic human rights are not crippled so that the police officers can treat him in an inhuman manner. On the contrary, they are under obligation to protect his human rights and prevent all forms of atrocities.

16. The apex Court time and again cautioned the police authorities to follow the guidelines in case of arrest and retention in its catena of judgments. In ***Munshi Singh Gautam v. State of M.P***., AIR 2005 SC 402, the apex Court held that powers of the police do not include torturing a person to extract information, be he an accused or a witness. Law enforcers cannot take law into their hands in the name of collecting evidence. It is further held that dehumanizing torture, assault and death in custody which have assumed alarming proportions, raised serious questions about the credibility of the rule of law and administrator of criminal justice system. The diabolic recurrence of police torture results in terrible scare in the minds of common citizens and their lives and liberty are under a new and unwarranted peril because the guardians of law destroy the human rights by custodian violence and torture invariably resulting in death. The vulnerability of human right assumes a traumatic torture when functionaries of the state, whose paramount duty is to protect the citizens and not to commit gruesome offences against them in reality perpetrate them.

17. In ***Ranjitsing Brahmajeeting Sharma v. State of Maharashtra***, AIR 2005 SC 2277, the apex Court held that presumption of innocence in a

human right. The same view has also been taken by the apex Court in ***Narendra Singh v. State of M.P***., AIR 2004 SC 3249.

18. In ***Delhi Judicial Services Association v. State of Gujarat*** (1991) 4 SCC 406 while dealing with the role of police, the apex Court condemned the excessive use of force by the police and observed as follows:

> *"The main objectives of police is to apprehend offenders, to investigate crimes and to prosecute them before the courts and also to prevent commission of crime and above all to ensure law and order to protect citizens' life and property. The law enjoins the police to be scrupulously fair to the offender and the Magistracy is to ensure fair investigation and fair trial to an offender. The purpose and object of Magistracy and police are complementary to each other. It is unfortunate that these objectives have remained unfulfilled even after 40 years of our Constitution. Aberrations of police officers and police excesses in dealing with the law and order situation have been subject of adverse comments from this Court as well as from other courts but it has failed to have any corrective effect on it. The police has power to arrest a person even without obtaining a warrant of arrest from a court. The amplitude of this power casts an obligation on the police and it must bear in mind, as held by this Court that if a person is arrested for a crime, his constitutional and fundamental rights must not be violated."*

19. In ***Rudul Sah v. State of Bihar***, AIR 1983 SC 1086, the apex Court in paragraph-6 of the judgment held as follows:

> "……..The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a Civil Court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violaters in the payment of the monetary compensation. Administrative sclerosis leading to flagrant infringements of

> fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield……..."

Similarly, following ***Rudul Sah*** (supra) in ***Bhim Singh, MLA v. State of J & K and others***, AIR 1986 SC 499, the apex Court held as follows:

> "…….We can only say that the Police Officers acted in a most highhanded way. We do not wish to use stronger words to condemn the authoritarian acts of the police. If the personal liberty of a Member of the Legislative Assembly is to be played with in this fashion, one can only wonder what may happen to lesser mortals; Pollice Officers who are the custodians lf law and order should have the greatest respect for the personal liberty of citizens and should not flout the laws by stooping to such bizarre acts of lawlessness. Custodians of law and order should not become depredators of civil liberties. Their duty is to protect and not to abduct."
>
> "…….We have no doubt that the constitutional rights of Shri Bhim Singh were violated with impunity. Since he is now not in detention, there is no need to make any order to set him at liberty, but suitably and adequately compensated, he must be. That we have the right to award monetary compensation by way of exemplary costs or otherwise is now established by the decisions of this Court in ***Rudul Sah v. State of Bihar***, (1983) 3 SCR 508: (AIR 1983 SC 1086) and ***Sebastian M. Hongray v. Union of India***, AIR 1984 SC 1026. When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation……."

20. In view of the aforesaid law laid down by the apex Court, it is to be considered whether the petitioner is entitled to get any compensation for violation of his fundamental rights under Article 21 of the Constitution of India. Keeping in view the law laid down by the apex Court in ***Rudul Sah*** and ***Bhim Singh*** (supra), this Court awarded compensation in ***Manibhadra Biswal*** (supra) to the tune of Rs.10,000/-. The apex Court in ***Hardeep Singh v. State of M.P***., (2012) 1 SCC 748 awarded compensation of Rs.2,00,000/-,

whereas in the case of ***Dr.Mehmood Nayyar Azam*** (supra), the apex Court awarded a compensation of Rs.5,00,000/-.

21. Applying the law laid down by the apex Court to the present case, there is no iota of doubt that the petitioner had undergone mental torture at the hands of insensible police officer. The very conduct of the police authority has destroyed the brightness and willpower of the petitioner. The inhuman treatment can be well visualized when the petitioner was scot free by the order passed by learned S.D.J.M., Kendrapara, but the mental torture harassment, humiliation and as such the mental agony already suffered by the petitioner cannot be determined in terms of money. In order to restore the human dignity of the petitioner, this Court is of the considered view that a sum of Rs.2,00,000/- (two lakhs) should be granted towards compensation to be paid by the State within a period of three months, which will be realized from the erring officers in equal proportion from their salary as thought appropriate by the competent authority of the State.

22. In the result, the writ petition (criminal) is allowed, but there shall be no order as to cost.

Writ petition allowed.

2018 (I) ILR - CUT- 335

BISWANATH RATH, J.

C.M.P. NO. 713 OF 2017

NABA KUMAR SHAW …….. Petitioner

.Vrs.

SISIR KUMAR PAL ……..Opp.Party

CIVIL PROCEDURE CODE, 1908 – O-12, R-6
r/w Section 96(3) C.P.C.

Whether judgment on admission can be held to be a compromise decree so as to be excluded from the purview of appeal U/s. 96 (3) of C.P.C. ? – Held, No.

Judgment and decree involving an application under Order 12, Rule 6 C.P.C. amounts to decree but it cannot be treated as a compromise decree – Held, the petitioner having clear remedy of

appeal, the CMP filed by him under Article 227 of the Constitution of India is not maintainable. (Paras 6,7,8)

Case Law Referred to : -

1. AIR 1976 SC 2446 : Miss Maneck Custodji Surjarji -V- Sarafazali Nawabali Mirza

For Petitioner : M/s.B.Baug, M.Baug, R.R.Jethi, P.C.P.Das & G.R.Sahoo

For Opp.Party : Mr. A.B.Lenka, B.K.Swain & B.Patnayak

Date of hearing : 06.09. 2017
Date of Judgment: 09.10.2017

JUDGMENT

BISWANATH RATH, J.

This Civil Miscellaneous Petition involves the impugned order dated 11.4.2017 passed by the learned Civil Judge, (Senior Division), First Court, Cuttack vide Annexure-3 involving Civil Suit No.324 of 2016, an outcome involving consideration of a petition under Order 12, Rule 6 of the Code of Civil Procedure filed by the defendant.

2. Short background involves in the case is that the opposite party as plaintiff filed suit seeking partition of the suit schedule land with a case that the plaintiff as well as the defendant acquired the suit land jointly through a common sale deed and after purchase both of them have mutated their names before the Revenue Authority following which mutation record-of-right of Khata No.861 was prepared in their names involving an area of Ac.0.092 decimals. Plaintiff further pleaded that after purchase of the land, the plaintiff constructed his pucca residential house on its western side and residing therein whereas the defendant is in possession on the eastern side stated to have been lying vacant. Plaintiff has also a case that there is a common passage left on the southern portion of the suit land which runs in east-west direction having six feet in breadth. It is only when dissension arose among the parties, the plaintiff was constrained to seek partition on mutual understanding but on refusal by the defendant, the plaintiff came up with the suit. The defendant after appearance on admission of the fact that both the plaintiff and defendant have equal share over the suit land while remaining silent on the possession and construction part, pleaded in the plaint at the same time presented his written statement followed by a petition under Order 12, Rule 6 of the Code of Civil Procedure.

In the first round of litigation when the application under Order 12, Rule 6 of the Code of Civil Procedure at the instance of the defendant stood rejected by order dated 20.9.2016 by the trial court, the petitioner-defendant preferred C.R.P.No. 29 of 2016 before this Court and on adjudication of the C.R.P.No.29 of 2016 this Court directed as follows:

> "From the reading of the prayer made in the plaint and the admission of the defendant in paragraph No.3 of the written statement, this Court finds, the admission of the defendant remains unambiguous and there was no difficulty in allowing the application under Order-12 Rule 6 of the C.P.C.
>
> Under the circumstances, this Court finds the findings of the trial court in the impugned order rejecting the application under Order 12, Rule 6 of C.P.C. is not sustainable in the eye of law and consequently while interfering in the impugned order, this Court sets aside the same and remits the matter back to the Civil Judge (Sr.Division), 1st Court, Cuttack for re-adjudication of the application under Order 12, Rule 6 of the C.P.C. afresh."

3. On remand of the matter by this Court, the petition under Order 12, Rule 6 of the code of Civil Procedure was taken up afresh and disposed of vide the impugned order thereby disposing the suit with a preliminary decree against the defendant but without cost further declaring the plaintiff and defendant have got ½ share over the suit schedule property. The parties were also directed to effect partition amicably amongst them within a period of two months hence, failing which they or either of them may approach the court to get their lands separately allotted to them in accordance with the defined shares. Being aggrieved by the above order, defendant preferred this Civil Miscellaneous Petition.

4. In assailing the impugned order challenging the particular portion of the impugned order directing while effecting partition, the Commissioner was directed to give respect to the possession of the parties to the suit land, Sri B.Baug, learned counsel appearing for the petitioner contended that while passing such decree, the trial court should have taken into consideration that possession of one party over the suit land ennures to the benefit of other co-sharer/joint purchaser and the trial court has also further to deal with the stand of the defendant that by the time of purchase of the disputed land, there existed a double storied building and there has been clandestine suppression of this aspect by the plaintiff in the plaint. It is also contended that in the

event the trial court's direction is accepted, there may not be partition of the whole property equally amongst the parties. It is under the above circumstances, Sri Baug, learned counsel contended that while decreeing the suit, the trial court should not have given any a attachment on the possession of the party over the suit land. Taking recourse to restrictions under Section 96(3) of the Code of Civil Procedure, Sri Baug further contended that there being no scope for appeal against the impugned decree, the petitioner is constrained to take resort to Article 227 of the Constitution of India involving the above Civil Miscellaneous Petition.

5. To its opposition, Sri A.B.Lenka, learned counsel appearing for the plaintiff-opposite party at the threshold challenged the maintainability of the Civil Miscellaneous Petition being an application under Article 227 of the Constitution of India under the pretext of availability of a clear statutory appeal remedy against the impugned order. Referring to the provisions under Order 12, Rule 6 of the Code of Civil Procedure, Sri Lenka, learned counsel further contended that for the nature of the petition and for involvement of a decree, no Civil Miscellaneous petition under Article 227 of the Constitution of India is maintainable and thus, prayed for rejection of the Civil Miscellaneous Petition on the ground of maintainability.

Considering the involvement of a challenge to the maintainability of the Civil Miscellaneous Petition, this Court, therefore, proceeds to decide the maintainability aspect at the first instance.

Provision under Order 12, Rule 6 of the Code of Civil Procedure reads as follows:

> **6. Judgment on admissions.-** (1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the court may at any stage of the suit, either on the application of an party or of its own motion and without waiting for the determination of any other question between the parties, make such Order or give such judgment as It may think fit, having regard to such admissions.
>
> (2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced.

Provision under Section 96 (3) of the Code of Civil Procedure dealing with appeals from original decree restricts appeal from a decree passed by the court with the consent of parties.

Now a bare reading of the provision under Order 12, Rule 6 of the Code of Civil Procedure, it appears the word "at any stage" used in the aforesaid rule points out either on the application of any party or on its own motion and without waiting for determination of any other question between the parties, a court can give such judgment as it may think fit having regard to the admission of facts. Further, since the judgment under this provision is followed by a decree bearing the date on which the judgment is pronounced, the judgment involving an application under Order 12, Rule 6 of the Code of Civil Procedure amounts to decree.The words "decree" and "judgment" have been well defined under Sections 2 (2) and 2 (9) of the Code of Civil Procedure. Looking to the nature of the provision under Order 12, Rule 6 of the Code of Civil Procedure and the decree being dependant on the context of the petition under Order 12, Rule 6 of the Code of Civil Procedure, though there is no objection to such decree by the plaintiff yet, such decree under no circumstance can be held to be a compromise decree so as to be excluded from the purview of appeal following the provisions at Section 96 (3) of the Code of Civil Procedure. It be made here clear that Section 96(3) only excludes the compromise decree from the purview of appeal.

6. For the observations made hereinabove, particularly, holding that the judgment and decree involving an application under Order 12, Rule 6 of the Code of Civil Procedure cannot be treated as a compromise decree, this Court observes the petitioner has a clear remedy of appeal for adjudication of the point raised herein and such adjudication is not available to be considered by this Court in exercise of extraordinary jurisdiction under Article 227 of the Constitution of India. In deciding a case as to if a petition under Article 227 of the Constitution of India is maintainable for availability of statutory appeal remedy, the Hon'ble Apex Court in the case of ***Miss Maneck Custodji Surjarji v. Sarafazali Nawabali Mirza, AIR 1976 SC 2446***, in paragraph-6 of the said judgment held as follows:

> "**6.**It is very difficult to appreciate the reasoning behind the order made by the High Court. It is to say the least an extraordinary order which flies in the face of law and judicial procedure. The respondent had clearly a legal remedy available to him by way of an appeal against the decree of the City Civil Court and this remedy was not only adequate but more comprehensive than the one under Art. 227 of the Constitution. Even so, for some inexplicable reasons, the respondent chose to prefer a Special Civil Application under Art.227 of the Constitution and Vaidya J., entertained the Special Civil Application and granted relief to the respondent casting to the winds the well-settled principle that the High Court does not ordinarily, in

exercise of its discretion, entertain a special civil application under Art. 227 of the Constitution where an adequate alternative legal remedy is available to the applicant. It is true that this principle is not rigid and inflexible and there can be extraordinary circumstances where despite the existence of an alternative legal remedy, the High Court may interfere in favour of an applicant, but this was certainly not one of such extraordinary cases. It is indeed difficult to see how the learned Judge could entertain a Special Civil Application against a decree passed by a subordinate court when the procedural law allows an appeal against it and that appeal lies to the High Court itself. It must be realized that the jurisdiction under Art. 227 of the Constitution is an extraordinary jurisdiction which is to be exercised sparingly and in appropriate cases and it is not to be exercised as if it were an appellate jurisdiction or as if it gave unfettered and unrestricted power to the High Court to do whatever it liked. That apart, it is interesting to note that the order passed by the learned Judge was not an interlocutory order but a final order disposing of the special civil application and by that order the learned Judge did not set aside the decree passed by the City Civil Court, but merely directed stay of its execution pending the disposal of the Small Cause Court suit. It defies one's comprehension as to how such an order could be made by the learned Judge. It is also difficult to see how the learned Judge could give a direction that the decision of the City Civil Court on the issue whether the respondent was a paying guest would not bind the parties in the adjudication of the Small Cause Court suit. The question whether the parties in the Small Cause Court suit would be bound by the decision of the City Civil Court would be a question which would arise for determination in the Small Cause Court suit and the Small Cause Court would have to determine it in deciding the suit before it. If the decision of the Small Cause Court is erroneous, the aggrieved party would have a right to file an appeal against it and the appellate court would then consider this question and adjudicate upon it. But we fail to understand how the learned Judge could, without any decision having been given by the Small Cause Court and such decision having been brought up before him in appeal or revision, enter upon a consideration of this question and pronounce upon it. The order passed by the learned Judge was clearly erroneous and it must be quashed and set aside and the Special Civil Application must be dismissed. We may make it clear that whenever the Small Cause Court hears the suit it will not take into account any observations made by the learned Judge in the impugned judgment in regard to the question whether the decision of the Civil Court is binding or not and it will proceed to decide the suit before it in the light of what it considers to be the correct legal position."

7. For the observations made by this Court herein above and for the finding that there appears a clear statutory appeal remedy available to the

petitioner, no order involving Order 12, Rule 6 of the code of Civil Procedure can be agitated by way of an application under Article 227 of the Constitution of India.

8. Accordingly, this Court while holding that the present Civil Miscellaneous Petition is wholly not maintainable, but, considering that the petitioner has a statutory appeal remedy, for the petitioner's moving this Court under bonafide impression, this Court directs the petitioner to take resort to the remedy of statutory appeal agitating the issue raised in this Civil Miscellaneous petition.

9. In the result, the Civil Miscellaneous Petition stands dismissed, but, however, with the permission to the petitioner to approach the appellate forum as against the impugned order and if any such appeal is filed within two weeks hence, the same shall be disposed of in accordance with law. No order as to cost.

Petition dismissed.

2018 (I) ILR - CUT- 341

BISWANATH RATH, J.

W.P.(C) NO. 9664 OF 2012
WITH
W.P.(C) NO. 16433 OF 2015

MADHUMITA DAS .....Petitioner

.Vrs.

THE COLLECTOR, KHURDA & ORS. .....Opp. Parties

SERVICE LAW – Petitioner born in a Brahmin family and married to a Schedule Caste boy – After marriage she obtained Scheduled Caste Certificate in her favour and got a job in a duly constituted recruitment process – Departmental proceeding initiated against her for obtaining Caste Certificate by applying fraud and misrepresentation and she was dismissed from service – Hence the writ petition.

This Court considering the conduct of the petitioner, that she has not obtained the Caste Certificate by dishonest or fabricated manner but under mistaken impression, set aside the order of dismissal and directed for consideration of her case for continuance in the post as she was holding at the time of dismissal, if the said post is

still laying vacant – However, in the event the said post is not lying vacant, then to consider her absorption in the said post or a parallel post provided she has not attended the age of superannuation – It is also made clear that in the event, the petitioner is re-instated in future, she will not be entitled to any future promotion or benefit.

(Para 12)

Case Laws Referred to : -

1. AIR 1995 SC 94 : Kumari Madhuri Patil and another -V- Additional Commissioner Tribal Development & Ors.
2. 2017 (II) OLR 991 : Shri Harisankar Prasad Ram -V- State of Odisha & Ors.
3. 2012) 8 SCC 430 : Kavita Solunke –V- State of Maharashtra & Ors.
4. AIR 1996 S.C. 1011 : Mrs. Valsamma Paul -V- Cochin University & Ors.
5. AIR 2006 S.C. page-1177 : Anjan Kumar –V- Union of India & Ors.
6. (2012) 8 SCC 430 : Kavita Solunke –V- State of Maharashtra & Ors.

For Petitioner : M/s.U.C.Mishra, A.Mishra, B.P.Chhualsingh, D.R.Sen, A.Bal & S.P.Das

For Opp.Parties: Addl. Standing Counsel
M/s. Dayananda Mohapatra, M.Mohapatra, G.R.Mohapoatra & A.Dash

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Date of hearing : 8. 01. 2018
Date of Judgment : 25.01.2018

JUDGMMENT

BISWANATH RATH, J.

W.P.(C) No.9664 of 2012 has been filed by the petitioner challenging the impugned orders passed by the opposite party no.1 therein vide Annexures-11 & opposite party no.3 vide Annexure-7 seeking further declaration that the proceeding initiated against the petitioner vide Annexure-8 and the dismissal order of the petitioner vide Annexure-12 based on the Tahasildar's order vide Annexure-7 as illegal and void.

2. Similarly, W.P.(C) No.16433 of 2015 is filed by the very same petitioner to quash the subsequent proceeding initiated against the petitioner involving an allegation on her caste status by the opposite party no.2 and in the alternative if the proceeding found to be maintainable, the opposite party no.2 be directed to allow the petitioner represented / assisted by a lawyer of her choice by allowing her application vide Annexure-10.

3. Short background involved in the case is that on the application of the petitioner for grant of a caste certificate to the then Tahasildar, Bhubaneswar, the Tahasildar initiating a proceeding under the Miscellaneous Certificate Rules bearing Misc. Case No.7 of 1996 after conducting due enquiry and involving a report of the R.I. issued a caste certificate in favour of the petitioner recording her caste as Scheduled Caste and sub caste as 'Dewar' on 5.1.1996 appearing at Annexure-1. Petitioner applied for a job in the B.D.A. taking help of the caste certificate and being selected in a duly constituted recruitment process joined as Junior Assistant on 17.10.1998. While the petitioner was continuing as such, it is alleged by the petitioner that involving some misbehavior and ill comments relating to caste and gender by the Vice Chairman, Bhubaneswar Development Authority (hereinafter in short called as V.C., B.D.A.) on 27.3.2011 the petitioner lodged F.I.R. against the V.C., B.D.A. in Mahila P.S. at Bhubaneswar which was registered as Mahila P.S. Case No.133 dated 29.7.2011. It is alleged that the V.C., B.D.A. misutilizing his official position and power with an intention to take revenge wrote a letter to the Sub-Collector, Bhubaneswar in W.P.(C) No.9664 of 2012 for having an investigation regarding caste certificate of the petitioner. Based on the direction of the Sub-Collector, the Tahasildar opposite party no.3 initiated Rev. Misc. Case no.47 of 2011 against the petitioner and issued notice to the petitioner on 5.8.2011 asking the petitioner to appear on 12.8.2011 and show cause on the allegations against her. Petitioner in order to strengthen her show cause applied for copies of relevant orders and documents. Petitioner was denied with such opportunity on the other hand, the Tahasildar fixed the case to 16.8.2011 for filing of the show cause. Under constrained on 16.8.2011 the petitioner filed her show cause denying all the allegations and further took the stand that the Tahasildar has no authority to review its earlier order rather following the Rule 9 of the Orissa Caste Certificate Rules 1980 hereinafter in short called as Rules 1980 a person is required to move the Collector involving any such issue. It is alleged that the Tahasildar, Bhubaneswar without considering the submissions of the petitioner passed an order on 16.8.2011 rejecting the caste certificate issued in favour of the petitioner appearing at Annexure-7. It is further alleged that basing on the order of the Tahasildar, the V.C., B.D.A. initiated a departmental proceeding against the petitioner to remove her from service and for realization of her entire salary, she has received since the date of her joining till date of such order. Petitioner at this juncture filed a writ petition bearing W.P.(C) No. 23511 of 2011. This High Court entertaining the writ petition stayed the impugned order directing for no coercive action against the petitioner till

disposal of the writ petition. On 1.11.2011 this High Court disposing the writ petition observed that since the petitioner has the provisions for appeal involving the impugned order to the Collector permitted the petitioner to file an appeal. The petitioner, accordingly, preferred appeal before the Collector and the Collector finally dismissed the appeal vide its order vide Annexure-11.

In the meantime, the petitioner has been removed from her service by order dated 3.3.2012 as appearing at Annexure-12.

4. Assailing all these orders passed by the two independent authorities, one under the Orissa Caste Certificate Rules, 1980 being registered as Rev. Misc. Case No.47 of 2011 went up to appeal involving the orders at Annexures-7 & 11 and, the other a proceeding at the instance of the employer appearing at Annexure-12 involving dismissal of the petitioner from her service, also with a direction to recover all the amounts involved towards her salary and perks during her service in B.D.A. The petitioner moved W.P.(C) No.9644 of 2012.

Assailing the aforesaid orders, Shri A. Mishra, learned counsel for the petitioner contended that the petitioner was granted a caste certificate showing her to be belonging to scheduled caste by the Tahasildar. The competent authority initiated a duly constituted Misc. Case No.7/96. The caste certificate vide Annexure-1 was granted following due procedures and after entering into necessary enquiry, thus, the petitioner contended that there is no question of petitioner's playing any fraud or obtaining the caste certificate by misleading or under misrepresentation of facts. Shri Mishra, also contended that the petitioner's case was considered for employment by the B.D.A. being a sponsored candidate by the employment exchange, there was no problem with the certificate of the petitioner until and unless a rift arose between the V.C., B.D.A and the petitioner involving the alleged misbehavior to the petitioner. He further contended that for the decision of the Hon'ble Apex Court in the case of ***Kumari Madhuri Patil and another*** *versus* ***Additional Commissioner Tribal Development and others*** as reported in **AIR 1995 SC 94,** the case of the petitioner instead of being disposed by the Tahasildar should have been referred to the State Level Scrutiny Committee. Petitioner thus alleged that the initiation of the proceeding by the Tahasildar is contrary to the decision of the Hon'ble Apex Court involving **AIR 1995 SC 94**. While assailing the order of the B.D.A. in the matter of termination of the petitioner from her services, the petitioner alleged that since there was a rift between the petitioner and the V.C., B.D.A. involving

the misbehavior of the V.C. to the petitioner in all fairness the departmental proceeding should have been kept away from the V.C. Further, taking aid of the decisions of the Hon'ble Apex Court in **AIR 1995 SC 94** and the other decision in the case of ***Shri Harisankar Prasad Ram*** *Versus* ***State of Odisha and others*** as reported in **2017 (II) OLR 991** a decision of the Hon'ble Apex Court in the case of ***Shalini*** *versus* ***New English High School Assn. & others*** involving Civil Appeal No.10997 of 2013 decided on 12.12.2013 and in the case of ***Kavita Solunke*** *versus* ***State of Maharashtra and others*** as reported in **(2012) 8 Supreme Court Cases 430** Shri Mishra, contended that for the decisions of this Court as well as of the Hon'ble Apex Court, referred to hereinabove, the position involving such matters has been settled to the extent restraining any action against the delinquent or the person involved in the event there is no dishonest intention and use of fabricated materials in obtaining such certificates.

Shri Mishra, thus claimed that the petitioner's case is squarely covered by the above decisions and consequently, the order of dismissal and the direction for recovery of entire salary and perks involved therein should be interfered with and set-aside.

5. In filing another writ petition vide W.P.(C) No.16433 of 2012 learned counsel for the petitioner for the aforesaid developments contended that a proceeding having already been initiated to check the genuineness in the caste certificate granted in favour of the petitioner and the proceeding having ended with some outcome up to the level of appellate authority, there was no question of initiation of a proceeding by the State Level Scrutiny Committee appearing at Annexure-11 and Shri Mishra, learned counsel for the petitioner thus contended that for all the above developments, the notice vide Annexure-11 should be interfered with and quashed.

6. In his opposition Shri D. Mohapatra, learned counsel for the Bhubaneswar Development Authority (B.D.A.) taking this Court to the discussions involved in the order passed by the Tahasildar vide Annexure-7 and also the order passed by the Collector in disposal of the appeal at Annexure-7 contended that there has been a threadbare consideration of the case of the petitioner on the illegal issuance of a caste certificate and for the detail discussions made therein and the findings therein, Shri Mohapatra submitted that there is absolutely no infirmity in either of the orders passed by the Tahasildar or the Collector appearing at Annexure-7 & Annexure-11. Further, the initiation of the departmental proceeding and the

final outcome resulting dismissal of the petitioner as well as recovery of entire salary involved and the perks becomes a natural fall out and dependent on the outcome of the Annexure-7 and Annexure-11 leaving no scope for this Court for interfering in the same.

7. Learned State Counsel supporting the stand taken by Shri Mohapatra so far it relates to challenge of the orders vide Annexures-7 & 8, submitted that for the concurrent finding of fact by both the authorities arriving with one conclusion that there has been grant of illegal caste certificate in favour of the petitioner, both the orders do not stand to any scrutiny any further.

8. Considering the rival contentions of the parties, this Court finds, the factual matrix involved here is, the petitioner is a lady candidate taking aid of the caste certificate in favour of her by the then competent authority applied for a post in the B.D.A. Finding her suitable, she was appointed as a Junior Assistant in the B.D.A. The proceeding initiated involving examination of the genuineness of the caste certificate granted in her favour is based on a complaint of the employer regarding the genuineness of the caste certificate involving the petitioner. It is at this stage of the matter, taking into consideration the provisions contained in the Orissa Caste Certificate (Scheduled Caste and Scheduled Tribe) Rules, 1980 (hereinafter in short called as the Rules, 1980), this Court finds, the Rules, 1980 has scope for grant of caste certificate by the competent authority includes Revenue Officer not below the rank of Tahasildar / Additional Tahasildar. Under Rule 4 therein provides a verification before the grant of caste certificate. Rule 8 prescribes for issue of caste certificates. Rule 8 Sub Rule 5 makes the provision for penalizing the Officer for issuing wrong caste certificate carelessly and deliberately without proper investigation. Similarly Rule 9 therein prescribes any person aggrieved by an order passed by a competent authority subordinate to that of District Magistrate/Collector may prefer appeal before the District Magistrate/Collector concerned and to the concerned R.D.C. where the order is passed but however, within a period of thirty days of passing of such orders and the order passed by the appellate authority shall remain final. Looking to the factual background involved herein, this Court finds, the caste certificate involving Annexure-1 was issued in favour of the petitioner by the Tahasildar following the provisions at Sub Rule 5 of Rule 6 of the Rules 1980 basing on an enquiry and depending on the materials support supporting the claim of the petitioner. Rule 8 (2) makes provision for enquiring the allegations involving the genuineness in the case

the service authorizing the competent authority who issued the caste certificate shall have the right to cancel the same and pass orders for revocation of the benefits that might have acquired by the person concerned. It is at this stage, this Court finds, raising the doubt on the caste certificate in favour of the petitioner vide Annexure-2, the B.D.A. made a complaint to the Sub-Collector, Bhubaneswar to enquire into the genuineness of the caste certificate indicating the reasons therein and it appears, the complain to the Sub-Collector vide Annexure-2 was made on 2nd of August, 2011. Basing on this complaint, a Misc. Case was registered as Rev. Misc. Case No.47/11 involving the Misc. Case No.7/96 purported to be under Rule 8(2) of Orissa Caste Certificate Rules, 1980. On being noticed the petitioner filed her objection and considering her objection the competent authority i.e. the Tahasildar, Bhubaneswar in disposal of the Rev. Misc. Case No.47/11 while holding that the proceeding before him is maintainable following the provisions at Sub-Rule 2 of Rule 8 of Rules, 1980, recorded the admission of the petitioner that she was 'Brahim' by caste at the time of her birth and she having married to one Scheduled Caste person claimed to be belonging to the Scheduled Caste category. The Tahasildar after taking into consideration the decision of the Hon'ble Apex Court in the case of ***Mrs. Valsamma Paul*** *versus* ***Cochin University and others*** as reported in **AIR 1996 S.C. 1011** and in another decision in the case of ***Anjan Kumar*** *versus* ***Union of India and others*** as reported in **AIR 2006 S.C. page-1177** further, taking into consideration the Government of India in the Ministry of Home Affairs in their directives vide Letter No.35/1/72-RV (ACT-V) dated 2nd May, 1975 where the Government has circulated that no person, who was not a Scheduled Caste or a Scheduled Tribe by birth, will be deemed to be a member of the Scheduled Caste or Scheduled Tribe merely because he or she had married a person belonging to a Scheduled Caste or a Scheduled Tribe, further after coming to hold that since the husband of the petitioner belonging to 'Kaibarta' by caste, it appears, under no circumstance, the wife could become 'Dewar' by caste. The Tahasildar thus observed that the petitioner has obtained the caste certificate by misleading the authority. This view of the Tahasildar has been affirmed by the Collector in his order in the Appeal at Annexure-11. For the concurrent finding of fact and for the concurrent material establishing that the petitioner was ' Brahmin' that too for her own admission and for the settled position of Law on this score by the Hon'ble Apex Court, this Court, therefore, observes, under no circumstance, the petitioner could have been granted a caste certificate. However, considering that the Tahasildar being a responsible officer having granted the caste

certificate in favour of the petitioner after required enquiry and materials produced by the petitioner at the relevant point of time, the petitioner cannot be held to be obtaining the caste certificate applying fraud or misrepresentation of facts and it may be a case of mistaken consideration of the claim of the petitioner and based on improper conducting of inquiry, for which no responsibility can be attributed to the petitioner. Further, there is also no finding by either of the competent authorities on the misrepresentation of facts at the time of initial issuance of the caste certificate. It may thus be a case of grant of caste certificate under mistaken consideration of the case of the petitioner.

9. For the aforesaid observation, there is no illegality involving the orders vide Annexures-7 & 11 and accordingly, this Court refuses to interfere in the same.

10. For the refusal of interference in the order vide Annexure-7, this Court now proceeds to find out the validity of the dismissal of the order at Annexure-12 and initiation of the proceeding involved therein vide Annexure-8. For the holding of this Court in the above paragraphs, there is no illegality or infirmity in the order vide Annexure-7 being passed on 16.8.2011, this Court finds, there is no illegality in the initiation of the disciplinary proceeding by the employer basing on the findings and the declaration vide Annexure-7. Therefore, there is no scope for interfering in the initiation of the proceeding vide Annexure-8. For the established allegation vide Annexures-7 & 11, this Court also finds, the employer justified in holding a disciplinary proceeding involving the petitioner but for the orders therein ending with the direction for dismissal of the petitioner and recovery of entire entitlements of the petitioner in the meantime and also the perks involving her, this Court is now inclined to examine the decision relied on by the petitioners and going through the decisions in the case of ***Kavita Solunke*** *versus* ***State of Maharashtra and others*** as reported in **(2012) 8 Supreme Court Cases 430**, this Court finds, in paragraph nos.20 to 23, the Hon'ble Apex Court has observed as follows:

> "**20.** The decision of this Court in *State of Maharashtra* v. *Sanjay K. Nimje* relied upon by the learned counsel for the respondents was distinguished even by V.S. Sirpukar, J. in *Vilas case*. The distinction is primarily in terms whether the candidates seeking appointment or admission is found guilty of a conduct that would disentitle him/her from claiming any relief under the extraordinary powers of the Court. This Court found that if a person secures appointment or admission on the basis of

false certificate, he cannot retain the said benefit obtained by him/her. The courts will refuse to exercise their discretionary jurisdiction depending upon the facts and circumstances of each case.

21. The following passage from the decision in *Nimje case* is apposite: (SCC p. 487, para 18)

"*18.* …. In a situation of this nature, whether the Court will refuse to exercise its discretionary jurisdiction under Article 136 of the Constitution of India or not would depend upon the facts and circumstances of each case. This aspect of the matter has been considered recently by this Court in *Sandeep Subhash Parate* v. *State of Maharashtra.*

22. Applying the above to the case at hand we do not see any reason to hold that the appellant had fabricated or falsified the particulars of being a Scheduled Tribe only with a view to obtain an undeserved benefit in the matter of appointment as a teacher. There is, therefore, no reason why the benefit of protection against ouster should not be extended to her subject to the usual condition that the appellant shall not be ousted from service and shall be reinstated if already ousted, but she would not be entitled to any further benefit on the basis of the certificate which she has obtained and which was 10 years after its issue cancelled by the Scrutiny Committee.

23. In the result, we allow this appeal, set aside the order passed by the High Court and direct the reinstatement of the appellant in service subject to the condition mentioned above. We further direct that for the period the appellant has not served the institution which happens to be an aided school she shall not be entitled to claim any salary/back wages. She will, however, be entitled to continuity of service for all other intents and purposes. The respondent shall do the needful within a month from the date of this order. The parties are left to bear their own costs.*"*

11. Similarly, going through the decision vide ***Shalini*** *versus* ***New English High School Assn. & others*** involving Civil Appeal No.10997 of 2013 decided on 12.12.2013 this Court finds, in a similar situation, the observation made in sub-paragraph no.4 of paragraph no.7 reads as follows:

"In essence, the Section cancels with pre-emptive effect any benefit that may have been derived by a person based on a false caste certificate. Whilst Caste Certificate has been defined in Section 2(a) of the 2000 Act, False Caste Certificate has not been dealt with in the Definitions clause. There is always an element of deceitfulness, in order to derive unfair or undeserved benefit whenever a false statement or representation or stand is adopted by the person concerned. An innocent statement which later transpires to be incorrect may be seen as false in general sense would normally not attract

> punitive or detrimental consequences on the person making it, as it is one made by error. An untruth coupled with a dishonest intent however requires legal retribution."

In the above case, considering that there was no fraud or misleading of facts adopted in the matter of obtaining of caste certificate, the Hon'ble Apex Court in paragraph no.10 directed that in the event, the post falls vacant before the appellant reaches the age of retirement or superannuation, she shall be reappointed to the post but with no further promotion as a scheduled tribe candidate. This Court in earlier occasion in deciding a case in similar situation as reported in **2017 (2) OLR 991** considering the continuance of the petitioner in service on the basis of such wrong certificates preventing the petitioner from getting any future benefit, permitted for continuance of the petitioner in the service but however, without any future promotion or benefits.

12. For the observation of this Court that the petitioner has not obtained the caste certificate in dishonest or fabricated manner, but for the grant of the certificate in favour of the petitioner under mistaken impression and considering that there is no stay order permitting the continuance of the petitioner in her employment pursuant to the order of termination vide Annexure-12 involving W.P.(C) No.9664 of 2012, while interfering with the order vide Annexure-12 therein, this Court sets aside the same and directs for consideration of the case of the petitioner regarding her continuance in the post as she was holding at the time of dismissal order, in the event, the same is still laying vacant and in the event, the said post is not laying vacant for the selection of a fresh candidate in the meantime, then consider her absorption in the said post or a parallel post immediately on vacation of the post by the incumbent further provided she has not attended the age of superannuation. This Court makes it clear that in the event, the petitioner is reinstated in future, she will be disentitled to any future promotion or benefit.

13. Now coming to take a decision on W.P.(C) No.16433 of 2015 for the observations of this Court made hereinabove holding the proceedings initiated by the Tahasildar and the appeal involved in Annexure-7 and Annexure-11 maintainable in the eye of law, answering the dispute involving in W.P.(C) No.16433 of 2015, this Court declares the further initiation of the proceeding vide Annexure-11 in the above writ petition becomes bad and set aside the same.

14. Both the writ petitions succeed to the extent indicated hereinabove, but however, there is no order as to cost. Writ petitions allowed.

2018 (I) ILR - CUT- 351

BISWANATH RATH, J.

W.P.(C) NO. 14792 OF 2004

KALPATARU SENAPATI ……..Petitioner

.Vrs.

ODISHA GRAMYA BANK & ORS. ……..Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART. 311(2)

Disciplinary proceeding – Dismissal from service – Appellate Authority confirmed the order – Hence the writ petition.

In this case it is alleged that the Departmental Authority and Enquiry Officer changed for four times and the Presenting Officer changed for five times – The delinquent was not supplied relevant documents on the ground of being available in police custody – No opportunity to examine his own witnesses – Though the delinquent requested to defer the enquiry on account of his illness the Enquiry Officer allowed the Presenting Officer to prove the case of the Management and abruptly concluded the enquiry exparte – There is no counter denying all these allegations even though the writ petition is pending for more than 13 years – Gross-violation of the principles of natural justice – The manner of closing of the disciplinary proceeding is bad – Held, the impugned report of the Enquiry Officer, orders passed by the Disciplinary Authority as well as the Appellate Authority are set aside – However, considering the serious nature of allegations against the petitioner, this Court remands this matter to re-start the Enquiry Proceeding and to conclude the disciplinary proceeding within six months – The status of the petitioner shall be relegated back to the stage as on 23.06.2003 on which date he was set-exparte and his reinstatement is solely for the purpose of completing the departmental proceeding. (Paras 10,11,12)

Case Law Relied on : -

1. 1994 Supp.(2) SCC 641 : Ravi S.Naik -V- Union of India & Ors.

Case Laws Referred to : -

1 AIR 1974 S.C 396 : Qudrat Ullah vrs. Municipal Board, Bareilly.
2. AIR 1961 S.C. 1623: State of Madhya Pradesh vrs. Chintaman Sadashiva Waishampayan.
3. 108 (2009) CLT 304 : Duryodhan Lenka vrs. Chairman of Board of Directors, Kalinga Gramya Bank, Cuttack & Ors.

4. (1996) 3 SCC 364 : State Bank of Patiala and others vrs. S.K. Sharma.
5. (2007) 7 SCC 236 : Bank of India & Others vrs. T. Jogram.
6. (2010) 5 SCC 349 : Union of India & Others vrs. Alok Kumar.
7. (2010) 3 SCC 556 : Sarva Uttar Pradesh Gramin Bank vrs. Manoj Kumar Sinha.
8. (2011) 2 SCC 316 : S.B.I. and Others vrs. Bidyut Kumar Mitra & Others.
9. (2009) 13 SCC 469 : Union of India and others vrs. G. Annadurai.
10. (1993) 4 SCC 727 : Managing Director, ECIL, Hyderabad, etc. vrs. B. Karanakar etc.
11. (2002) 10 SCC 293 : Hiran Mayee Bhattacharya vrs. Secretary, S.M. School for Girls & others.
12. AIR 2005 SC 3272 : State Bank of India and another vrs. Bela Baghchi & Ors.
13. 2006 (7) SCC 212 : State Bank of India vrs. Ramesh Dinakar Pande.
14. AIR 2006 SC 3522 : Chairman-cum-M.D., TNCS Corporation Ltd. and Ors. vrs. K. Meerabai.
15. AIR 2003 SC 1462 : Regional Manager, DPRTC vrs. Moti Lal.
16. 1995 (6) SCC 749 : B.C. Chaturbedi vrs. Union of India and others.

For Petitioner : M/s. Bijan Ray, Sr. Adv., D.K.Das, S.M.Singh, S.K.Roy & K.Nayak

For Opp.Parties: M/s. Manoj Ku. Mishra, Sr.Adv., P.K.Das, D.K.Pattnaik, S.K.Pradhn, S.Senapati, A.K.Nayak, L.Mishra, D.Mishra, B.K.Mishra, B.B.Mohanty, P.K.Nanda & Jagajit Panda

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Date of hearing : 21.12.2017
Date of Judgment : 19.01.2018

JUDGMENT

BISWANATH RATH, J.

This writ petition involves challenge to the orders involving Annexures-2, 5, 7 and 9 and further for a direction to the opposite parties to reinstate the petitioner in service and to treat the period of his suspension and the entire period since when the petitioner went out of service till the date of his resumption in duty on reinstatement as on duty with all consequential reliefs.

2. Factual narratives involving the case as available from the pleadings is; on or about 17.09.1996 petitioner joined Sankhatras Branch of Cuttack Gramya Bank as a Field Officer while one Sri D.P. Dora was working

aspermanent Branch Manager and one Sri S.C. Mishra as Cashier-cum-clerk of the said Branch. During 17.09.1996 to 17.08.1998 Sri Dora continued as Branch Manager. There were regular detail inspections and snap inspections during the above period. In the month of August, 1998 Sri Dora was transferred and in his place one Sri B.D. Parida was posted as Branch Manager, but for some reason or other, Sri Parida's joining was delayed and in the meanwhile the petitioner was kept temporarily in-charge of the Branch. On 09.02.1999, the petitioner's wife died, while he was on leave, one Amiya Das, Field Officer, Balikuda Chhak Branch remained in-charge of Sankhatras Branch. In the month of March, 1999, as it as a closing month, on the request of the Area Manager, the petitioner was asked to perform closing work. It was, however, the entire accounts and closing work were completed by the Cashier-cum-Clerk, Sri S.C. Mishra and one deputed C/C Maheswar Moharana under the supervision of the petitioner. While continuing on leave the petitioner also prayed for transfer on account of his unable to perform duties both as Manager and Field Officer in the said Branch for the sad demise of his wife. Sri B.D. Parida, who was transferred and being appointed as Branch Manager, failed to join for about one and half years and thus compelling the petitioner to continue temporarily in-charge Branch Manager till 05.03.2000. On 11.03.2000 Sri S.C. Mishra was relieved and transferred, in the meantime, the petitioner remained on leave on account of "Sradha ceremony" of his father and on the very next day the petitioner was informed over telephone about the fraud taken place in the Bank and that Sri S.C. Mishra, the Cashier-cum-Clerk got absconded. A F.I.R. was lodged on 16.07.2000 at the Sadar Police Station, Cuttack by Sri B.D. Parida on the alleged fraud in the accounts and misappropriation committed in the Bank. The Head Office in the process suspended the petitioner and Sri S.C. Mishra on 17.07.2000. It is further pleaded that while the petitioner was continuing under suspension, a charge-sheet was framed involving a Vigilance case and communicated to the petitioner on 13.03.2001. It appears that the charge-sheet was framed by the Vigilance Officer, Sri B.S. Nanda appearing to be the uncle of Sri S.C. Mishra. Petitioner requested for supply of documents for submitting his show-cause, supply of the documents being refused, the petitioner under compulsion submitted a show-cause on 08.06.2001. It is also alleged that the petitioner was not even allowed to verify the ledger and books of accounts despite the repeated reminders and representations dated 27.03.2001 and 03.05.2001. Establishment appointed one N. Rath as the Enquiring Officer and one A.K. Hota as Presenting Officer. In the meantime, Sri N. Rath was taken out and one Sri P.C. Pradhan was appointed as the

Enquiring Officer. A couple months after, the Presenting Officer was also replaced by one Sri B.K. Biswal. There is also subsequent change of the Presenting Officer Sri Prakash Mishra. On 13.02.2003 there is again a change of the Enquiring Officer by appointing one Sri S.K. Mohanty. Upon completion of the enquiry, the enquiry report was submitted on 24.12.2003. Based on the recommendations in the enquiry, the disciplinary authority passed an order of punishment of dismissal against the petitioner on 06.02.2004 appearing at Annexure-7. Petitioner preferred appeal and the appeal was also dismissed vide the order of dismissal appearing at Annexure-9 resulting the filing of the present writ petition.

3. Assailing the notice to show-cause, enquiry report, the order of dismissal and the order in appeal, Shri Ray, learned senior counsel appearing for the petitioner submitted that the charges involving the petitioner have been framed under non-existence Service Regulation which got natural death in the year 2000 for being repealed and substituted by Cuttack Gramya Bank Officers Service Regulation, 2000 (for short the "Regulation, 2000") came into force with effect from 26.02.2001. Shri Ray, learned senior counsel vehemently urged that for the order of dismissal since involved initiation of a proceeding under a non-existing Service Regulation, not only the enquiry proceeding but also the order of dismissal as well as the appellate order, all stand vitiated. Shri Ray, learned senior counsel appearing for the petitioner further advancing his argument also contended that the enquiry proceeding also vitiated for violation of Regulation 38 of the Regulation, 2000 as the enquiry was concluded without affording opportunity of receiving documents as well as perusal of documents mooted during course of enquiry. It is next contended by Shri Ray, the learned senior counsel for the petitioner that even though the F.I.R. involved the petitioner and Sri S.C. Mishra, but the charge-sheet was only submitted against said S.C. Mishra, thereby exonerating the petitioner from the charges and further documents involving the criminal case even though were called for by the petitioner during the enquiry, there is no supply of any such document, thereby denying the delinquent/petitioner to properly defend his case. There is also no witness examined on behalf of the establishment except the P.O. which also vitiates the enquiry. Referring to a decision of the Hon'ble Apex Court in the case of ***Qudrat Ullah vrs. Municipal Board, Bareilly***, reported in AIR 1974 S.C. 396, dealing with the undertaking of proceeding under non-existing statutes, Shri Ray, learned senior counsel appearing for the petitioner contended that the decision referred to hereinabove has full support to the petitioner's case. Further,

referring to a decision of the Hon'ble Apex Court in the case of ***State of Madhya Pradesh vrs. Chintaman Sadashiva Waishampayan,*** reported in AIR 1961 S.C. 1623 and another decision of this Court in the case of ***Duryodhan Lenka vrs. Chairman of Board of Directors, Kalinga Gramya Bank, Cuttack and others,*** reported in 108 (2009) CLT 304 on the ground of violation of natural justice, particularly for non-supply of relevant records and not permitting the delinquent to have the perusal of the relevant documents during the Enquiry proceeding, Shri Ray, learned senior counsel appearing for the petitioner contended that the enquiry proceeding also otherwise vitiates and for the illegal enquiry proceeding all subsequent orders like the order of dismissal as well as the appellate order also fails. Shri Ray, learned senior counsel appearing for the petitioner in the above circumstances contended that this Court should interfere in the impugned orders, set-aside the same and allow the writ petition by giving appropriate relief to the petitioner.

4. In his opposition, Shri Manoj Kumar Mishra, learned senior counsel appearing for the contesting opposite parties referring to the preliminary counter affidavit of the opposite parties while admitting that the charges were framed under a non-existing law, but under the premises of continuance of same provision in the new Rule, following the procedures of the existing statute relevant for the employees of the establishment and for the new Rule came into force during the course of initiation of proceeding creating some bonafide confusion, Shri Mishra, learned senior counsel contended that there is no procedural irregularities or illegalities requiring any judicial review of such matters. Referring to the case record, Shri Mishra, learned senior counsel appearing for the contesting opposite parties also contended that the record of the proceeding reveals that even though the charges were framed under Cuttack Gramya Bank (Staff) Service Regulation, 1980 (for short the "Regulation, 1980"), but the proceeding has been concluded following the Regulation, 2000 and the mentioning of the Regulation, 1980 in the show-cause or charge-sheet is an inadvertent as well as a bonafide mistake and the enquiry enquiry proceeding should be treated as a proceeding under the Regulation, 2000. To establish their case, Shri Mishra, learned senior counsel appearing for the contesting opposite parties also took this Court to certain provisions in the Regulation, 1980 and Regulation, 2000. Further, for the petitioner's preferring an appeal under Regulation 48 of the Regulation, 2000, Shri Mishra, learned senior counsel appearing for the contesting opposite parties contended that the petitioner being conscious of the

proceeding initiated following the Regulation, 2000 participated although, having not raised this technical defect at any time and consciously preferring the appeal under the provisions of the new Regulation, is estopped from taking disadvantage of an inadvertent and bonafide mentioning of the non-existing Regulation in the Enquiry proceeding. Further, taking this Court to the charges framed involving the petitioner, Shri Mishra, learned senior counsel appearing for the contesting opposite parties also alleged that looking to the gravity in the offence involved involving financial irregularity, forgery, fraud which amounts to serious acts of misconduct being established contended that this Court should refrain itself from interfering in such matters as protection of such person will result in bad precedence particularly involving the financial institution. Shri Mishra, learned senior counsel taking the existence of the new Regulation by the time of initiation of Disciplinary proceeding contended that the proceeding initiated involving the petitioner will be deemed to have been initiated under the New Regulation and petitioner is estopped from taking any such plea. Further, for the provision contained at Regulation 73(2) of the Regulation, 2000, it also becomes clear that proceeding initiated following the provision of Regulation, 1980 shall have to be deemed to be proceeding under Regulation, 2000. It is also contended by Shri Mishra, learned senior counsel that there being no difference in procedure with regard to initiation of disciplinary proceeding for major misconduct in both the Service Regulations 1980 and 2000, there is also otherwise no prejudice to the petitioner in the matter of conducting of the Disciplinary proceeding. It is under the circumstances and on the premises of specific pleading and no allegation of prejudice, Shri Mishra, learned senior counsel contended that there is no scope for interfering in the Disciplinary proceeding matters on account of non-supply of any material document or not allowing perusal of any document and that for the settled position of law restricting the power of Court and restricting the power of judicial review of the High Courts. Shri Mishra, learned senior counsel also relied on decisions, such as, in the cases of ***State Bank of Patiala and others vrs. S.K. Sharma,*** reported in (1996) 3 SCC 364, ***Bank of India & Others vrs. T. Jogram,*** reported in (2007) 7 SCC 236, ***Union of India & Others vrs. Alok Kumar,*** reported in (2010) 5 SCC 349, ***Sarva Uttar Pradesh Gramin Bank vrs. Manoj Kumar Sinha,*** reported in (2010) 3 SCC 556, ***S.B.I. and Others vrs. Bidyut Kumar Mitra & Others,*** reported in (2011) 2 SCC 316, ***Union of India and others vrs. G. Annadurai,*** reported in (2009) 13 SCC 469, ***Managing Director, ECIL, Hyderabad, etc. vrs. B. Karanakar etc.,*** reported in (1993) 4 SCC 727, ***Hiran Mayee Bhattacharya vrs. Secretary, S.M.***

School for Girls & others, reported in (2002) 10 SCC 293, ***State Bank of India and another vrs. Bela Baghchi & Others,*** reported in AIR 2005 SC 3272, ***State Bank of India vrs. Ramesh Dinakar Pande,*** reported in 2006 (7) SCC 212, ***Chairman-cum-M.D., TNCS Corporation Ltd. and others vrs. K. Meerabai,*** reported in AIR 2006 SC 3522, ***Regional Manager, DPRTC vrs. Moti Lal,*** reported in AIR 2003 SC 1462 and ***B.C. Chaturbedi vrs. Union of India and others,*** reported in 1995 (6) SCC 749, Shri Mishra, learned senior counsel appearing for the contesting opposite parties submitted that there is no infirmity in the impugned order and as the matter involves an inadvertent and bonafide mentioning of non-exiting Regulation leaving no scope for this Court to interfere in such matters otherwise.

5. Considering the facts involved herein, this Court frames the following questions for adjudication of the issues at hand :-

> (i) Whether the Disciplinary proceeding suffers for being initiated under non-existing Regulation ?
>
> (ii) Whether the Disciplinary proceeding suffers on account of non-compliance of natural justice inasmuch as for non-supply of vital documents and not allowing the petitioner to at least have the chance of scrutinizing the documents relied upon by the employer ?

6. Considering the rival contentions of the parties, this Court firstly moving to the objection on maintainability of the proceeding as raised by Shri Ray, learned senior counsel appearing for the petitioner particularly dealing with the Issue No.1 framed hereinabove, this Court finds, on perusal of the F.I.R. appearing at Annexure-1 it discloses involvement of one Sri S.C. Mishra and not the petitioner. The pleadings reveal charge-sheet involving the F.I.R. vide Annexure-1 is a pointer to the involvement of said S.C. Mishra and non-involvement of the present petitioner which has no denial by the contesting opposite parties. The article of charges involving the disciplinary proceeding against the petitioner appearing at page-26 of the brief reads as follows :-

> "1. Shri Kalpataru Senapati, while discharging his duties as Manager-in-charge of Sankhatras Branch did not follow the systems and procedures of the Bank created a chaotic condition in the branch. The special inspection team consisting of Sri A.P. Rao and Sri M.K. Prusty, Inspecting Officers inspected the Branch functioning from 11.03.2000 to 18.03.2000 and during this period they observed the following lapses on the part of Mr. Senapati :

(a) The daily vouchers were not released since 01.02.2000.
(b) General Ledger was not written after 12.02.2000.
(c) General Ledger balance was not written after 12.02.2000.
(d) Supplementary and Cash Book were not written after 25.02.2000.

(e) Interest calculations in SB a/cs for the half year ended March 2000 was not completed and the interest was not posted in the ledger till 10.03.2000.

(f) Balancing of Books and accounts was in arrear. No attempt was made to update the same nor balancing of books, particularly SB and Loan head was not being done for the current period.

(g) Following books were not maintained:

i. Scroll Book.
ii. Register for Cash requisition.
iii. Voucher register.
iv. Overdue Time Deposit Register.
v. Limit Sanctioned Register.
vi. Time barred loan document Register.
vii. Loan security Register.
viii. Recovery Register.
ix. Statement Register.
x. Security & Printing register.
xi. Movement register.
xii. Movement register.
xiii. Suit filed Register.
xiv. Loan Pass Book issued Register.
xv. Standing Instruction register.
xvi. Loan Notice issue Register.
xvii. Letter Inward Register.
xviii. Title deed Register.

(h) Cash-in-hand was not posted in General Ledger since 23.11.98.
(i) Salary of the sub staff was kept in sundry Creditors a/c and Sundry Creditors was not tallying with General Ledger.

(j) GCR was not realized from SB a/cs/RD a/cs where ever applicable.

The above omission and commissions were made by Shri Senapati with ulterior motive and malafied intention to defraud the Bank. By creating such chaos in the Branch he in connivance with the Cashier-cum-Clerk of the branch, misappropriated amounts which are detailed hereunder. Shri Senapati knowingly created the above type of chaotic condition which are

detrimental to the interest of the bank and in conflict with instructions of HO regarding systems and procedure. He is therefore guilty of misconduct in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Staff Regulation, 1980 for which he is charged.

2. In 64 SB a/cs different amounts on different dates totaling to Rs.17,37,200/- as per Annexure-I was received at Sankhatras Branch. Shri Kalpataru Senapati in connivance with the receiving Cashier misappropriated the amounts after issue of counterfoils of pay-in-slips and making entries in the respective Pass Books. Shri Senapati did not preserve the pay-in-slip (Bank's portion) nor got the amounts entered in Bank's Books viz. Cash receipt Book, Supplementary, Ledger folio etc. Thus he did not serve the Bank honestly and faithfully and therefore he is guilty of misconduct in terms of Regulation 19 and 30(I) of Cuttack Gramya Bank Staff Regulation 1980 for which he is hereby charged.

3. In 29 SB a/cs different amounts on different dates totaling to Rs.8,21,875/- as per Annexure-II was received at Sankhatras Branch. Shri Senapati, in connivance with the receiving Cashier, misappropriated the amounts after issue of counterfoils of respective pay-in-slips to the depositors. Shri Senapati did not arrange to preserve the pay-in-slip nor got the amounts entered in Banks Books. Thus he did not function honestly and faithfully and therefore he is charged for misconduct in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Staff Regulation, 1980.

4. Different amounts on different dates in 11 nos. of SB a/cs totaling to Rs.2,25,500/- was received at Sankhatras Branch as per Annex-III in connivance with the receiving Cashier Shri Senapati misappropriated the amounts after entry in respective Pass Books. Shri Senapati did not preserve the respective pay-in-slips (Bank's portion) nor got the amounts entered in any of the Bank's Books. Thus, he did not function honestly and faithfully and therefore he is charged for misconduct in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Staff Regulation, 1980.

5. Shri Senapati allowed unauthorisedly posting of higher amounts of interest in 17 nos. of SB Pass Books totaling to Rs.61,621/- as per details in Annexure-IV. Thus Shri Senapati displayed indolence and therefore charged for misconduct in terms of Regulation 30(1) of Cuttack Gramya Bank Staff Regulation, 1980.

6. In 19 nos. of SB a/cs Shri Senapati passed withdrawal slips of different dates and different amounts totaling to Rs.2,46,280/- for payment as per details in Annexure-V. The account-holders have denied having receiving the amounts. Shri Senapati in connivance with the paying cashier,

did not function honestly and faithfully and misappropriated the amounts. He is therefore charged in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Staff Regulation, 1980.

7. Shri Senapati did not exercise proper control and supervised and unauthorisedly got posted different amounts of withdrawals on different dates in 14 nos. of SB Pass Books totaling to Rs.2,40,100/- although money was actually not paid from the Bank. This act on his part is unauthorized and wrongful. Therefore, Shri Senapati is hereby charged for misconduct in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Staff Regulation, 1980.

8. Sri Kalpataru Senapati credited Rs.12,300/- (Twelve thousand three hundred only) on 28.06.2000 in SB a/c no.4521 of Sri Rama Chandra Mallick without receipt of any amount on that day. He also passed one withdrawal slip dated 30.06.2000 in this account with forged signature. Thus Sri Senapati maligned the faith and confidence reposed on him and defrauded the bank and misappropriated the amount. Therefore, Sri Senapati is guilty of misconduct in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Staff Regulation, 1980.

9. Shri Senapati passed one withdrawal slip dated 15.01.2000 for Rs.11,000/- in SB a/c. no.2292 of Sri Nageswar Rao. The fingerprint on the withdrawal slip was of a different person than the account holder and the same was unidentified. He passed the withdrawal slip in order to defraud the Bank and misappropriated the amount. He is guilty of misconduct in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Staff Regulation, 1980.

10. Shri Senapati passed one withdrawal slip dated 17.04.2000 for Rs.19,000/- with forged signature of the account holder, Shri Manoranjan Behera in his SB a/c. no.3023 in order to defraud the bank and misappropriated the amount. Thus Shri Senapati did not function honestly and guilty of misconduct in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Staff Regulation, 1980.

11. Shri Senapati passed one withdrawal slip dated 28.09.98 for Rs.9,500/- with forged signature in SB a/c no.2173 of one Situ Mallick in order to defraud the bank and misappropriated the amount. Thus he did not function honestly and faithfully. He is guilty of misconduct in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Staff Regulation, 1980.

12. Shri Senapati passed one withdrawal slip dated 25.04.2000 for Rs.4,000/- in SB a/c no.3436 of one Sri Prasanta Kumar Nayak on which signature of account holder was forged. Shri Senapati did so in order to

defraud the bank and misappropriated the amount. Thus he did not function honestly and faithfully. He is guilty of misconduct in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Staff Regulation, 1980.

13. Shri Senapati allowed payment of withdrawal slip dated 28.05.99 for Rs.30,000/- in SB a/c. no.1408 of one Mr. Prakash Kumar Pradhan. The withdrawal slip does not contain "Pay Cash" instruction, nor signature was verified. The "Cash paid" seal has not been fixed on the withdrawal slip. The withdrawal amount has not been posted in the ledger account. Shri Senapati, however, has signed the Cashier's Summary which confirms the payment of Rs.30,000/- on 28.05.99. Thus, Shri Senapati grossly neglected in his duty and due to omissions on his part Bank is likely to incur loss to the extent of overdrawal in the account, if any, which may be detected in course of balancing of books and interest attributable thereagainst. Thus Shri Senapati is guilty of misconduct in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Staff Regulation, 1980.

14. In gross abuse of position Shri Senapati withdrew Rs.2,000/- on 27.03.99 from his SB a/c no.3354 with Sankhatras Branch without submitting any withdrawal slip and without posting the debit entry in his SB a/c which resulted in inflated balance in his account and consequent over drawal in his account to the extent of Rs.2,000/-. Thus he maligned the faith and confidence reposed on him as Manager-in-charge of the branch and therefore guilty of misconduct in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Staff Regulation, 1980 for which he is hereby charged.

15. In gross abuse of position Shri Senapati gave fictious credit of Rs.600/- in his own SB a/c. no.3354 and withdrew the amountin course of time resulting in overdrawal of Rs.600/- from his account. Thus, Shri Senapati did not function honestly and faithfully for which he is found guilty of misconduct in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Staff Regulation, 1980.

16. Shri Senapati credited Rs.900/- each on 11.06.99 and 01.09.99 in the SB a/c no.1287 of Sri N.C. Pati, landlord of Sankhatras Branch without any voucher. On 02.08.99 another credit entry of Rs.900/- and withdrawal of Rs.900/- in the said account were not posted in the account. On 30.09.99 Shri Senapati made a fictitious credit Rs.2,700/- to the above said SB a/c. Thus, Sri Senapati extended excess credit to the account which consequently resulted in overdrawal of Rs.1091.70p in the account. Shri Senapati is therefore guilty of indolence and dishonesty which are misconduct in terms of Regulation 19 and 30(1) of Cuttack Gramya Bank Regulation, 1980 for which he is hereby charged."

Charges from Item nos.1 to 16 clearly reveal that the petitioner has been charge-sheeted for guilty of misconduct in terms of Regulations 19 and 30(1) of the Regulation, 1980. Entire reading of the charge-sheet leaves no doubt that the petitioner has been charge-sheeted under the provisions of Regulation, 1980. For better appreciation of the above, this Court takes note of the provision at Regulation 19 and Regulation 30(1) of the Regulation, 1980 which are quoted as herein below:-

> "19. **Officer and employee to promote the bank's interest –** Every Officer or employee shall serve the Bank honestly and faithfully, and shall use his utmost endeavours to promote the interests of the Bank and shall show courtesy and attention in all transactions and intercourse with the officers of Government and the Bank's constituents.
>
> 30(1). **Penalty –** Without prejudice to the provisions of other regulations, an officer or employee who commits a breach of these regulations or who displays negligence, inefficiency or indolence, or who knowingly does anything detrimental to the interests of the Bank or in conflict with its instructions or who commits a breach of discipline or is guilty of any other act of misconduct, shall be liable to the following penalties –
>
> (a) reprimand;
>
> (b) delay or stoppage of increments or promotion;
>
> (c) degradation to a lower post or grade or to a lower stage in his incremental scale;
>
> (d) recovery from pay of the whole or part of any pecuniary loss caused to the Bank by the officer or employee;
>
> (e) Removal from service which shall not be a disqualification for future employment.
>
> (f) dismissal."

It is at this stage, considering the contentions of the opposite parties that the proceeding can be declared to be a proceeding under the Regulation, 2000 for the provision contained at Regulation 73(2) of Regulation, 2000, this Court finds Regulation 73(2) of Regulation, 2000 reads as hereunder :-

> "**73. Repeal and Savings**
> (1) ……
> (2) Notwithstanding such repeal, any order made or action taken under the provisions so repealed shall be deemed to have been made or taken under the provisions of these regulations."

This Court also takes note of Regulation 19 and Regulation 38 of Regulation, 2000 to have better appreciation of the matter and the provision at Regulation 19 and 38 of the Regulation, 2000 reads as hereunder :-

> "19. **Obligation to Promote the Bank's Interest –** Every officer or employee shall serve the Bank honestly and faithfully, and shall use his utmost endeavour to promote the interests of the Bank and shall show courtesy and attention in all transactions and dealings with officers of Government, the Bank's constituents and customers.
>
> 38. **Penalties –** Without prejudice to foregoing Regulations of this Chapter an officer or employee who commits a breach of these Regulations or who displays negligence, inefficiency or indolence or who commits acts detrimental to the interests of the Bank or in conflict with its instructions, or who commits a breach of discipline or is guilty of any other acts of misconduct, shall be liable for any one or more penalties as prescribed hereinafter."

Reading of both the provisions, this Court does not find any basic difference therein. Reading of the brief this Court finds, the petitioner was placed under suspension on 17.07.2000, contemplation of preliminary enquiry was charge-sheeted on 17.07.2000. The Regulation, 2000 though is of the year 2000, but in fact came into effect on 26.02.2001. For provision at Regulation 73(2) protecting such action taken in the existence of the Regulation, 1980, looking to the continuance of the provision at Regulation 19 also in the Regulation, 2000 and further looking to the allegations involving the petitioner developing up to framing of charges, this Court finds indication of drawing of the proceeding under Regulation, 1980 is just a mere inadvertent mentioning further in any event the proceeding also gets protected under the provisions at Regulation 73(2) of the Regulation, 2000. It has not materially affected the enquiry further. There is also no allegation that there is any violation of any of the provision in the Regulation, 2000 except making an objection on the maintainability of the Disciplinary proceeding on account of being drawn up under the non-existing Regulation. From the conduct of the petitioner upto the stage of Appeal, it all through appears petitioner never remained in impression that the proceeding is not covered by the Regulation, 2000. There was never any allegation during the Enquiry proceeding. It is on the other hand, it appears that the charges involving the petitioner were communicated to the petitioner vide Annexure-2 on 13.03.2001, the Regulation, 2000 was brought into effect on 26.02.2001 by way of publication in Gazette on 26.02.2001 there remain no doubt that the indication of Regulation, 1980 in

the charge-sheet dated 13.03.2001 might be as a result of bonafide impression again for the protection under Regulation 73(2) of the Regulation, 2000 all proceedings initiated by this date continues. As such, this Court finds, the proceeding involving the petitioner is very much maintainable. Besides entire reading of the show-cause in response to communication by the petitioner at Annexure-3 to the writ petition as well as the pleadings involving the writ petitioner, there is absolutely no pleading on the score of maintainability of the Disciplinary proceeding and such a plea is only taken at the time of hearing. For the observations and reasons indicated hereinabove, this Court finds the Issue No.(i) framed by this Court fails and answered against the petitioner.

7. Now, coming to answer on Issue No.(ii) as to "Whether the Disciplinary proceeding suffers on account of non-compliance of natural justice inasmuch as for non-supply of vital documents and not allowing the petitioner to at least have the chance of scrutinizing the documents relied upon by the employer ?

From the fact narrations, this Court finds, petitioner is absolutely silent on aspect of non-compliance of natural justice in his show-cause vide Annexure-3. But, however, while considering the allegations made by Shri Ray, learned senior counsel particularly on the aspect of violation of natural justice, scan of the record this Court finds the petitioner has filed Memorandum of Appeal to the Appellate authority vide Annexure-6 which bears the following infirmities at the instance of the petitioner :-

> "B. INFIRMITIES IN THE CONDUCT OF THE INQUIRY AND THE ENQUIRY REPORT.
>
> The procedure of inquiry outlined above fulfil the principles of "reasonable opportunity" and "natural justice" and is generally followed everywhere. But, in the instant case, the Hon'ble Inquiry Officer gave total go-by to the above universally accepted procedure of inquiry and finished the inquiry in a maverick manner, as elaborated hereinafter :-
>
> (i) In paragraph 2 of the Enquiry Report, the Enquiry Officer has written that there had been 17 (seventeen) sittings of the enquiry.
>
> The business transacted in those sittings are given below in brief:
>
> 20.9.2001 : (Preliminary hearing) adjourned to 28.9.2001.

28.9.2001 : On being asked by the Enquiry Officer, I denied the charge, and asked time for communication of my decision in the matter of engaging a defence representative, which was allowed.

6.12.2001 : The presenting officer asked for 15 days time for collection of relevant documents relating to the matter from various offices such as vigilance department, etc. The time asked for was granted.

8.1.2002 : The presenting officer submitted photocopies of a 60 (sixty) documents, marked as M.E.I. to M.E.60. I requested the Enquiry Officer for allowing me time for verification of the Exhibits produced by the presenting officer. The presenting officer stated a number of further documents and Registers were in the police custody and the same would be produced in the inquiry.

19.2.2002 : The presenting officer submitted further documents marked as M.E.61 to M.E.73, photocopies of which were handed over to me. The presenting officer also submitted a list of management witnesses to be examined in support of the charges.

18.4.2002 : On request, I was allowed 15 days time for appointment of my Defence Representative.

9.10.2002 : Allowed further time upto 17.10.2002 for giving the name and consent letter of the Defence Representative.

17.10.2002 : Permission given by the Enquiry officer to appoint Shri Amiya Das, Field Officer, as Defence Representative.

14.3.2003 : No enquiry held as the Bank was closed on account of holidays under N.I. Act.

11.4.2003 : Defence Representative Sri Amiya Das having been transferred to a distant branch had withdrawn his consent letter to act as Defence Representative. Therefore, time was given for finding out another person to act as Defence Representative.

16.4.2003 : The hearing adjourned as the presenting officer was absent on leave.

23.4.2003 : Time allowed for giving the name of the Defence Representative.

6.5.2003 : Failing to arrange any Defence Representative, I stated that I would defend my case myself. I prayed for 15 days time for submitting list of defence documents and witnesses, which was granted.

16.5.2003 : I submitted a letter containing the list of documents numbering 32 (thirty-two) which I required for my defence.

27.5.2003 : As the presenting officer failed to provide me with the additional documents indicated in my letter dated 16.5.2003, I submitted a petition, dated 27.5.2003 for giving me permission to collect those vital documents from

(1) various departments of H.O.
(2) Area Office,
(3) Other branches,
(4) Crime Branch Office and Other courts.

6.6.2003 : Remained absent from the sittings of the inquiry on health ground under intimation.

17.6.2003 : to the Inquiry officer.

23.6.2003 : The Inquiry Officer allowed the inquiry to proceed ex-parte on 23.6.2003."

(ii) From the details of the inquiry proceedings narrated above, it is clear
(a) that the presenting officer submitted photocopies of 60 (sixty) documents on 8.1.2002 which were marked as M.E.I. to M.E. 60, and 12 (twelve) documents on 19.2.2002 marked as M.E. 61 to M.E. 73 to prove the charges framed against me. I requested for allowing me to inspect the original documents. But the same was not allowed denying me the right of the reasonable opportunity to defend myself by inspecting the original documents which were proposed to be relied upon to prove the charges framed against me. This was in violation of Regulation 38 of Cuttack Gramya Bank Officers and Employees Service Regulation, 2000.

(iii) The Enquiry Report under discussion in the present case is vitiated due to the infirmities stated above.

(a) In the inquiry held on 16.5.2003, I submitted a list of 32 additional documents for production in the inquiry for my defence.

(iv) As per sub-regulation (16) of UCO Bank Officer Employees (D&A) Regulation, the evidence on behalf of the charge officer is required to be produced after the completion of the following stages :-
(a) Production of management documents in support of the charges and inspection thereof by the accused officer, and

(b) examination and cross-examination of the witnesses produced on behalf of the management.

(v) In his report, the Enquiry Officer has admitted the enquiry was completed on 23.6.2003 ex-parte.

(vi) At page 2 of his Report, the Hon'ble Enquiry Officer observed as under :-

"…… In the enquiry proceedings dated 17.6.2003, the presenting officer (P.O) requested to present the case on behalf of management through his 'self-examination' instead of examining the management witnesses the list of which was submitted in the enquiry proceedings dated 19.2.2002. Considering the non-attendance of the CSO in the enquiry proceedings dated 23.6.2003 also, I allowed the presenting officer (P.O.) to present the case on behalf of the management through his 'self-examination."

8. Going through the above, this Court finds, petitioner has several fronts on violation of principle of natural justice. There was serious allegation to the effect that there have been production and making of several documents by the Presiding Officer by submitting photocopies and the request of the petitioner for allowing him to inspect the original documents has been denied which is claimed to be in violation of Regulation 38 of the Regulations, 2000. It is also alleged by the petitioner that the charge-sheeted officer produced 32 additional documents to support of his case, there has been no consideration of such documents and that there has been again violation of Regulation 38 of the Regulations, 2000. The Enquiry Officer has a clear indication in his proceeding that he completed the enquiry on 23.06.2003 ex-parte, it is alleged that in spite of petitioner's asking for deferring the enquiry on account of his illness the Enquiry proceeding was concluded abruptly. It is again alleged that the Enquiry Officer allowed the Presenting Officer to prove the case of management on his self examination goes to clearly establish that there is no independent witness examined to establish the case of the management, this Court thus observes, the Enquiry Officer followed a procedure unknown to law. There is also an observation of the Enquiry Officer that neither the Presiding Officer nor the C.S.O. has submitted the briefs. Thus, this Court observes, the Enquiry Officer closed the enquiry in a perfunctory manner. There is virtually no evidence establishing documents from the side of management. It is at this stage, on perusal of the order of the Disciplinary Authority finds place at Annexure-7, this Court finds though the Disciplinary Authority took note of certain observations establishing the charges involving the petitioner, but the Disciplinary Authority nowhere either discussed the objections being raised by the delinquent nor dealt with the same. Now, coming to peruse the Appeal

memorandum submitted by the petitioner finds place at Annexure-8, this Court again finds, the petitioner raised the issue of violation of principle of natural justice as well as the closure of enquiry proceeding ex-parte on non-acceptance of medical certificate in proof of adjournment and there was absolutely no evidence by the management establishing the charges against the petitioner, the Appellate authority did not consider the allegations of the petitioner on all these accounts on the other hand in one sentence at paragraph-5 of the Appellate order observed as follows :-

> "5. The Appellate Board found that the Disciplinary Authority has given sufficient opportunity to Sri Senapati to defend his case. There is no violation of natural justice at any stage."

9. This Court observes that the Appellate Authority is not an empty formality and since the question of survival of employment of a person got involved, the Appellate Authority ought to have dealt with all such issues raised by the delinquent-petitioner, in absence of which such orders are to be simply declared illegal.

10. The case at hand not only involves a case of ex-parte closure of the Enquiry proceeding in spite of petitioner's asking for adjournment on ground of ailment, this case also involves non-furnishing of documents relied on by the management to the delinquent, this case also involves non-consideration of documents produced by the delinquent and non-confrontation of the same, further the case also involves non-examination of management witnesses independent of the Presenting Officer and thereby failure of establishing the charges against the delinquent, for all these above, this Court finds that there is serious violation of fundamentals in the matter of domestic enquiry, thereby causing a serious prejudice to the delinquent.

11. It is at this stage this Court further considers that the petitioner has the specific allegation that Enquiry Officer was changed four times and the Presenting Officer is also changed five times. Even Departmental representative was changed two times and the Departmental Authority also got changed four times. Documents asked for were denied on the ground of being available in police custody. There is no opportunity of examining his own witnesses. No personal hearing and there is closure of the proceeding ex-parte. Writ petition got pending for over 13 years, but there is no counter denying all these allegations. It is here this Court takes into account the decision of the Hon'ble Apex Court in the case of ***Ravi S. Naik vrs. Union of***

India and others, reported in 1994 Supp. (2) SCC 641 wherein the Hon'ble Apex Court held ex-parte closure of enquiry resulted in violation of principles of natural justice and fair play of Articles 14, 21 and 311(3) of the Constitution of India. Law is also fairly well settled that mere saying that the petitioner had the opportunity of going through the documents is not sufficient, on the other hand the enquiry record must establish that he was asked to have the inspection. In the case of ***Canara Bank vs. VK Awasthy***, reported in (2005) 6 SCC 321, it was held that Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute, what particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the frame-work of the statute under which the enquiry is held. Noticing the principles of natural justice, the decision of the Hon'ble Apex Court in Kihoto Hollohan case, *Mrs. Maneka Gandhi vrs. Union of India & another*, reported in (1978) 1 SCC 248, *Union of India and another vrs. Tulsiram Patel*, reported in (1985) 3 SCC 398 and reiterating that an order of an authority exercising judicial or quasi judicial functions passed in violation of the principles of natural justice is procedurally ultra vires and, therefore, suffers from a jurisdictional error and that is the reason why in spite of finality under paragraph 6 (1) of the Tenth Schedule, such a decision is subject to judicial review on the ground of non-compliance with the rules of natural justice, it is settled that while applying the principles of natural justice, it must be borne in mind that "they are not immutable but flexible" and they are not cast in a rigid mould and cannot be put in a legal strait-jacket. Whether the requirements of natural justice have been complied with or not has to be considered in the context of the facts and circumstances of a particular case.

12. Under the above circumstances and as a result, this Court thus interfering in the Enquiry proceeding declares the manner of closing the Disciplinary proceeding as bad, as a consequence while setting aside the Enquiry report at Annexure-5 also set-aside the subsequent orders passed by the Disciplinary Authority as well as the Appellate Authority vide Annexures-7 and 9 as bad in law and not sustainable. But, however, considering the serious allegations involving the petitioner and as this Court interferes in the Enquiry proceeding also on the premises of gross violation of principle of natural justice and that the Disciplinary proceeding being concluded ex-parte, this Court directs for restart of the Enquiry proceeding

involving the charge-sheet vide Annexure-2 and to conclude the Disciplinary proceeding afresh, but however, providing opportunity of defence to the delinquent-petitioner who shall be appearing before the Disciplinary Authority with the certified copy of the order of this Court on 02.02.2018. This Court also makes it clear that in the event of necessity of appointment of a fresh Enquiry Officer for long lapse of time in the meanwhile, it will be open to the Disciplinary Authority to appoint a fresh Enquiry Officer and conclude the Disciplinary proceeding within a period of six months. For the remand of the proceeding and as the petitioner was facing a dismissal order, but for the reopening of the Enquiry proceeding, the status of the petitioner so far his employment is concerned shall be relegated back to the stage as on 23.06.2003 on which date he was set ex-parte and his reinstatement be solely for the purpose of completing the departmental proceeding. His entitlement, if any, will be dependent upon the ultimate outcome in the Disciplinary proceeding following a decision of the Hon'ble Apex Court in the case of ***Managing Director, ECIL, Hyderabad, etc. vrs. B. Karanakar etc.,*** reported in (1993) 4 SCC 727.

13. The writ petition succeeds to the extent indicated hereinabove and with an order of remand. In the circumstance, there is no order as to costs.

Writ petition allowed.

2018 (I) ILR - CUT- 370

BISWANATH RATH, J.

W.P.(C) NO. 12677 OF 2004

PRADEEP KUMAR MOHAPATRA ……..Petitioner

.Vrs.

CHAIRMAN, ODISHA GRAMYA BANK & ORS. …….Opp. Parties

CUTTACK GRAMYA BANK OFFICERS AND EMPLOYEES SERVICE REGULATION, 2000 – REGULATION - 47

Appeal against the punishment awarded by the Disciplinary Authority – Whether the appellate authority has jurisdiction to enhance the punishment ? – Held, No.

This Court while setting aside the impugned order, remitted back the matter to the appellate authority for re-hearing.

(Para 7)

Case Laws Referred to : -

1. (2013) 2 SCC(L&S)608: Chairman,L.I.C. of India & Ors. -V- A.Masilamani
2. AIR 1998 SC 2713 : Punjab National Bank & Ors. -V- Kunj Behari Misra

For Petitioner : M/s.S.S. Das, P.K.Nayak, K.C.Khuntia

For Opp.Parties: Mr. Kailash Ch. Kanungo

Date of hearing : 09.01.2018
Date of Judgment : 09.01. 2018

JUDGMENT

BISWANATH RATH, J.

Heard Shri S.S. Das, learned counsel appearing for the petitioner and Shri Kailash Ch. Kanungo, learned counsel appearing for contesting opposite party nos.1 and 2.

2. At the outset, challenging the order passed by the appellate authority, Shri Das, learned counsel appearing for the petitioner raised question of jurisdiction of the appellate authority in the matter of enhancement of punishment particularly while hearing an appeal at the instance of the delinquent/petitioner Shri Das, learned counsel also alleged that the impugned order also suffers for being passed without afford of opportunity to respond to its desire for enhancement of the punishment involving the matter. Shri Das, learned counsel further taking this Court to the provisions for appeal involving the Cuttack Gramya Bank Officers and Employees Service Regulation, 2000 (for short "Regulation, 2000"), contended that there being no specific provision authorizing the appellate authority to enter into enhancement of the punishment awarded by the Disciplinary Authority, the appellate authority is estopped from exercising such right. It is under the circumstance, Shri Das, learned counsel appearing for the petitioner submitted that the appellate order so far enhancing the punishment is bad and this Court should interfere with the same and pass appropriate order involving the appeal.

3. Shri Kanungo, learned counsel appearing for the contesting opposite party nos.1 and 2 though has no objection to the objection by the counsel for the petitioner that once there is an attempt for enhancement of punishment involving the disciplinary proceeding by the appellate authority, there must

be an opportunity to the delinquent or to the party likely to be affected to have his objection in the matter of enhancement of the punishment before taking such decision. But, however, taking this Court to the provision at Regulation 47 of the Regulation, 2000, Shri Kanungo, learned counsel appearing for the contesting opposite party nos.1 and 2, submitted that for the provisions therein the appellate authority has the right to consider the appeal and pass suitable order within a specified time indicated therein. Further, referring to a decision of the Hon'ble Apex Court in the case of ***Chairman, Life Insurance Corporation of India and others vrs. A. Masilamani,*** reported in (2013) 2 SCC (L&S) 608, Shri Kanungo, learned counsel appearing for the opposite party nos.1 and 2 taking support of the observations there in paragraph-19, submitted that for the support of the decision to the case of opposite party nos.1 and 2 to this case, there is no infirmity in the order of the appellate authority requiring any interference by this Court.

4. Considering the rival contentions of the parties, this Court finds, the admitted position involved in this case is that the petitioner faced a disciplinary proceeding and suffered an order of punishment awarded by the Disciplinary authority in acceptance of the recommendations of the Enquiry Officer. Being aggrieved by the order of punishment passed by the Disciplinary Authority, the petitioner filed an appeal before the appellate authority in terms of Regulation 47 of the Regulation, 2000. Further, there is also no dispute that the appellate authority before entering into the question of enhancement of punishment, admittedly not putting the petitioner / delinquent to notice of enhancement. It is now taking into account the provision for appeal under the Regulation, 2000, this Court finds Regulation 47 of the Regulation, 2000 runs as follows :-

> "**47. Right to appeal**
>
> (i) An officer or employee shall have right of appeal against any order passed under these Regulations which injuriously affects his interest.
>
> (ii) The appeal shall be preferred to the Appellate Authority mentioned in the Regulation 48 within 45 days of the date of receipt of the order appealed against. The Appellate Authority shall consider the appeal and pass suitable order preferably within a period of 6 months."

Reading of the aforesaid provision, this Court finds, not only the appeal shall be preferred within forty-five days of receipt of the order appealed against,

but the appellate authority is also required to consider the appeal and pass a suitable order preferably within a period of six months. It is at this stage, looking to the Memorandum of Appeal filed by the petitioner at Annexure-15, this Court finds, the petitioner in making the appeal to the appellate authority has the following prayer :-

> "In view of the facts stated above it is prayed that, the Hon'ble Board or Directors may kindly be pleased admit the memorandum of appeal and after perusing the records may kindly quash the impugned final order of the Disciplinary Authority passed on dt. 05.06.04.
>
> And may kindly pass any other order/orders which the Hon'ble Board of Directors feel deemed fit and proper for my benefit and for which act of kindness, I shall be grateful to you. Sirs."

Reading the grounds taken in the Appeal and the prayer made therein, this Court finds, the petitioner has a prayer for setting aside the order passed by the Disciplinary Authority. It is under the circumstance, this Court observes that for no specific provision authorizing the appellate authority to also have the right to go for enhancement of the punishment in deciding the appeal, it was incumbent upon the appellate authority to confine to the request made in the appeal and in disposal of the Appeal either to allow the appeal or to enter into reduction in the punishment in the event the punishment is grossly disproportionate to the quantum of offence or even remitting the matter back to the Disciplinary Authority for consideration on the question of imposition of punishment. In absence of any specific provision authorizing the appellate authority to go for enhancement of punishment suo-motu, this Court finds there was no scope with the appellate authority to go for enhancement of punishment.

5. Now, coming to consider the decision cited by Shri Kanungo, learned counsel appearing for opposite party nos.1 and 2, this Court finds, for the pleadings involved therein, the issue involving therein and for no involvement of question on the issue as to whether a punishment awarded by the Disciplinary authority can be enhanced by the appellate authority taking up the appeal by the delinquent in absence of notice being involved therein, this Court finds, the decision indicated above has no application to the case at hand.

6. It is at this stage of the matter, this Court takes into consideration the case of ***Punjab National Bank & Others vrs. Kunj Behari Misra,*** reported in AIR 1998 SC 2713, wherein the Hon'ble Apex Court has even gone to the

extent stating that even in case the Management is not agreeing with the enquiry report and taking a different view then previous to reaching finality, it must give an opportunity to the delinquent on taking decision on enhancement punishment differing from the view of the enquiry report.

7. For the observations hereinabove and the decision referred to hereinabove, the decision of the appellate authority becomes bad and as re-consideration of the appeal is necessity, this Court interfering with the appellate order set-aside the same and remits the matter back to the appellate authority for re-hearing of the appeal and passing order strictly confining to the prayer in the appeal and by disposing the appeal within a period of four months hereinafter. Since the petitioner is retired in the meantime, there may not be any notice for appearance to the petitioner and this Court directs the petitioner to appear before the appellate authority along with a certified copy of this order within three weeks hence to facilitate the appellate authority to proceed with the fresh adjudication of the Appeal involving the petitioner.

8. The writ petition succeeds but with an order of remand with aforesaid observation and direction. No cost.

Writ petition allowed.

2018 (I) ILR - CUT- 374

S.K. SAHOO, J.

MISC. CASE NO. 152 OF 2017
(Arising out of CRLA No. 695 of 2016)

SUDARSAN SAHANI .....Appellant/Petitioner

.Vrs.

STATE OF ODISHA (Vig.) .....Respondent/Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.389

Suspension of conviction pending appeal – Only in rare and exceptional cases, the court may stay or suspend conviction by assigning reasons.

In this case, the learned trial Court while acquitting the petitioner of the charges under sections 420, 468, 201 and 120B I.P.C.

has not assigned a single reason for convicting the petitioner U/s. 13(2) read with section 13(1)(d) of the P.C.Act, 1988 – So when the charge of criminal conspiracy has failed and there is nothing that the petitioner had conspired with other co-accused persons to grab the Government fund allotted for construction of pot-holes, the impugned judgment suffers from total non-application of mind and unless the said judgment relating to the petitioner is not stayed till disposal of the appeal, there will be failure of justice – Held, since the petitioner has made out an exceptional case, the impugned order of conviction passed against him by the learned Special Judge (Vigilance) is stayed/suspended till disposal of the appeal. (Paras 9,10)

Case Laws Referred to : -

1. A.I.R. 2001 SC 3320 : K.C. Sareen -Vrs.- C.B.I., Chandigarh.
2. A.I.R. 2004 SC 1188 : State of Maharashtra -Vrs.- Gajanan.
3. A.I.R. 2008 SC 35 : State of Punjab -Vrs.- Deepak Mattu.
4. AIR 2008 SC 2962 : State of Panjab -Vrs.- Navraj Singh.
5. A.I.R. 2009 SC 1185 : C.B.I. -Vrs.- M.N. Sharma.
6. 2012 (12) SCC 384 : State of Maharastra through CBI -Vrs.- Balakrishna.
7. 2015 C.L.J 250 : Shyam Narain Pandey -Vrs.- State of U.P.
8. 2017(II) ILR -CUT- 406: Purna Chandra Kisan -Vrs.- State of Orissa.
9. (2010) 47 OCR 236 : Harihar Mishra -Vrs.- Republic of India.
10. A.I.R. 2001 SC 3320 : K.C. Sareen -Vrs.- C.B.I., Chandigarh.
11. A.I.R. 2004 SC 1188 : State of Maharashtra -Vrs.- Gajanan.
12. A.I.R. 2008 SC 35 : State of Punjab -Vrs.- Deepak Mattu.
13. AIR 2008 SC 2962 : State of Punjab -Vrs.- Navraj Singh.
14. A.I.R. 2009 SC 1185 : C.B.I. -Vrs.- M.N. Sharma.
15. 2012 (12) SCC 384 : State of Maharastra through CBI -Vrs.- Balakrishna.
16. 2015 CLJ 250 : Shyam Narain Pandey -Vrs.- State of U.P.
17. 2017(II) ILR -CUT- 406 : Purna Chandra Kisan -Vrs.- State of Orissa.
18. (2010) 47 OCR 236 : Harihar Mishra -Vrs.- Republic of India.
19. A.I.R. 2009 SC 1911 : Prasad @ Hariprasad Acharaya -Vrs.- State of Karnataka

For Petitioner : Mr. Asok Mohanty, Sr. Adv.

For Opp.Party : Mr. Srimanta Das, Sr. Standing Counsel (Vig.)

Date of Hearing : 14.09.2017
Date of judgment : 15.09.2017

JUDGMENT

S. K. SAHOO, J.

The appellant/petitioner Sudarsan Sahani who is the Deputy Executive Engineer, Office of EIC, Rural Works, Bhubaneswar has filed this misc. case

under section 389 of Cr.P.C. for suspension of his conviction passed by the learned Special Judge (Vigilance), Phulbani in G.R. Case No. 08 of 2013 (v) (T.R. No.08 of 2013) vide impugned judgment and order dated 13.12.2016 in convicting him under section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') and sentencing him to undergo rigorous imprisonment for two years and to pay a fine of Rs.2,000/- (rupees two thousand), in default, to undergo further R.I. for one month.

2. The petitioner along with co-accused Saroj Kumar Mishra, Prasanta Kumar Patra and Abakash Padhy were charged under section 13(2) read with section 13(1)(d) of the 1988 Act along with offences punishable under sections 420, 468, 201 and section 120-B of the Indian Penal Code on the accusation of misappropriating government money to the tune of Rs.1,50,000/- (one lakh fifty thousand) in connivance with each other.

The learned Trial Court acquitted the co-accused Abakash Padhy of all the charges. The petitioner and the other two co-accused persons namely Saroj Kuamr Mishra and Prasanta Kumar Patra were also acquitted of the charges under sections 420, 468, 201 and 120-B of the Indian Penal Code but they were found guilty under section 13(2) read with section 13(1)(d) of the 1988 Act.

3. The prosecution case, in short, is that pursuant to an allegation of misappropriation of government money of Rs.1,50,000/- by showing false execution of pot-hole repair work in NH 217 from 147 K.M. to 171 K.M. in the year 2004, an enquiry was taken up, in course of which it was ascertained that during the period 2002 to 2004, the petitioner was the S.D.O. of NH Sub-division, Balliguda, co-accused Saroj Kumar Mishra was the Executive Engineer, NH, Division, Berhampur and co-accused Prasanta Kumar Patra was the Junior Engineer of NH Section, Balliguda. During the said period, an estimate was made relating to periodical renewal of NH 217 and the same was sanctioned and agreement was executed on 19.02.2004 with contractor Sri Arun Kumar Choudhury relating to P.R. Coat of NH 217 from 148 KM to 154 KM for an amount of Rs.36,98,199/- with date of commencement and completion from 19.02.2004 to 18.06.2004 and further time extension was given upto 30.01.2005. The enquiry further revealed that while the said agreement was subsisting, another agreement was executed for the same portion of work with co-accused Abakash Padhy overlapping the earlier agreement with an estimate of Rs.4,64,881/- with the date of commencement

and completion from 10.09.2004 to 09.03.2005. After execution of agreement with co-accused Abakash Padhy, co-accused Prasanta Kumar Patra made necessary entries relating to pot-hole repair work in the measurement book and an amount of Rs.1,50,000/- was paid to co-accused Abakash Padhy on 14.10.2004. It further came to light that pot-hole repair works from 147 KM to 171 KM was not actually executed and false bills were prepared and payment of Rs.1,50,000/- was shown. The Superintending Engineer, NH Circle (South), Bhubaneswar conducted an inspection and came to the conclusion that the agreement drawn by the Executive Engineer, NH, Division, Berhampur was unauthorized as another agreement over the same patch was already in force and it was further found that inflated rates were given to the Contractor in order to give undue financial benefit for executing pot-hole repair works and that the measurement books were not produced before him for his scrutiny.

4. The learned Trial Court in his impugned judgment has been pleased to hold that the prosecution has failed to bring home the offences under sections 420 and 468 of the Indian Penal Code in as much as since final bill had not been prepared, payment of Rs.1,50,000/- to co-accused Abakash Padhi in an inflated rate cannot be accepted.

The learned Trial Court further held that on careful scrutiny of the material, there appears nothing to the fact that the petitioner conspired along with the other co-accused persons to grab the government funds allotted for construction of pot-holes and therefore, the prosecution has failed to bring home the charge under section 120-B of the Indian Penal Code against the accused persons.

The learned Trial Court further held that the disappearance of MB No.1311 against the petitioner and co-accused persons Saroj Kumar Mishra and Prasant Kumar Patra was not founded and accordingly, the prosecution has failed to substantiate the charge under section 201 of the Indian Penal Code against the accused persons.

However, the learned Trial Court held that the prosecution has successfully established the offence under section 13(2) read with section 13(1)(d) of the 1988 Act against the petitioner and the co-accused Saroj Kumar Mishra, Prasanta Kumar Patra and accordingly found them guilty.

5. Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioner strenuously contended that after acquitting the petitioner of the

charges under sections 420, 468, 201 and section 120-B of the Indian Penal Code, the learned Trial Court has illegally convicted the petitioner under section 13(2) read with section 13(1)(d) of the 1988 Act particularly when he has observed in paragraph-17 of the impugned judgment that on 10.09.2004 the Executive Engineer Saroj Kumar Mishra had entered into an agreement with co-accused Abakash Padhy vide Agreement No.1F2/04-05 for the self-same work with commencement and completion date as 10.09.2004 to 09.03.2005 and as such, the subsequent contract i.e. 1F2/04-05 entered into in between co-accused Saroj Kumar Mishra and Abakash Padhy was illegal . It is further contended that such a finding is against co-accused Saroj Kumar Mishra and co-accused Abakash Padhy, who has been acquitted of all the charges. It is further contended that without any finding against the petitioner in the entire impugned judgment, the learned Trial Court should not have jumped to the conclusion that the prosecution has successfully established the offence under section 13(2) read with 13(1)(d) of the 1988 Act against the petitioner. It is further contended that in absence of any reasoning/findings as to why the petitioner is found guilty under section 13(2) read with section 13(1)(d) of the 1988 Act after being acquitted of the offences under Indian Penal Code, the impugned judgment and order of conviction against the petitioner is perverse and suffers from non-application of mind and therefore, cannot be sustained in the eye of law. It is further contended that since on the face of the impugned judgment, the petitioner has a very good case for acquittal and the appeal being of the year 2016 is not likely to be taken up for hearing in the near future, unless the conviction is stayed/suspended, the petitioner would suffer irreparable loss and injury and his service will be at stake.

6. Mr. Srimanta Das, learned Senior Standing Counsel for the Vigilance Department appearing for the opposite party vehemently opposed the prayer for stay of conviction and also filed his objection to such petition. It is contended that the learned Trial Court after going though the evidence on record has rightly found the petitioner guilty and since stay of conviction should be exercised only in exceptional circumstances and in rare cases where failure to stay conviction would lead to injustice and irreversible consequences, nothing having been pointed out by the learned counsel for the petitioner in that respect, no favourable order should be passed in his favour. It is further contended that delay in disposal of the appeal and the submission that there are good arguable points by itself are not sufficient to grant suspension of conviction. The learned counsel further contended that laxity in

corruption cases would encourage corruption and therefore, the misc. case should be dismissed. He placed reliance in the case of **K.C. Sareen -Vrs.- C.B.I., Chandigarh reported in A.I.R. 2001 Supreme Court 3320**, **State of Maharashtra -Vrs.- Gajanan reported in A.I.R. 2004 Supreme Court 1188**, **State of Punjab -Vrs.- Deepak Mattu reported in A.I.R. 2008 Supreme Court 35, State of Panjab -Vrs.- Navraj Singh reported in AIR 2008 Supreme Court 2962, C.B.I. -Vrs.- M.N. Sharma reported in A.I.R. 2009 Supreme Court 1185, State of Maharastra through CBI -Vrs.- Balakrishna reported in 2012 (12) SCC 384, Shyam Narain Pandey -Vrs.- State of U.P. reported in 2015 Criminal Law Journal 250, Purna Chandra Kisan -Vrs.- State of Orissa reported in 2017(II) ILR -CUT-406** and **Harihar Mishra -Vrs.- Republic of India reported in (2010) 47 Orissa Criminal Reports 236**.

7. In the case of **K.C. Sareen -Vrs.- C.B.I., Chandigarh reported in A.I.R. 2001 Supreme Court 3320,** it is held as follows:-

> "10. The legal position, therefore, is this: Though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction, the Court should not suspend the operation of the order of conviction. The Court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. It is in the light of the above legal position that, we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act. No doubt when the appellate Court admits the appeal filed in challenge of the conviction and sentence for the offence under the PC Act, the superior Court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the PC Act, dehors the sentence of imprisonment as a sequel thereto, is different matter.
>
> 11. Corruption by public servants has now reached a monstrous dimension in India. Its tentacles have started grappling even the institutions created for the protection of the republic. Unless those tentacles are intercepted and impeded from gripping the normal and orderly functions of the public offices through strong legislative, executive as well as judicial exercises the corrupt public servants could even paralyse the functioning of such institutions and thereby hinder the democratic policy. Proliferation of

corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions. When a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a Court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior Court. The mere fact that an appellate Court or revisional forum has decided to entertain his challenge and to go into the issues and findings made against such public servants once again should not even temporarily absolve him from such findings. If such a public servant becomes entitled to hold public office and to continue to do official acts until he is judicially absolved from such findings by reason of suspension of the order of conviction, it is public interest which suffers and sometimes even irreparably. When a public servant who is convicted of corruption is allowed to continue to hold public office, it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction, the fall out would be one of shaking the system itself. Hence, it is necessary that the Court should not aid the public servant who stands convicted for corruption charges to hold only public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a Court order suspending the conviction.

12. The above policy can be acknowledged as necessary for the efficacy and proper functioning of public offices. If so, the legal position can be laid down that when conviction is on a corruption charge against a public servant, the appellate Court or the revisional Court should not suspend the order of conviction during the pendency of the appeal even if the sentence of imprisonment of suspended. It would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision."

In the case of **State of Maharashtra -Vrs.- Gajanan reported in A.I.R. 2004 Supreme Court 1188**, it is held as follows:-

"5. In the said judgment of K.C. Sareen (supra), this Court has held that it is only in very exceptional cases that the court should exercise such power of stay in matters arising out of the Act. The High Court has in the impugned

order nowhere pointed out what is the exceptional fact which in its opinion required it to stay the conviction. The High Court also failed to note the direction of this Court that it has a duty to look at all aspects including ramification of keeping such conviction in abeyance. The High Court, in our opinion, has not taken into consideration any of the above factors while slaying the conviction. It should also be noted that the view expressed by this Court in K.C. Sareen's case (supra) was subsequently approved followed by the judgment of this Court in Union of India v. Atar Singh and Anr. (2003) 12 SCC 434."

In the case of **State of Punjab -Vrs.- Deepak Mattu reported in A.I.R. 2008 Supreme Court 35**, it is held as follows:-

"6. An order of suspension of conviction admittedly is not to be readily granted. The High Court in its order dated 11.1.2005 passed a judgment irrespective of conviction and sentence, only on two grounds;

(i) A long time may be taken to decide the appeal.

(ii) There are good points to argue.

7. While passing the said Order, the High Court did not assign any special reasons. Possible delay in disposal of the appeal and there are arguable points by itself may not be sufficient to grant suspension of a sentence. The High Court while passing the said Order merely noticed some points which could be raised in the appeal. The grounds so taken do not suggest that the Respondent was proceeded against by the State, mala fide or any bad faith…."

In the case **State of Punjab -Vrs.- Navraj Singh reported in AIR 2008 Supreme Court 2962**, it is held as follows:-

"12. It is to be noted that learned Single Judge while directing suspension of conviction indicated no reasons.

13. Above being the position, the order of the learned Single Judge, directing the suspension/stay of the conviction as well as the order refusing to recall the said order cannot stand and are set aside."

In the case of **C.B.I. -Vrs.- M.N. Sharma reported in A.I.R. 2009 Supreme Court 1185**, it is held as follows:-

"10. It is to be noted that learned Single Judge while directing suspension of conviction indicated no reasons.

11. Above being the position the order of the learned Single Judge, directing the suspension/stay of the conviction cannot stand and is set aside."

In the case of **State of Maharastra through CBI -Vrs.- Balakrishna reported in 2012 (12) SCC 384**, it is held as follows:-

> "12. Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that, the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examined whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The Court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done."

In the case of **Shyam Narain Pandey -Vrs.- State of U.P. reported in 2015 Criminal Law Journal 250**, the Hon'ble Supreme Court has held as follows:-

> "7. 'Convict' means declared to be guilty of criminal offence by the verdict of Court of law. That declaration is made after the Court finds him guilty of the charges which have been proved against him. Thus, in effect, if one prays for stay of conviction, he is asking for stay of operation of the effects of the declaration of being guilty.
>
> 8. It has been consistently held by this Court that unless there are exceptional circumstances, the appellate Court shall not stay the conviction, though the sentence may be suspended. There is no hard and fast rule or guidelines as to what are those exceptional circumstances. However, there are certain indications in the Code of Criminal Procedure, 1973 itself as to which are those situations and a few indications are available in the judgments of this Court as to what are those circumstances.
>
> 9. It may be noticed that even for the suspension of the sentence, the Court has to record the reasons in writing under Section 389(1) Code of Criminal Procedure. Couple of provisos were added under Section 389(1) Code of Criminal Procedure pursuant to the recommendations made by the Law Commission of India and observations of this Court in various judgments, as per Act 25 of 2005. It was regarding the release on bail of a convict where the sentence is of death or life imprisonment or of a period not less than ten years. If the appellate Court is inclined to consider release of a convict of such offences, the Public Prosecutor has to be given an opportunity for showing cause in writing against such release. This is also

an indication as to the seriousness of such offences and circumspection which the Court should have while passing the order on stay of conviction. Similar is the case with offences involving moral turpitude. If the convict is involved in crimes which are so outrageous and yet beyond suspension of sentence, if the conviction also is stayed, it would have serious impact on the public perception on the integrity institution. Such orders definitely will shake the public confidence in judiciary. That is why, it has been cautioned time and again that the Court should be very wary in staying the conviction especially in the types of cases referred to above and it shall be done only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences resulting in injustice."

In the case of **Purna Chandra Kisan -Vrs.- State of Orissa reported in 2017(II) ILR -CUT- 406**, it is held as follows:-

"10. No doubt, for the aforesaid stigma of conviction is likely to lead removal from the service if the employer so desired and in that event, he as well as his family members shall suffer. The injury that the petitioner-appellant is likely to suffer i.e. removal from service cannot be said to be irreparable injury coupled with irreversible consequences resulting in injustice. In the case of ***Shyam Narain Pandey (supra)***, it has been held that loss of job is no ground to stay/suspend the conviction."

In the case of **Harihar Mishra -Vrs.- Republic of India reported in (2010) 47 Orissa Criminal Reports 236**, it is held as follows:-

"10. From the discussion as aforesaid, five broad principles emerge, which, in my considered view, is a guide so far as exercise of discretion under Section 389(1), Code of Criminal Procedure in relation to stay/ suspension of conviction is concerned. They may be called the 'Panchasheel' for exercise of discretion under Section 389(1), Code of Criminal Procedure for suspension of an order of conviction. They are –

(i) The Appellant, who seeks interference of the Appellate Court under Section 389(1), Code of Criminal Procedure so far as the order of conviction is concerned, must come with clean hands, and with due frankness and fairness specifically draw attention of the Appellate Court to the specific consequences he is going to suffer, if discretion by the Court is not exercised in his favour.

(ii) Such discretion by the Appellate Court may be exercised in favour of the appellant only in rare and exceptional cases depending upon the special facts of the case and not as a matter of course.

(iii) Such discretion may be exercised only where failure to stay the conviction would lead to injustice and irreversible consequences. The Court has to examine carefully on the basis of materials supplied and materials available on record as to whether the consequences sought to visit the appellant at present or on a future date is/are real.

(iv) While exercising the discretion, the Appellate Court has a duty to look at all the aspects including ramification of keeping the conviction in abeyance, and it is under further obligation to support its order for reasons to be recorded by it in writing.

(v) *In case of public servants convicted of corruption charges, the discretion should not be exercised*."

8. On the face of the impugned judgment of the learned Trial Court, it is apparent that after acquitting the petitioner of the charges under sections 420, 468, 201 and 120-B of the Indian Penal Code, the learned Trial Court has not assigned a single reason for convicting the petitioner under section 13(2) read with section 13(1)(d) of the 1988 Act. The finding, if any, so far as that offence is concerned relating to execution of agreement on 10.09.2004 is against co-accused Saroj Kumar Mishra and Abakash Padhy, out of which co-accused Abakash Padhy has been acquitted of all the charges. When the charge of criminal conspiracy has failed and it is observed that there appears nothing to the fact that the petitioner had conspired with other co-accused persons to grab the Govt. fund allotted for construction of pot-holes and the petitioner and all other co-accused persons have been acquitted of such charge, it was the duty on the part of the learned Trial Court to discuss the ingredients of the offence under section 13(1)(d) which is punishable under section 13(2) of the 1988 Act and after discussing the evidence on record, to give a finding thereon as to how the ingredients of such offence so far as the petitioner is concerned, is attracted.

Section 354 of Cr.P.C. which deals with language and contents of judgment, inter alia, states that the judgment shall contain the point or points for determination, the decision thereon and *the reasons for the decision*.

In the present case even though the learned Trial Court has formulated the point that "if the accused persons, during the year 2002 to 2004, being the public servants had abused their position as such public servant and thereby obtained pecuniary advantage of Rs.1,50,000/- entrusted to them and committed criminal misconduct" which has got relevance to the charge under section 13(1)(d) read with section 13(2) of 1988 Act but while discussing

such charge, the learned Trial Court has given its finding in paragraph-7 that the petitioner and the co-accused persons Saroj Kumar Mishra and Prasanta Kumar Patra were 'public servants' within the meaning of public servant as defined in section 2 of the 1988 Act. The learned Trial Court further held in paragraph 12 that co-accused Abakash Padhy had executed the work. Thereafter, the learned Trial Court discussed the core issue that when one agreement was subsisting then a second agreement for the same work has got legal sanctity or not. After discussing the evidence, the learned Trial Court has arrived at a finding that on 22.09.2004, notice of show cause vide Ext.Q was issued to Arun Kumar Choudhury which means till 22.09.2004, the earlier contract with Arun Kumar Choudhury was not rescinded and was very much in force in view of clause 2(b)(1) of the conditions of contract but on 10.09.2004 the Executive Engineer (co-accused Saroj Kumar Mishra) had entered into an agreement with co-accused Abakas Padhy vide Agreement no. 1F2/04-05 for the self same work with commencement and completion date as 10.09.2004 and 09.03.2005 and as such, the subsequent contract i.e. 1F2/04-05 entered into in between co-accused Saraj Kumar Mishra and Abakas Padhy was illegal.

After giving such finding, the learned Trial Court has discussed the charges under sections 420, 468, 120-B and 201 of the Indian Penal Code and disbelieved the prosecution case relating to such charges. Thereafter, the learned Trial Court has suddenly jumped to the conclusion in paragraph 29 that the prosecution has successfully established the offence under section 13(2) read with section 13(1)(d) of 1989 Act against the petitioner and co-accused persons Saroj Kumar Mishra, Prasanta Kumar Patra. Therefore, it is apparent that even though while discussing the charges under section 13(2) read with section 13(1)(d) of 1988 Act, the learned Trial Court has not given any finding against the petitioner and his finding relating to execution of an agreement on 10.09.2004 during the subsistence of the earlier agreement was against co-accused Saraj Kumar Mishra and Abakas Padhy, the conclusion arrived at for such charge against the petitioner is totally misconceived.

A duty is cast on the Trial Court to arrive at the truth and to render justice. If the Trial Court shrinks from its duty and responsibility then it would make a mockery of the criminal justice delivery system. If a reasoned judgment is not passed by the Trial Court and a party is left in darkness in searching for the reasons as to why he has been convicted or why an accused has been acquitted then not only the parties to the case but also the society at large who are expecting a sound and reasoned judgment would raise accusing

finger against the Judge either for his incapability or otherwise which would tilt the basic structure of the foundation of administration of justice.

In case of **Prasad @ Hariprasad Acharaya –Vrs.- State of Karnataka reported in A.I.R. 2009 Supreme Court 1911** where the High Court of Karnataka had upheld the conviction of the appellant passed by the learned Trial Court without assigning any reasons, it is held as follows:-

> 8. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind. The absence of reasons has rendered the High Court's judgment not sustainable.
>
> 9. Even in respect of administrative orders Lord Denning, M.R. in Breen v. Amalgamated Engg. Union (1971) 1 All ER 1148, observed: "The giving of reasons is one of the fundamentals of good administration." In Alexander Machinery (Dudley) Ltd. v. Crabtree 1974 ICR 120 (NIRC) it was observed: "Failure to give reasons amounts to denial of justice." "Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance.

In case of **Mukhtiar Singh and another -Vrs.- State of Punjab reported in A.I.R. 1995 S.C. 686**, it is held that a decision does not mean the 'conclusion', it embraces within its fold the reasons which form the basis for arriving at the 'conclusions'. In case of **Prem Kaur -Vrs.- State of Punjab reported in A.I.R. 2013 S.C. 2083**, it is held that the Court must give reasons for reaching its conclusion.

The recording of reasons in a judgment is an essential requirement because such reasons can alone show whether the Court has applied its mind to all the facts and circumstances relevant to the point in dispute. Reasons form the substratum of the decision. If reasons are not given for arriving at a

conclusion, the judgment is robbed of one of the most essential ingredients and forfeits its claim to be termed a judgment in the eye of law. Recording of reasons necessarily implies the appreciation and consideration of evidence. A judgment written in a proper manner containing reasons for finding by the Trial Court is of considerable help to the Appellate Court. A judgment which does not fulfil the basic and essential requirement of section 354 of Cr.P.C. is not only a defective judgment but in fact it is no judgment in the eye of law. A judgment not in conformity with the provisions of section 354 of Cr.P.C. is a nullity. The absence of reasons goes to the root of the matter and it is not a mere irregularity but a patent illegality which cannot be cured under section 465 of Cr.P.C.

Though in case of **Harihar Mishra** (supra) while formulating panchasheel for exercise of discretion under section 389(1) Cr.P.C. for suspension of an order of conviction, a learned single Judge of this Court has held in case of public servant convicted of corruption charges, the discretion should not be exercised but the Hon'ble Supreme Court in case of **K.C. Sareen** (supra), has held that the power to suspend an order of conviction, apart from the order of sentence, is not alien to section 389(1) of the Code, its exercise should be limited to very exceptional cases: Similarly the Hon'ble Supreme Court in case of **Balakrishana Dattatraya Kumbhar** (supra), while dealing with a case under 1988 Act, has held that the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence but such power must be exercised with great circumspection and caution, for the purpose of which, the appellant must satisfy the Court as regard the evil that is likely to befall him, if the said conviction is not suspended. The Hon'ble Supreme Court in case of **Shyam Narain Pandey** (supra) has held that it has been cautioned time and again that the Court should be very wary in staying the conviction especially in the types of cases referred to above and it shall be done only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences resulting in injustice.

9. Therefore, in the facts and circumstances of the case, when the impugned judgment of the learned Trial Court exhibits a stony silence regarding the reasons for arriving at the conclusions against the petitioner and the conclusions against the petitioner suffers from total non-application of mind and without any materials on record, in view of the fallacy in the impugned judgment as discussed above, I am of humble view that if the impugned judgment of conviction so far the petitioner is concerned is not

stayed/suspended, by the time the appeal is taken up for hearing and decided finally, much water will be flown under the bridge and the evil that would likely to befall on the petitioner in the meantime would aggravate and it would be too late to set the clock back. I am of the further view that the petitioner has made out an exceptional case for stay/suspension of conviction. It is one of such exceptional cases where the order of conviction should be stayed/suspended otherwise it would cause irreparable loss and injury coupled with irreversible consequences resulting in serious miscarriage of justice to the petitioner.

10. Accordingly, the order of conviction passed against the appellant-petitioner by the learned Special Judge (Vigilance), Phulbani in G.R. Case No. 08 of 2013 (v) (T.R. No. 08 of 2013) is stayed/suspended pending disposal of the appeal. The Misc. Case is accordingly allowed.

Application allowed.

2018 (I) ILR - CUT- 388

S. K. SAHOO, J.

CRLMC NO. 53 OF 2005

MIHIR CHANDRA DASH ……..Petitioner

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 – S.391

Section 391 Cr.P.C. empowers the appellate Court to take further evidence or to direct it to be taken by the Court below – However, law is well settled that such power should not be exercised where either the prosecution had got ample opportunity to adduce evidence but has not availed it or the accused persons had got such opportunity for the same purpose or for cross-examining the witnesses and failed in that respect – In case of taking additional evidence, the Court must see whether the prosecution or the accused had no opportunity to produce such additional evidence before the trial Court – Additional evidence must be necessary not because it would be impossible to pronounce the judgment but because there would be failure of justice without it – So, such power has to be exercised sparingly and only in suitable cases.

In this case despite sufficient opportunity for the accused persons to cross-examine P.Ws. 4 and 6, they have not availed the same – So the appellate Court should not have exercised its power U/s. 391 Cr.P.C. in a liberal manner, which suffers from non-application of mind – Held, the impugned order allowing the petition U/s. 391 Cr.P.C. is quashed.

For Petitioner : Mr. Piyush Kumar Mishra
For Opp.Parties : Mr. Prem Kumar Patnaik, A.G.A

Date of Hering : 23.10.2017
Date of Judgment: 23.10.2017

JUDGMENT

S. K. SAHOO, J.

Heard Mr. Piyush Kumar Mishra, learned counsel for the petitioner and Mr. Prem Kumar Patnaik, learned Addl. Government Advocate for the State.

The petitioner Mihir Chandra Dash is the informant in Khandagiri P.S. Case No.188 of 1995 in which charge sheet was submitted on 26.06.1995 under sections 341, 323, 325, 509, 506 read with section 34 of the Indian Penal Code against accused persons Bapi @ Sangram Keshari Bhuyan and Gagan Bhuyan. Those accused persons were charged in the Court of learned J.M.F.C., Bhubaneswar for offences punishable under sections 341/323/325/509/506 read with section 34 of the Indian Penal Code. The learned trial Court vide judgment and order dated 22.01.2003 found the accused persons guilty under sections 323, 325 and 509 of the Indian Penal Code, however acquitted them of the charge under sections 341/506 of the Indian Penal Code and passed sentence accordingly. Both the accused preferred Criminal Appeal No.22/2 of 2003 which is subjudiced in the Court of learned Ist Addl. Sessions Judge, Bhubaneswar.

It appears that during pendency of the appeal, a petition was filed by the appellants before the Appellate Court under section 391 of Cr.P.C. and another petition under section 311 of Cr.P.C. for additional evidence and for recalling P.Ws. 4, 6 and 8 for cross-examination respectively. The petition under section 311 Cr.P.C. was not pressed. However, the learned Appellate Court considering the submissions made on behalf of the appellants, allowed the petition filed under section 391 Cr.P.C. and directed for cross-examination of P.Ws. 4, 6 and 8 vide order dated 05.11.2004 and further directed the appellants to appear before the learned trial Court on 01.12.2004.

The said order dated 05.11.2004 passed by the learned 1st Addl. Sessions Judge, Bhubaneswar in Criminal Appeal No.22/2 of 2003 has been impugned in this application under section 482 of Cr.P.C.

On verification of the lower Court record, it appears that after receipt of the order of the Appellate Court, summons were issued to all the three witnesses but P.W.8 only appeared before the learned trial Court and was cross-examined by the defence on 07.01.2005. The other two witnesses i.e. P.W.4 Annapurna Dash and P.W.6 Subash Chandra Sahoo did not appear for which summons were again issued by the learned trial Court.

It is contended by the learned counsel for the petitioner that the impugned order dated 05.11.2004 passed by the learned Appellate Court suffers from non-application of mind. It is contended that even though sufficient opportunity was afforded to the accused persons for cross-examination of P.W.4 and P.W.6, but they did not avail such opportunities and therefore, the learned Appellate Court was not justified in exercising its power under section 391 Cr.P.C. directing the learned trial Court to allow the accused persons for cross-examination of the P.Ws.4, 6 and 8.

Section 391 Cr.P.C. empowers the Appellate Court to take further evidence or to direct it to be taken by the Court below. Law is well settled that this power should not be exercised in cases where either the prosecution had got ample opportunity to adduce evidence but has not availed the opportunity or the accused persons had got ample opportunity for the same purpose or for cross-examining the witnesses and failed in that respect. In case of taking additional evidence, the Court must see whether the prosecution or the accused had no opportunity to produce such additional evidence before the trial Court. Additional evidence must be necessary not because it would be impossible to pronounce the judgment but because there would be failure of justice without it. The power has to be exercised sparingly and only in suitable cases.

In the present case, since P.W.8 has already been cross-examined and only one question has been put to him by way of suggestion, the learned counsel for the petitioner has no such grievance in that respect. Now it is to be seen whether the impugned order in respect of P.W.4 and P.W.6 for cross-examination is sustainable in the eye of law or not. P.W.4 Annapurna Dash was examined in chief on 8th December 1998. On that day the defence declined for cross-examination. P.W.6 was also examined in chief on

22.12.1998 and on that day the cross-examination was deferred on the petition filed by the learned defence counsel and on the next date i.e. on 12.02.1999, the cross-examination of P.W.6 was declined. A petition was filed by the accused persons for recalling P.Ws. 4, 6 and 8 and vide order dated 06.04.1999, the recall petition was allowed and P.Ws. 4, 6 appeared before the learned trial Court for their cross-examination on 19.04.2000 and 01.12.1999 respectively but the defence declined to cross-examine the witnesses. Therefore, it is clear that in spite of affording sufficient opportunity to the accused persons to cross-examine P.W.4 and P.W.6, they have not availed the same.

In view of the background of the case and the conduct of the accused persons in not availing the opportunities provided to them, the learned Appellate Court should not have exercised its power under section 391 Cr.P.C. in a liberal manner by giving another opportunity for cross-examination of P.W.4 and P.W.6. The order suffers from non-application of mind and therefore, invoking power under section 482 Cr.P.C., the impugned order dated 05.11.2004 passed by the learned Ist Additional Sessions Judge, Bhubaneswar in Criminal Appeal No.22/2 of 2003 stands quashed. The lower Court records be sent to the learned Appellate Court. Since the appeal is of the year 2003, the learned Appellate Court shall do well to take up the appeal at an earliest for hearing and dispose of it in accordance with law.

The interim order of stay dated 14.01.2005 stands vacated. It is made clear that this Court has not expressed any opinion on the merits of the appeal and the same shall be adjudicated in accordance with law. Accordingly, the CRLMC application is allowed.

Application allowed.

2018 (I) ILR - CUT- 391

S. K. SAHOO, J.

CRLMC NO. 1476 OF 2005

GANDHI JENA & ANR. ……..Petitioners

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 – S.240(2)

Framing of charge in warrant case – Charge must be read over and explained to the accused in person for his/her understanding and answer whether he/she pleads guilty of the offence charged or claims to be tried – Held, the provision being mandatory, does not permit the accused to answer the charge through counsel.

Case Laws Referred to :-

1. (2017) 68 O.C.R. 1148 : Niranjan Rana -V- State of Odisha

For Petitioners : Mr. Amitav Tripathy
For Opp.Parties : Mr. Priyabrata Tripathy, A.S.C.
Mr. Sarat Ch. Satapathy

Date of Hearing : 04.12.2017
Date of Judgment: 04.12.2017

JUDGMENT

S. K. SAHOO, J.

Heard Mr. Amitav Tripathy, learned counsel for the petitioners, Mr. Priyabrata Tripathy, learned Addl. Standing Counsel for the State and Mr. Sarat Chandra Satapathy, learned counsel for the opposite party no.2.

The petitioners Gandhi Jena and Banchanidhi Jena have filed this application under section 482 of the Code of Criminal Procedure (for short "Cr.P.C.") to quash the impugned order dated 04.02.2005 passed by the learned S.D.J.M.(P), Rourkela in G.R. Case No.1447 of 2002 in framing charges under sections 498-A/34 of the Indian Penal Code section 4 of the Dowry Prohibition Act. The said case arises out of Mahila P.S. Case No.17 of 2002.

Since the petitioner no.1 is the husband and the petitioner no.2 is the father-in-law of the opposite party no.2 Smt. Laxmi Jena @ Lenka and the case arises out of matrimonial dispute, on the last date, on the submission of the learned counsels for the respective parties, this case was adjourned to obtain instruction regarding pendency of other cases between the parties so also to see if there is any possibility of compromise between the parties. The respective parties were also directed to remain present today and in that respect, the learned counsels were asked to intimate their respective parties.

Mr. Sarat Chandra Satapathy, the learned counsel for the informant-opposite party no.2 stated that in spite of communication in the address which was available with him to the opposite party no.2, there is no response. Mr. Amitav Tripathy, learned counsel for the petitioners also stated that there is no response from the petitioners. In view of such submissions made by the respective parties, since the petitioners and the opposite party no.2 are not present and this is an application under section 482 of Cr.P.C. which is of the year 2005, I am not inclined to adjourn the matter any further.

The sole contention which was raised by Mr. Amitav Tripathy, learned counsel appearing for the petitioners is that since offence under section 498-A of the Indian Penal Code carries punishment upto 3 years, it is a "warrant- case" as per the definition prescribed under section 2(x) of Cr.P.C. and therefore, the learned Magistrate should have followed the procedure which is laid down for trial of "warrant-case" by a Magistrate under Chapter-XIX of Cr.P.C. It is further contended that section 240(2) of Cr.P.C. mandates that charge shall be read over and explained to the accused and he shall be asked whether he pleads guilty of the offence charged or claims to be tried. It is contended that in the present case, in absence of the petitioners, since the charges were read over and explained to the representing lawyer to which he pleaded not guilty and claimed to be tried, therefore, the mandates as required under section 240(2) of Cr.P.C. have not been complied with and as such, the impugned order should be set aside.

Mr. Priyabrata Tripathy, learned Addl. Standing Counsel appearing for the State on the other hand contended that since the representing lawyer of the petitioners pleaded not guilty to the charges and claimed to be tried on behalf of the petitioners, there is no question of any prejudice caused to the petitioners and therefore, on that ground, the impugned order should not be set-aside.

In the case of **Niranjan Rana -Vrs.- State of Odisha reported in (2017) 68 Orissa Criminal Reports 1148**, it is held as follows:-

> "……Section 240(2) of Cr.P.C. mandates that it is the duty if the Trial Court not only to read the charge in presence of the accused but to explain the same to the accused so that he understands it thoroughly. Since the accused shall be asked then whether he pleads guilty of the offence charged or claims to be tried, unless he understands the charge properly, there would be failure of justice. The mechanical approach of framing charge by the Trial Court without understanding the purport of section 240(2) of Cr.P.C.

can never be appreciated. It is well settled that where the statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. **(Ref: Nazir Ahmed v. King Emperor reported in A.I.R. 1936 P.C. 253, Rao Shiv Bahadur Singh v. State of Vindhya Pradesh reported in A.I.R. 1954 SC 322, State of U.P. v. Singhara Singh reported in A.I.R. 1964 S.C. 358, Chandra Kishore Jena v. Mahavir Prasad reported in 1999 (8) SCC 266, Dhananjaya Reddy v. State of Karnataka reported in 2001 (4) SCC 9 and Gujurat Urja Vikas Nigam Limited v. Essar Power Ltd. reported in 2008 (4) Supreme Court Cases 755).**

Section 240 of Cr.P.C. does not permit the accused to answer the charge through his counsel.

In case of **HDFC Bank Ltd. v. J.J. Mankan reported in (2010) 45 OCR (SC) 294 : (2010) 1 SCC 679,** it is held that it will lead to an absurd situation that the charge was framed against the accused in his absence, which would defeat the very purpose of Sub-section (2) of Section 240 of Cr.P.C.

In case of **Santosh Kumar Nayak v. State of Orissa reported in 2011 (Vol.2) OLR 106,** it is held that the charge was not read over and explained to the accused in person and the same is in violation of Section 240(2) of Cr.P.C.

In case of **Tankadhar Mishra v. Republic of India reported in Vol.I (2017) Current Criminal Reports 65,** it is held that in view of the language of section 240(2) Cr.P.C., it appears that the same is mandatory and in the case, the charge was neither read and explained to the petitioner nor his plea of guilty or otherwise was recorded. Concession of counsel cannot override statutory mandatory provisions and therefore, framing of charge against the petitioner in his absence has defeated the very purpose of Sub-section (2) of Section 240 of Cr.P.C."

In view of the proposition of law as laid down in the case of **Niranjan Rana (supra)**, I am not inclined to accept the objection which has been raised by the learned Addl. Standing counsel for the State and since it is not disputed that the charge has been framed in violation of the procedure as laid down under section 240(2) of Cr.P.C., the impugned order is set-aside and the petitioners are directed to appear in person before the learned S.D.J.M.(P), Rourkela on 8th January 2018 without fail and in their presence, the learned Magistrate shall frame the charges in accordance with law. With the aforesaid observation, the CRLMC is disposed of.

Application disposed of.

2018 (I) ILR - CUT- 395

S. K. SAHOO, J.

CRLMC NO. 2264 OF 2004

DR. BINOD BIHARI NAIK .....Petitioner

.Vrs.

STATE OF ORISSA .....Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.482

Quashing of order taking cognizance – Offence U/ss. 493, 503, 313/34 I.P.C. – Petitioner-doctor challenged the order on the ground that he aborted pregnancy of the victim with her consent.

In this case the victim has categorically stated that she was taken to a private clinic by the family members of her lover by giving an impression of formal check up of the child in the womb where the doctor gave some medicines to her for which she became senseless and after one hour when she regained her sense, she came to know there has been termination of her pregnancy and when she confronted about such termination she was threatened with dire consequences if she would disclose the incident before anybody.

From the materials on record it is clear that neither the procedure laid under sections 3, 4 and 5 of the MTP Act have been followed nor the consent of the victim has been taken for termination of six months pregnancy – Rather in a clandestine manner the petitioner succumbed to the dirty tricks played by the lover and caused the abortion – Held, this Court is not inclined to invoke its inherent power to interfere with the impugned order. (Paras 7,8)

Case Law Referred to : -

1. (1994) 3 SCC 430 : Dr.Jacob George -V- State of Kerala

For Petitioner : Mr. J.R. Dash, K.L.Dash, C.N.Jena
For Opp.Party : Mr. Prem Kumar Patnaik, A.G.A.

Date of Hearing : 02.01.2018
Date of Judgment: 02.01.2018

JUDGMENT

S. K. SAHOO, J.

A doctor sometimes assumes the role of a creator, a healer of the sufferings and a saviour of life. He is adored as he understands his

responsibility and attempts to bring back smile on the face of the patient with all the ability at his command. Hippocrates said, "Whenever a doctor cannot do good, he must be kept from doing harm". Here is the case of an unfortunate victim who consciously chooses to be a mother on assurance of marriage by her lover and expecting her dream of possibilities coming to realities. When the unborn was anxiously waiting in her womb to see the new world, to touch the warm skin of mother with his little fingers, the doctor succumbed to the dirty tricks played by the lover, assumed the role of a destroyer and stopped the movement of life within womb even without the knowledge and consent of the victim making her frozen, broken and shattered.

In case of **Dr Jacob George -Vrs.- State of Kerala reported in (1994) 3 Supreme Court Cases 430**, it is held as follows:-

> "1. Life is said to be the most sublime creation of God. It is this belief and conception which lies at the root of the arguments, and forceful at that, by many religious denominations that human beings cannot take away life, as they cannot give life. This idea is so intense with some religious leaders that they would even oppose any measure of birth control. Abortion or miscarriage would be opposed with greater force by these persons.
>
> 2. Mahatma Gandhi, Father of the Nation, urged long back in Harijan that God alone can take life because He alone gives it. For the Jains, taking away of even animal life is a sin, as, according to them, animals are as much part of God as human beings. Buddhists too preach Ahimsa.
>
> 3. Our *Reg Veda II* recites:
>
> "Grant us a hundred autumns that we may see the manifold world. May we attain the long lives which have been ordained as from yore."
>
> *Atharva Veda I* contains the following:
>
> "May we be enabled to see the sun for a longtime."
>
> The aforesaid shows that life is beyond price and it is not only a legal wrong, but a moral sin as well, to take away life illegally."

2. In this application under section 482 of Cr.P.C., the petitioner Dr. Binod Bihari Naik has challenged the impugned order dated 06.09.2003 of the learned S.D.J.M., Kuchinda passed in G.R. Case No.281 of 2002 in taking cognizance of offences under sections 493/503/313/34 of the Indian Penal Code and issuance of process against him. The said case arises out of Kuchinda P.S. Case No.85 of 2002.

It appears that the petitioner filed an application before the learned S.D.J.M., Kuchinda to quash the prosecution launched against him on the ground that he is not only a registered medical practitioner but also a Government doctor and therefore, he is a public servant and since the alleged act of termination of pregnancy was committed by him in due discharge of his official duty, without sanction under section 197 of Cr.P.C., the case is not maintainable in the eye of law.

The learned S.D.J.M., Kuchinda considered such petition and vide order dated 30.09.2004, he has been pleased to hold that no clear cut case has been made out to show that the petitioner is entitled to protection under section 197 of Cr.P.C. and accordingly, the petition filed by the petitioner was dismissed.

The said order dated 30.09.2004 has not been challenged before this Court.

3. The prosecution case, as per the first information report lodged by the victim on 16.08.2002 before the officer in charge, Kuchinda police station is that she was aged about twenty years and the co-accused Lochan Pujhari kept physical relationship with her on the assurance of marriage for which she became pregnant. It is further stated that she was taken to a doctor by the co-accused Lochan Pujhari, his elder brother Gobinda, his mother and brother-in-law as per their previous plan giving false impression to her for formal check up of the child in the womb. The co-accused persons talked with the doctor and left the victim with the doctor who administered some medicines to her for which she became senseless and after one hour when she got back her senses, she found that her six months pregnancy had been terminated. She was told by the co-accused persons not to disclose about the same before anybody and threatened with dire consequence.

On the basis of such first information report, Kuchinda P.S. Case No.85 of 2002 was registered on 16.08.2002 under sections 493/506/313/34 of the Indian Penal Code and section 3 of the SC & ST (PA) Act and after completion of investigation, charge sheet was submitted on 24.08.2003 against the petitioner as well as the co-accused persons under sections 493/506/313/34 of the Indian Penal Code and section 3 of the SC & ST (PA) Act.

4. Mr. J.R. Dash, learned counsel appearing for the petitioner fairly submitted that the provision under section 197 of Cr.P.C. would not be

applicable in the case as the allegation against the petitioner is that in a private clinic, he aborted the pregnancy of the victim and therefore, it cannot be said that the act was done in due discharge of his official duty as a public servant. However it is contended by the learned counsel for the petitioner that the victim was brought to the clinics of the petitioner where she was accompanied by others including her lover and with the consent of the victim, the pregnancy was terminated and therefore, the ingredients of the offence under section 313 of the Indian Penal Code are not attracted.

Mr. Prem Kumar Patnaik, learned Additional Government Advocate for the State on the other hand submitted that even though the other offences like under sections 493 and 506 of the Indian Penal Code are not attracted against the petitioner but the statement of the victim and other materials clearly reveal that at the relevant point of time, the victim was pregnant for six months and the victim has categorically stated that she was administered with some medicines for which she became senseless and by the time she got back her senses after one hour, the termination had already been completed and therefore, there is no material on record that the victim consented for causing the miscarriage and therefore, the ingredients of the offence under section 313 of the Indian Penal Code is clearly applicable against the petitioner.

5. On perusal of the available materials on record, certain factual aspects are not disputed i.e. (i) the victim was pregnant for six months (ii) the termination of pregnancy was done in a private clinic situated at Majhipali by the petitioner.

6. Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereafter 'MTP Act') reads as follows:-

> "3. **When pregnancies may be terminated by registered medical practitioners**.-(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.
>
> (2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-
>
> (a)where the length of the pregnancy does not exceed twelve weeks if such medical practitioner is, or

(b)where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that,-

(i)the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health; or

(ii)there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation I.-Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation II.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment.

(4)(a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman."

In view of sub-section (2) of section 3, it is very clear that even if the pregnancy does not exceed twelve weeks then also the only on the ground that the continuance of the pregnancy would involve the risk to the life of the pregnant woman or of grave injury to her physical or mental health or there is substantial risk that if the child were born, it would suffer from such physical and mental abnormalities as to be seriously handicapped, the pregnancy can be terminated by a registered medical practitioner. If it exceeds twelve weeks

but does not exceed in twenty weeks then also such opinion of not less than two registered medical practitioners is necessary.

Section 4 of the MTP Act deals with the place where the pregnancy can be terminated.

Section 5 of the MTP Act lays down that the length of the pregnancy as noted down in the sub-section (2) of section 3 and the opinion of not less than two registered medical practitioners so also the place of termination of pregnancy as provided under section 4 shall not apply to the termination of pregnancy by a registered medical practitioner in a case where the opinion has been formed in good faith that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

Thus in view of sub-section (2) of section 3 of the MTP Act, there can be no termination of pregnancy if the length of the pregnancy had exceeded twenty weeks. The only exception is found in section 5 of the MTP Act under which the pregnancy can be terminated immediately to save the life of the pregnant woman at any stage of pregnancy, if the opinion of the registered medical practitioner is formed in good faith. Section 5 of the MTP Act strictly restricts to the cases where the life of the pregnant woman would be in danger in case the pregnancy is not terminated and does not refer to any other circumstances. Undoubtedly, the opinion in that regard has to be formed by a registered medical practitioner and such opinion should be in good faith. The expression "good faith" discloses that the opinion has to be based on the necessary examination required to form such an opinion.

7. In this case, not only the pregnancy period of the victim was six months and therefore has exceeded twenty weeks but also there is absolutely no material that to save the life of the victim, the termination of pregnancy was necessary. The victim has categorically stated that she was taken to the private clinics situated at Majhipali by the family members of co-accused Lochan Pujhari by giving an impression of formal check up of the child in the womb where the doctor gave some medicines to her for which she became senseless and after one hour, when she regained her senses, she came to know that there has been termination of her pregnancy. When she confronted about such termination to the co-accused persons, they told her not to disclose the incident before anybody and threatened her with dire consequence. Therefore, it is apparent from the statement of the victim that her consent had not been taken before termination of pregnancy.

It is prima facie clear from the available materials on record that neither the procedure as laid down under sections 3, 4 and 5 of the MTP Act have been followed nor the consent of the victim has been taken for termination of her six months pregnancy. Therefore, when there is no material that the miscarriage was done in good faith for the purpose of saving the life of the victim and the victim's consent for such miscarriage has not been obtained but it was done in a clandestine manner making the victim senseless by administering some medicine, I am of the view that the prima facie ingredients of the offence under section 313 of the Indian Penal Code is made out so far as the petitioner is concerned.

8. Therefore, I am not inclined to invoke my inherent power to interfere with the impugned order. Accordingly, the CRLMC application being devoid of merits, stands dismissed.Any observation made in this judgment shall not influence the learned trial Court in adjudicating the case and the learned trial Court shall go by the evidence to be adduced by the respective sides during course of trial. Lower Court records be sent back immediately.

Application dismissed.

2018 (I) ILR - CUT- 401

S.N. PRASAD, J.

W.P.(C) NOs. 525 OF 2017
WITH BATCH

BHABENDRA PRADHAN & ORS. ……..Petitioners

.Vrs.

STATE OF ODISHA & ORS. ……Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – ARTS 14, 226

Engagement of Sikhya Sahayak – Resolution of the Govt. Dt. 26.12.2016 restricting the age limit to 32 year is challenged basing on the fact that previously the Govt. on various resolutions extended the age limit to 42 years.

Since there was no recruitment for several years and intending candidates crossed 32 years, the Govt. on the recommendation of the

High Power Committee extended the age limit of 32 years upto 42 years – The above issue was also considered in W.P.(C) NO. 18542/2014 by a co-ordinate Bench of this Court wherein it was observed that the same shall not be a precedent for other cases in future – This Court has also considered provisions of Odisha Elementary Education (Method of Recruitment and Conditions of Service of Teachers and Offices) Rules, 1997 and Odisha Civil Service (Fixation of Upper Age limit) Rules, 1989 wherein the State Govt. has fixed the upper age limit upto 32 years – So if there will be any deviation it would create discrimination – Held, this being the policy decision of the Govt. and no case of malice or arbitrariness has been made out by the Petitioners-candidates, the writ petitions praying to relax the age upto 42 years have no merit, hence dismissed. (Paras 8, 9, 47, 48)

(B) CONSTITUTION OF INDIA, 1950 – ARTS 14, 225

Engagement of Sikhya Sahayak – Challenge made to clause 6.1 of the resolution Dt. 26.12.2016 fixing minimum 50% marks in Higher Secondary/Graduation level.

Neither the rules and regulations governing the recruitment process by the National Council for Teacher Education (NCTE), the apex academic authority, nor the Right to Education Act, 2009 have been taken into account while fixing the minimum 50% marks – Held, the writ petitions of the candidates, deprived to participate in the selection process, are allowed and the matter is remitted to the State authorities for taking consequential steps in respect of such category of employees strictly as per NCTE regulation before proceeding further in the selection process. (Paras 16 to 18)

(C) CONSTITUTION OF INDIA, 1950 – ARTS 14, 226

Appointment of Sikhya Sahayak – Direction of O.P.No.1 to O.P.No.2 Dt. 26.12.2016 to reserve 60% vacancies to be filled up by candidates having science background i.e. +2 and +3 Science and 40% by candidates having Arts and Commerce background i.e. +2 Arts or Commerce / +3 Arts – Hence the writ petitions.

State Govt. is the best judge to induct persons as teachers to strengthen the foundation of the students of class-I to class-V – It is the policy decision of the Govt. in the larger interest of the students – Decision don't suffer from the vice of malice or arbitrariness – Held, this Court declined to interfere with the above action – However, the prayer regarding omission of consideration of candidature of B.A/B.Sc.

and 2 years diploma in elementary education is allowed with a direction to state authorities to act strictly in pursuance to the minimum educational qualification provided under the NCTE notification before proceeding further in the selection process.

(Paras 22,23)

(D) CONSTITUTION OF INDIA, 1950 – ART. 226

Appointment of Sikhya Sahayak – Clause 6.1 and 6.2 of the resolution Dt. 26.12.2016 relating to passing of Odiya, as M.I.L. upto class-X challenged.

In the State of Odisha it is required to extend education not only to Odiya knowing people but also to Urdu, Bengali, Telugu knowing candidates who are residing through out the state – Such teachers must know Odiya language, which is the requirement for the State of Odisha – Held, this court is not inclined to interfere in the above policy decision of the State Government. (Para 26)

Case Laws Referred to :-

1. (1985) 1 SCC 523 : K.Nagraj & Ors. -V- State of Andhra Pradesh & Anr.
2. (2011) 13 SCC 383 : State of Jharkhand & Ors Vrs. Ashok Kumar Dangi & Ors.
3. (2015) 2 SCC 796 : Census Commissioner & Others Vrs. R. Krishnamurthy.
4. 2016 SCC Online SC 1549 : Delhi Subordinate Services Selection Board Vrs. Praveen Kumar.
5. (2011) 9 SCC 645 : Chandigarh Administration Through the Director Public Instructions (Colleges), Chandigarh Vrs. Usha Kheterpal Waie & Ors.
6. 1999 3 SCC 422 : Babu Verghese & Others Vrs. Bar Council of Kerala & Ors.
7. (2005) 1 SCC 368 : State of Jharkhand & Ors. Vrs. Ambay Cements & Anr.
8. (2015) 7 SCC 690 : Zuari Cement Limited Vrs. Regional Director, Employees' State Insurance Corporation, Hyderabad & Ors.
9. (1995) Supp. (1) SCC 192 : Dr. Gangaprasad Verma & Ors. Vrs. State of Bihar & Ors.
10. (2004) 4 SCC 513 : State of Tamil Nadu & Another Vrs. S.V. Bratheep (minor) & Ors.
11. (2012) 9 SCC 545 : State of Gujurat & Ors. Vrs. Arvind Kumar T. Tiwari & Anr.
12. (2008) 7 SCC 383 : Pramod Kumar Vrs. U.P. Secondary Education Services Commission & Ors.
13. (2011) 4 SCC 606 : Visveswaraiah Technological University and Another Vrs. Krishnendu Halder & Ors.
14. (2017) 1 SCC 322 : V. Lavanya & Ors. Vrs. State of Tamil Nadu & Ors.

Date of hearing : 17.10.2017
Date of judgment: 23.10.2017

JUDGMENT

S. N. PRASAD, J.

In these writ petitions the petitioners have invoked the jurisdiction of this court conferred under Article 226 and 227 of the Constitution of India questioning some of the conditions of resolution dtd.26.12.2016.

These cases contain different grievance of the petitioners, as such, for convenience, the cases have been grouped category-wise depending upon the nature of prayers made in the writ petitions.

CATEGORY-I

2. In these batch of writ petitions clause 7 of the resolution dated 26.12.2016 as contained in Annexure-11 whereby and where under the maximum age for consideration of candidature of candidates to be engaged as Sikhya Sahayak has been restricted up to 32 years of age is under challenge. Further direction has been sought for to direct the State authorities to issue necessary corrigendum fixing the upper age limit up to 42 years.

3. In this batch of writ petitions the petitioners have raised the grievance on the basis of the fact that they are the candidates who are aspiring to be considered for their engagement as Sikhya Sahayaks.

Their contention is that in the State of Odisha there is no direct recruitment to the post of Asst. Primary Teacher, the Government has come out with a Recruitment Rule, known as Odisha Elementary Education (Method of Recruitment and Conditions of Service of Teachers and Officers) Rules, 1997 (hereinafter referred to as the Rules, 1997) which contains provision for recruitment of the teachers in the elementary education wherein the maximum age has been prescribed up to 32 years but the stipulation made therein regarding the upper age limit has not been followed for making selection of the Sikhya Sahayaks since the Government, after introduction of the Sarva Sikshya Aviyan, has issued various resolutions from 3.10.2000 wherein upper age limit of 32 years has been extended up to 42 years and the candidature of the candidates falling in between the age group of 32 to 42 years have been considered.

The Right to Education Act, 2009, known as Right of Children to Free and Compulsory Education Act, 2009 (herein after referred to as the RTE Act, 2009) has come into effect for the purpose of maintaining quality in the education system across the country amongst the children in between the age group of 6 to 14 years and to maintain the same provision has been

made under Section 23 of the said Act to constitute an apex body to lay down the minimum educational qualification, the apex body has been constituted by virtue of notification issued by the Central Government in the year 2010, amended in the year 2011, known as National Council for Teacher Education (in short NCTE). The NCTE, vide its notifications, have laid down the minimum educational qualification but no maximum age prescription has been laid down therein.

After coming into effect the RTE Act, 2009 and the decision to constitute the NCTE, the Government has come out with a notification on 10.01.2011 wherein the maximum age has been kept up to 42 years, as such, even after enactment of the RTE Act, 2009 the maximum age has been prescribed up to 42 years.

The Government has come out with a resolution on 6.8.2013 and for the first time the maximum age has been restricted up to 35 years, that was challenged before this court in series of writ petitions, one of it was W.P.(C) No.18542 of 2014 wherein the High Power Committee of the State Government has given relaxation to such candidates who were up to the age of 42 years to consider their candidature, in the light of the recommendation / decision of the High Power Committee, this court disposed of the writ petition vide order dtd.2.3.2015 whereby relaxation in the upper age limit up to 42 years for general candidates for engagement as Sikhya Sahayak have been accorded.

4. The contention of the petitioners is that right from 3.10.2000 till 6.8.2013 the candidates who were in between the age group of 32 years to 42 years have been allowed to participate for consideration of their candidature but without considering the grievance raised by the candidates falling under the age group of 33 to 42 years the Government has come out with a resolution bearing No.25605 dtd.26.12.2016 whereby and where under the maximum age has been restricted up to the age of 32 years and in the light of the said age prescription the decision has been taken to come out with an advertisement to fill up the vacancy of the Sikhya Sahayaks.

Their further grievance is that by doing this, the State has acted in arbitrary and illegal manner. It is their further contention that when there is no maximum age prescribed for consideration of engagement as Sikhya Sahayak, restricting it up to the age of 32 years, without following the precedence of last 13 years, cannot be said to be justified action on the part of the State.

It has also been submitted that the action of the State is further arbitrary and illegal because on information obtained under Right to Information Act, 7062 vacancies which are to be filled up, are of the previous years where the maximum age for consideration of candidature of one or the other candidate was 42 years, as such at least consideration for filling up 7062 vacancies should have been done on the basis of maximum age prescription up to 42 years.

Further arbitrariness has been shown by arguing that under the RTE Act, 2009 read with NCTE notification, the Teacher Eligibility Test has been held to be mandatory wherein no maximum age has been prescribed for getting the Teacher Eligibility Test, as such putting the maximum age up to 32 years will also be said to be unjustified action on the part of the State.

The contention has further been made that under the provision of RTE Act, 2009 there is a provision U/s.38(4) which stipulates that every enactment or the decision to be taken by the State in the field is to be placed before the Legislature, but these resolutions have not been placed before the legislature, as such the resolution itself is in violation of the provision of Section 38(4) of the RTE Act, 2009.

The learned Sr. Counsel appearing for the petitioners, on the strength of these grounds, have assailed the decision of the state and prayed to allow such category of candidates who are in between the age group of 32 to 42 years to participate in the selection process of the year 2016-17.

5. *Per contra* learned Advocate General arguing for the State has rebutted the argument, contention and the plea taken by the petitioners by arguing that the decision of the Government to fix upper age limit up to 32 years cannot be said to be unjustified, arbitrary, irrational, unreasonable and suffers from malice.

It has been contended that in the State of Odisha a rule has been formulated in the year 1989 known as Odisha Civil Service (Fixation of Upper Age Limit) Rules, 1989 (herein after referred to as the Rules, 1989) having been enacted in pursuance to the power conferred to the State under Article 309 of the Constitution of India whereby the State Government has fixed the upper age limit up to 32 years for recruitment in civil services or civil posts in pensionable establishments under the State Government.

The teachers were being appointed on the basis of maximum age prescribed up to 32 years before the specific rule has been framed by the

State Government in the year 1997 since the State of Odisha has formulated a rule known as Odisha Elementary Education (Method of Recruitment and Conditions of Service of Teachers and Officers) Rules, 1997 (herein after referred to as the Rules, 1997) which has been enacted upon in exercise of power conferred under Article 309 of the Constitution of India wherein apart from other eligibility conditions the condition for consideration of candidature of candidates up to the age of 32 years has been provided under the provision of Rule 7.

It has been contended that after 1997 the statutory provision contained for consideration of candidature in between the age of 18 to 32 years and even in course of operation of the provision of Rules, 1997 when the concept of Sarva Sikhya Aviyan, having been launched by the Central Government, has been adopted by the State of Odisha under which the main concern of Union as well as the State is to provide education to the children in between the age group of 6 to 14 years in order to universalize the education system across the country.

The State of Odisha has decided to appoint Swechha Sevi Sikhya Sahayak (in short SSS) by issuing a resolution in the name of the Governor of the State wherein the Government has taken decision to give relaxation in the maximum age by relaxing it for a period of ten years, i.e. to consider the candidature of such candidates up to the age of 42 years and the said decision was taken keeping the fact into consideration the predicament of such candidates who were waiting for their turn to be considered for engagement as teacher after getting certification on training or the bachelor in education degree. But due to appointment having not been made of the post of teachers, they might have crossed the maximum age prescribed of the age of 32 years, hence decision was taken to give relaxation of 10 years by extending 32 years of age up to 42 years and the said procedure continued up to the year 2011.

In the meanwhile, in the year 2009, RTE Act, 2009 has come. The sole aim of the RTE Act, 2009 was to provide free and compulsory education to all children up to the age of 6 to 14 years, wherein the provision has been made under Section 23 to constitute an apex body to provide quality teaching to the students in between the age group of 6 to 14 and in the light of the said provision the NCTE notification has come on 25th October, 2011 and thereafter on 29th July 2011 laying down the minimum educational qualification to be possessed by one or the other candidate for consideration of their candidature to be appointed as teacher. The government even

thereafter has come out with the resolution to consider the candidature up to the age of 42 years and it is for the first time on 6.8.2013 the maximum age has been restricted up to 35 years.

This decision of the State authorities have been challenged before this court and this court has asked the State authorities to consider the candidature of such candidates who are falling in between the age group of 35 years to 42 years and in view thereof the High Power Committee was constituted and recommended, considering the vacancy position, to grant relaxation up to 42 years of age of candidates, this court, accepting the recommendation, has disposed of the writ petition directing the state authorities to consider the candidature of such candidates who are in between the age group of 35 to 42 years but this will not be treated as precedence and no future advantage can be sought on the basis of this order.

6. Learned Advocate General, on the basis of the facts narrated herein above, has submitted that it is the decision of the government which was taken on 3.10.2000 depending upon the situation, need and requirement prevailing during the relevant time to grant relaxation of such candidates who have crossed 32 years of age and the government by relaxing the maximum prescription of age of 32 years either from the Rules, 1997 or from the Rules, 1989 has granted relaxation by 10 years, but the relaxation given to such category of candidates for the period of a decade does not confer any right upon the candidates to claim relaxation as a matter of right.

He submits that relaxation cannot confer any legal vested right upon the candidate and it is settled that the writ court is not meant to get benefit on the basis of precedence rather the party is to show legal vested rights for issuance of writ under Article 226 and 227 of the Constitution of India.

He submits that there is no doubt about the fact that the Sikhya Sahayaks are not in absolute sense a teacher but their duty is of teacher and in all the resolutions the Government has taken decision to absorb them in the regular establishment after completing particular years of service, now six years as Asst. Primary teacher. The Sikhya Sahayaks are being appointed on contract basis subject to renewal of their contract year to year depending upon their performance in service and all the conditions since been stipulated in the resolution and in the light of the same the successful candidates before engagement needs to enter into an agreement reflecting therein the terms and conditions and on its acceptance they are being engaged, as such the plea

taken by the petitioners that since they are treated to be teacher on the basis of the educational qualification, they cannot be differentiated in this way, is not to be considered by this court.

He submits that in the State of Odisha 32 years of age is maximum for engagement in all public service posts, as such it would not be appropriate for the State to continue with the policy to extend the benefit of relaxation for indefinite period otherwise it will be discriminatory to such candidates who are aspiring to be engaged in other public offices.

It is not in dispute that the Sikhya Sahayaks are not teacher in true sense and merely on account of the fact that they are to be engaged on the basis of the minimum qualification prescribed under NCTE, they will be given relaxation of age but giving relaxation on this count would be unfair to other public servant who are aspiring to be engaged in other public offices. The reason for having minimum educational qualification as provided under NCTE notification is that there is no direct recruitment to the post of Asst. Primary Teacher and it is from amongst the Sikhya Sahayaks, on completion of particular years of satisfactory service, they are being absorbed as Asst. Primary Teacher, hence it is the mandatory requirement of having minimum educational qualification of such Sikhya Sahayaks other wise the provision of RTE Act, 2009 read wit NCTE notification would be meaning less.

So far as the contention to fill of 7062 vacancies basis upon the previous guideline containing the maximum age of 42 years, it has been submitted on behalf of the State that there is no concept of any backlog vacancy rather the Sikhya Sahayaks are being engaged on year to year basis by preparing the select list and it is apparent from the condition laid down in the resolution itself that the select list is to be valid for a period of one year and the moment the validity of select list goes, the vacancy will come to the subsequent year.

So far as the contention that there is no maximum age prescribed for the Teacher Eligibility Test, as such the maximum age cannot be prescribed, but that argument is very astonishing and if that would be accepted then there should not be any maximum age what to say about 32 or 42 years.

So far as the contention regarding not placing the resolution before the Legislature as provided in pursuance to the provision made U/s.38(4) of the RTE Act, 2009, the same is not available to the petitioners considering the nature of prayer made by them. The learned Advocate General submits

that the petitioners now cannot raise this point to show the resolution as nullity since the prayer made by them in the writ petitions are to grant relaxation in the light of the resolution and if it will be said to be nullity by virtue of not following the provision of Section 38(4) of the Act, 2009, the entire payer of the petitioners will be said to be misconceived. He has also submitted that there is no prayer to declare the resolution as nullity.

7. In response, learned Sr. Counsel appearing for the petitioners has submitted that writ court has got ample power to mould the prayer and it can be moulded but the said argument has also been rebutted by learned Advocate General by submitted that the principle of moulding the prayer only be applicable if the prayer will be consistent with the pleading but here the prayer is different to that of the pleading hence this principle will not be applicable herein.

8. Heard the learned counsels for the parties and perused the documents available on record as also gone through the written notes of arguments filed by the parties.

This court, before appreciating the rival submission of the parties, has thought it proper to deal with the statutory provisions first.

In the State of Odisha the Education Code 1969 has been enacted uponto streamline the education system of the State. In streamlining the education system, a rule has been enacted upon, known as odisha Sub-ordinate Education (Method of Recruitment and Conditions of Service) Rules, 1993 (herein after referred to as the Rules, 1993) enshrined by virtue of the power conferred by proviso to Article 309 of the Constitution of India. The said rule has been meant to appoint the teachers and equivalent post of class-III of the State Civil Services in the offices subordinate to Director, Secondary Education, Orissa wherein under the provision of Rule 8(c) the condition of eligibility, so far as it relates to the minimum and maximum age, has been laid down by fixing it in between the age group of 20 to 32 years.

The State has come out with a Rule to appoint the elementary teachers in the year 1997 known as Odisha Elementary Education (Method of Recruitment and Conditions of Service of Teachers and Officers) Rules 1997 enshrined in pursuance to the powers conferred under proviso to Article 309 of the Constitution of India wherein under the provision of Rule 7(b) the minimum and maximum age has been provided in between the age group of 18 years to 32 years.

The provision has been made to fix the upper age limit for civil services and that rule has come in the year 1989 by its enactment by virtue of the power conferred under the proviso to Article 309 of the Constitution of India, known as Odisha Civil Service (Fixation of Upper Age Limit) Rules, 1989 wherein for recruitment of civil services or civil posts in pensionable establishment under the State Government the upper age limit for entry in the government service has been fixed up to 32 years except where higher upper age limit has been prescribed for any such service or post.

It is thus evident from the enactment of the State Government under its statutory power that the upper age has been fixed up to 32 years. The Government on its wisdom, depending upon the situation and requirement, has taken decision at the time when the concept of Sarva Sikhya Aviyan (in short SSA) has been directed to be implemented across the country by the Central Government with the cooperation of the respective State Governments and mission was to provide education to the children in between the age group of 6 to 14 years.

To relax the upper age limit which has been fixed under its enactment as 32 years by relaxing it for the period of 10 years, i.e. making the 32 years as 42 years reason behind it, as has been disclosed by the learned Advocate General in course of argument that to achieve the purpose of SSA more force of the volunteers were required to awaken the guardians by convincing them to sent their wards to the school so that they may get literacy and the rate of literacy in the country may go up. The govt. has taken decision to enhance the upper age limit up to 42 years for other reason also that was in the interest of the candidates who have failed to appear in the recruitment test because of no advertisement having been published by the State Govt. when they have passed out by getting the certification on training and the B.Ed., as such the upper age limit has been relaxed from the age of 32 years to 42 years and the candidates have participated in the selection process for engagement of SSS as it then was , i.e. in the year 2000, subsequently known as S.S. This process of giving relaxation of 10 years continued fairly for a period of more than 10 years. In between this period, Right to Education Act, 2009 has come to provide free education to all children in between the age group of 6 to 14 years. But simultaneously it has also been the concern of the legislature to provide quality education across the country so that a candidate residing in a state may be able to compete in the other states, i.e. in other words to achieve the aim of uniformity in the education system on the basis of the educational qualification as also merit-wise and to achieve that purpose, under the

provision of section 23 of the RTE Act, 2009 it has been provided to constitute an apex body by the Central Government by virtue of notification whose main authority will be to prescribe minimum educational qualification applicable across the country.

It has been gathered from the RTE Act, 2009 or the NCTE notification that there was no provision to provide minimum or maximum age to test the eligibility of candidates on this count, which goes to suggest that this has been left open for the respective State Governments to take decision to relax the maximum upper age limit or to make an enactment in this regard depending upon the situation and requirement existing in one or the other states of the country.

The State Govt., for the first time by virtue of resolution dtd.6.8.2013, has fixed the maximum age up to 35 years, meaning thereby the relaxation of 10 years has been reduced up to the year of 3 years, i.e. the maximum age has been relaxed from 32 as provided under the statute to 35 years.

This decision of the State Govt. fell for consideration before this court in series of writ petitions, one of them is W.P.(C) No.18542 of 2014. The state authorities have constituted a High Power Committee to judge the situation as to whether there is any requirement to grant relaxation to the candidates so far as it relates to relaxing the maximum age of 35 to 42 years. The High Power Committee has convened its meeting on 24.2.2015 and taken a decision to relax the age up to 42 years, but this was made as one time exercise and only based on court's order. It cannot be considered as precedent, for better appreciation the decision of the high power committee is being referred herein below:-

> *"A meeting was held under the Chairmanship of Commissioner-cum-Secretary to Govt., S & M E Deptt. in pursuance to the direction of hon'ble High Court, odisha in W.P.(C) No.18542 of 2014 for relaxation of upper age limit for engagement of Siksha Sahayak on 24.2.2015 at 12.00 Noon.*
>
> *The following officers were present in the meeting:-*
>
> *1. SPD, OPEPA*
> *2. Addl. Secretary to Govt., S & M E Deptt.*
> *3. Addl. Director (General), OPEPA*
> *4. U.C. Mohanty, Consultant, S & M E Deptt.*
> *5. Asst. Director (MIS), OPEPA*

Commissioner-cum-Secretary wanted to know the total number of candidates joined as Shiksha Sahayak till date. It was informed that as per the available date only 6449 candidates have joined as Shiksha Sahayaks till date as per the first preference offered by candidates.

On analysis of the eligibility conditions of the applicants, it is observed that after completion of all the preferences, the no. of posts advertised may not be filled up due to want of trained candidate and a large number of posts will remain vacant. On the other hand, it is ascertained that 513 no. of candidates beyond the upper age limit but within 42 years of age have applied for SS. Out of these, about 150 no. of SS have taken shelter in Hon'ble high Court which is under sub judice.

Keeping the mandate of RTE in view and taking the vacancies into consideration, the committee decided that the Deptt. will have no objection if the candidates beyond the upper age limit, i.e. up to 42 years of general candidates with 5 years age relaxation for SC/ST/OBC/SEBC/Women/Ex-Serviceman and 10 years age relaxation as per Order No.20199 dated 24.08.2013 of S & M E Deptt. are allowed by Hon'ble High Court for consideration for their engagement as per merit only who are otherwise eligible. But this will be one time and only based on Court order. It cannot be considered as precedent.

However, as the case is pending the final order of the Hon'ble High Court will adhered to for relaxation of upper age limit, i.e., 42 years for Shiksha Sahayaks.

The meeting ended with vote of thanks of the Chair."

The decision of the high power committee has been placed before this court at the time of hearing of W.P.(C) No.18542 of 2014, a coordinate Bench of this court has disposed of the writ petition vide order dtd.2.3.2015 by passing the following order:-

"Heard learned counsel for the petitioners and Mr. B. P. Tripathy, learned Standing Counsel for the School & Mass Education Department and Mr. P.K. Mohanty, learned senior counsel for the OPEPA.

The petitioners have filed this writ petition challenging the order dated 11.9.2014 issued by the Commissioner-cum-Secretary to Government in School & Mass Education Department reducing the maximum age limit to 35 years for making applications by the general candidates for the post of Sikhya Sahayak.

Counter affidavit sworn to by Sri Manoj Kumar Mohanty, Joint Secretary to Government, has been filed on behalf of the Commissioner-cum-Secretary to Government, School & Mass Education Department, O.P.1 enclosing the copy of the proceeding of the meeting (Annexure-A/1) held under the Chairmanship of O.P.1 on 24.2.2015 in pursuance of the direction of this Court issued on 30.1.2015, wherein they have taken the following decision:-

Keeping the mandate of RTE in view and taking the vacancies into consideration, the committee decided that the Deptt. will have no objection if the candidates beyond the upper age limit, i.e. up to 42 years of general candidates with 5 years age relaxation for SC/ST/OBC/SEBC/Women/Ex-Serviceman and 10 years age relaxation as per Order No.20199 dated 24.08.2013 of S & M E Deptt. are allowed by Hon'ble High Court for consideration for their engagement as per merit only who are otherwise eligible. But this will be one time and only based on Court order. It cannot be considered as precedent.

In view of such decision of the High Power Committee, the writ petition is allowed.

Since the Government in its resolution under Annexure-A/1 has no objection for relaxation of the upper age limit up to 42 years for general candidates for engagement of Sikhya Sahayak, I direct that the upper age limit shall be fixed to 42 years for consideration of engagement of Sikhya Sahayak of the petitioners. The applications, which have been rejected on the ground of over-age, shall be considered accordingly.

However, this order shall not be a precedent for other cases in future.

The Misc. Case also stands disposed of.
Issue urgent certified copy.

Let a free copy of this order be supplied to the learned counsel for the School & Mass Education Department."

It is thus evident from the decision of the state government taken by the high power committee and the order passed by this court that the petitioners have challenged the decision of the authority in reducing the

relaxation period from 10 years to 3 years, however, the same has been granted but with the condition not to treat it as precedence and this court has also passed order to that effect not to treat the order passed in the said writ petition as precedence and no future benefit will be given for other cases, meaning thereby the state government has granted relaxation only for once not to treat as precedence and this court, without interfering with the decision of the Government, has directed the State Government to grant relaxation by way of last chance. This order has attained its finality.

It is the considered view of this court that the same issue has been raised before this court on earlier occasion challenging the same clause but this court has declined to interfere by not quashing it, rather granted relaxation by way of last chance.

9. The State government has come out with the resolution on 26.12.2016 wherein the upper age limit has been fixed up to 32 years followed with the direction to advertise to fulfill the post Sikhya Sahayaks on the basis of the decision taken in the said resolution. These are under challenge in this batch of writ petitions.

It is evident from the discussion made herein above that the petitioners have challenged the said clause again.

Now the question is whether this court can extend the relief as has been sought for originally in the writ petitions, the answer of this court is in negative, reasons being that:-

(i) The same issue fell for consideration before this court in W.P.(C) No.18542 of 2014 for quashing of the decision of the State Government by which the maximum age has been reduced from 42 years to 35 years, but this court has not quashed the same, rather granted relaxation by way of one time exercise, i.e. by last chance, not to treat as precedence for future appointment and the said order has attained its finality, hence the same question, which has attained its finality, cannot be again agitated by other set of candidates.

(ii) That if it would be quashed by the court of law, then it will be highly discriminatory for the other candidates who are to be engaged in other civil services of the state government where, as per the provision of Rules, 1989, the maximum age prescribed is up to 32 years. In view thereof the original prayer made by the petitioners for quashing the prescription of upper age limit up to 42 years is not sustainable in the eye of law.

(iii) So far as the contention that the prescription of 32 years would not be applicable for candidates who are to be engaged as Sikhya Sahayaks since it is not under the regular establishment of the government, but the same is also not sustainable in view of the fact that although the entry point is as Sikhya Sahayak but after rendering particular years of service, now 6 years, they are being absorbed as Asst. Primary Teacher and the moment they will be absorbed as Asst. Primary Teacher, they will come under direct control of the State Government.

In view thereof the provision of Rules, 1989 will be applicable but the government in its wisdom and consciousness has come out with a rule in the year 2014 known as Odisha Elementary Education (Method of Recruitment and Conditions of Service of Teachers and Officers) amendment Rules, 2014 whereby and where under the provision of Rule 7 from Rules, 1997 has been omitted and it has rightly been omitted because in the State of Odisha there is no direct entry to the post of Asst. Primary Teacher, rather it is by way of absorption from amongst the Sikhya Sahayaks after rendering particular year of service subject to satisfactory performance of their service.

(iv) The contention has been raised that the Sikhya Sahayaks cannot be treated as teacher since they are being engaged on contract basis, as such they be given the premium by relaxing the eligibility condition so far as it relates to the age, but that can also not be acceded to for the reason that merely on account of the fact that they are to be engaged on contract basis, the conditions cannot be relaxed, further they are being engaged on the basis of the conditions mentioned in the resolution time to time issued by the State Government and one or the other candidates, after going through and after knowing it fully, are participating in the process, hence they cannot be allowed to raise this point, moreover, merely on account of the fact that they are only getting remuneration during the contract period of service, they cannot be given any special privilege of relaxation in the maximum age.

(v) So far as the remuneration part is concerned, the candidates who are to participate in the selection process, are knowing very well that what will they get and after accepting the terms and conditions of the resolution, they in order to be absorbed as Asst. Primary Teacher, are participating in the selection process, hence they cannot raise this point for relaxation in the eligibility condition.

(vi) The other reason is that relaxation in age or any eligibility condition or the reservation in post is the absolute prerogative of the state government

and is to be granted by it depending upon the situation existing in the state and the same cannot be claimed as a matter of right. The relaxation has been granted depending upon the situation as it was required, but it does not mean that the same will continue indefinitely or for ever.

It is settled that it is the policy decision of the state government and the policy decision is least to be interfered by the High Court sitting under Article 226 of the constitution of India unless it is arbitrary or suffers from malice. In the judgment rendered by Hon'ble Apex Court in the case of **K. Nagraj & Others Vrs. State of Andhra Pradesh & Another** reported in (1985) 1 SCC 523 wherein the issue was regarding reduction of the age of retirement from 58 to 55 years. The Hon'ble Apex Court has been pleased to hold that the same was taken by virtue of policy decision in order to provide employment opportunity to the younger sections of the society and the need to open up promotional opportunities to employees at the lower level early in their career and since it is based upon reasonable consideration, it was declined to be interfered with.

It has been laid down therein that if the age of retirement is fixed at unreasonably low level so as to make it arbitrary and irrational, the court's interference would be called for, though not for fixing the age of retirement but for mandating a closer consideration of the matter.

In the case of **State of Jharkhand & Others Vrs. Ashok Kumar Dangi & Others** reported in (2011) 13 SCC 383 Hon'ble Apex Court has been pleased to hold at paragraph 17 and 18 that it is well settled that the State Government must have liberty and freedom in framing policy. Further, it also cannot be denied that the courts are ill-equipped to deal with competing claims and conflicting interests. Often, the courts do not have the satisfactory and effective means to decide which alternative, out of the many competing ones, is the best in the circumstances of the case. One may contend that providing primary education to the children is essential for the development of the country. Whereas others argue that physical training of the children in the primary schools is must as that would make the nation healthy. As in the present case, the candidates trained in teaching claim that the posts of primary school teachers be filled by them and physical trained candidates be considered for posts of physical trained teachers only as they, in the absence of any training in education, are not equipped to teach in primary schools, whereas physical trained teachers contend that they should be considered for appointment against both the posts. These competing

claims, in our opinion, need to be addressed by the policy-makers. Further, we do not have the statistics as regards to the number of primary schools, the resources which the government can spend for providing physical trained teachers and their need. In such a situation, any direction in matters of policy is uncalled for.

In the case of **Census Commissioner & Others Vrs. R. Krishnamurthy** reported in (2015) 2 SCC 796 their Lordships of Hon'ble Apex Court have been pleased to hold at paragraph 25 that ".…….But the courts are not to plunge into policy-making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the executive. If a policy decision or a notification is arbitrary, it may invite the frown of Article 14 of the Constitution. But when the notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner."

In the case of **Delhi Subordinate Services Selection Board Vrs. Praveen Kumar** reported in 2016 SCC Online SC 1549 it has been held that it is the employer's prerogative to decide the age limit and academic suitability of candidates which they wish to employ and so long as the same are not contradictory to the academic eligibility as prescribed by the NCTE Act.

In the case of **Chandigarh Administration Through the Director Public Instructions (Colleges), Chandigarh Vrs. Usha Kheterpal Waie and Others** reported in (2011) 9 SCC 645 wherein Hon'ble Apex Court has been pleased to hold at paragraphs 22 and 23 as follows:-

> *"22. It is now well settled that it is for the rule-making authority or the appointing authority to prescribe the mode of selection and minimum qualification for any recruitment. Courts and tribunals can neither prescribe the qualifications nor entrench upon the power of the concerned authority so long as the qualifications prescribed by the employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post and are not violative of any provision of Constitution, statute and Rules. [See J. Rangaswamy vs. Government of Andhra Pradesh - 1990 (1) SCC 288 and P.U. Joshi vs. Accountant General - 2003 (2) SCC 632]. In the absence of any rules, under Article 309 or Statute, the appellant*

had the power to appoint under its general power of administration and prescribe such eligibility criteria as it is considered to be necessary and reasonable. Therefore, it cannot be said that the prescription of Ph.D. is unreasonable.

23. The Tribunal and the High Court have held that in the years 1989 and 1991, the Tribunal had accepted the earlier administrative instructions dated 20.8.1987 which required the UT cadre employees to be considered for the post has to be followed. The fact that at that time Ph.D. degree was not insisted upon, does not mean that for all times to come, Ph.D. degree could not be insisted. Ph.D. degree was made a qualification because UGC guidelines required it for direct recruitment post and the UPSC approved the same. Therefore, merely because on some earlier occasions, the posts of Principal were filled by UT cadre lecturers without Ph.D. degree, it cannot be argued that the Ph.D. degree cannot be prescribed subsequently."

So far as interference by way of exercise of power of judicial review in case of arbitrariness and malice, according to the considered view of this court, no case of malice and arbitrariness has been made out by the candidates, merely on account of the fact that the privilege has been given by relaxing the maximum age to the candidates for a period of more than a decade. Granting relaxation for a period cannot create any legal vested right and it cannot also be said to be arbitrariness and suffers from malice, rather if it will be granted it would be said to be arbitrary and malice towards the other candidates who are to be engaged in other public offices of the state government, for them 32 years is the maximum age as per the provision of Rules, 1989, as such this court, sitting under Article 226 of the constitution of India declines to interfere with respect to the policy decision of the state government for the reasons stated herein above.

(vii) So far as the alternative prayer to grant relaxation in the age, that cannot directed to be given in view of the fact that to get relaxation cannot be said to be legal vested right of a candidate, rather it depends upon the policy decision of the govt. depending upon the situation, need and requirement time to time. Moreover, the part of granting relaxation since been dealt with by this court in W.P.(C) No.18542 of 2014 wherein the same has been allowed to be given by way of last chance, not to be treated as precedence and not to be taken as an example for future appointment. Although these petitioners were not party to that writ petition but the issue was same and when the similar issue has been dealt with by this court, merely on account of the fact that these petitioners are not party to the proceeding, the order / direction /

observation contained therein will not be applicable for the future appointment.

In view thereof the alternative prayer is also not fit to be allowed, accordingly the same is rejected.

(viii) So far as the contention that for Teacher Eligibility Test since there is no maximum age, as such fixing maximum age will be said to be unjustified decision but this argument is also not acceptable to this court for the reason that if that would be accepted, there will be no meaning of fixing maximum age, rather a candidate even can be engaged at the age of 52 years, 59 years or even after retirement, but that is not the purpose of getting eligibility test, as provided under the RTE Act, 2009 rather the purpose is to get the educational qualification along with other minimum educational qualification as provided under the NCTE Act, although no age has been prescribed for getting Teacher Eligibility Test but Teacher Eligibility Test cannot be said to be recruitment as teacher rather it is an eligibility test and the minimum or maximum age as decided and provided under the statute will govern in testing the eligibility and suitability of the candidates, providing no age for getting Teacher Eligibility Test is immaterial for testing the suitability and eligibility of the candidate to be appointed as Sikhya Sahayaks.

(ix) So far as the argument of learned Sr. Counsel to direct to State authorities to fill up at least 7062 vacancies on the basis of previous resolution containing the maximum age up to 42 years, before appreciating the argument advanced on behalf of the parties on this ground, it would be relevant for this court to refer the legal position, although the same has been discussed herein above, but at the risk of repetition it is being discussed again in the context of this argument.

The Government of Odisha has formulated a rule in the year 1989 fixing the upper age limit of 32 years. In the year 1993 another rule was formulated by the State of Odisha known as the Odisha Sub-ordinate Education (Method of Recruitment and conditions of Service) Rules, 1993 wherein the upper age limit has been fixed as 32 years. Thereafter the Rules 1997 has been enacted upon for the primary teachers fixing the upper age limit as 32 years. The Rules 1993 and 1997 wherein the upper age limit has been fixed as 32 years is for the reason that in the other public offices under the State of Odisha the upper age limit has been fixed up to 32 years as per the provision of Rules, 1989, as such, in order to maintain parity in fixing the upper age limit, 32 years has been kept as the upper age limit even for the

teachers who are holders of Civil Posts being pensionable in view of the provision of Odisha Aided Education Employees' Benefit Rules, 1981. The State Government, in order to streamline the education by enforcing the Sarva Sikhya Aviyan (SSA) and to impart education to the children in between the age group of 6 to 14 years, has decided to appoint Swechha Sevi Sikhya Sahayak (SSS), now Sikhya Sahayak by giving relaxation in fixing the upper age limit as provided under the Rules, 1989 or Rules 1997.

It is evident from the discussion made herein above that the S.S. is to be engaged year to year and on every selection the government has come out with a separate resolution issued in the name of his Excellency, the Governor of the State in exercise of the provision of the Rules of Executive Business. The said relaxation has been granted up to the year 2011 for 10 years and on 6.8.2013 for a period of 3 years.

The State Government has never amended the provision of Rules, 1989 or 1997 so far as it relates to fixating of upper age limit of 32 years and these rules have been enacted upon in exercise of power conferred to the proviso to Article 309 of the Constitution of India, meaning thereby the upper age limit was there and in course thereof relaxation in the age was granted by virtue of issuance of different resolutions keeping it to consider up to 42 years of age.

In the light of this factual matrix the argument of the petitioners to fill up 7062 vacancies on the basis of the resolution which was in course of the said vacancies which will be said to be backlog vacancy, would be filled up by virtue of keeping the upper age limit up to 42 years. This argument is based upon the settled proposition that if any backlog vacancy is there, the same is to be filled up on the basis of the prevalent rule on the date of said vacancy.

In this context the definition of 'backlog vacancy' needs to be referred, i.e. the vacancy notified but not filled up then it will be said to be backlog vacancy. In the context of this position, it is to be seen by this court as to whether the principle of the rule prevalent on the date of 7062 vacancies would be followed or not?

As has already been discussed herein above that the statute for fixing upper age has been enacted under the proviso to Article 309 of the constitution of India, the same has never been amended. The petitioners' contention is that these resolutions wherein the upper age limit has been kept

to 42 years will be said to be amended but this contention is not sustainable in view of the fact that even in course of different resolutions having been issued time to time right from the month of October, 2010 till the year 2011 keeping the upper age as 42 years and on 6.8.2013 as 35 years that was in course of operation of the provision of Rules, 1989 or 1997 by relaxing the provisions contained therein. It is position of Law that resolutions cannot supersede the statutory provision enacted under the provision of proviso to Article 309 of the constitution of India.

The State Government although has come out with the amendment making amendment in the Rules, 1997 by enacting a rule in the year 2014 wherein the provision as contained in Rules, 1997 regarding the age criteria which has been omitted, although the provision of Rules, 2014 has been kept in abeyance by the order passed by the Tribunal in O.A. No.3078(C) of 2014 dtd.22.09.2014 even accepting the original statute as contained in the Rules, 2014 wherein the provision of Rule 7 of the Rules, 1997 has been omitted even in that situation, since it has already been observed herein above that the provision of Rules, 1989 will be applicable wherein the maximum age has been provided as 32 years, then also the maximum age of 32 years will be prevailing as on the date, but since it has been stayed by the court of law, hence even the provision as contained in Rule 7 of the Rules 1997 is applicable on the date.

In view of this discussion the contention of the petitioners is not acceptable to this court to issue direction upon the opposite parties to fill up 7062 vacancies on the basis of the resolution wherein the upper age limit has been provided up to 42 years.

(x) So far as the contention of the petitioners regarding the resolution having not been placed under the provision of Rule 38(4) of the RTE Act, 2009, as such the entire exercise of the state authorities is void, this argument is also not sustainable in view of the fact that neither in the RTE Act, 2009 nor in the NCTE notification there is any stipulation regarding the criteria of eligibility so far as it relates to minimum or maximum age which does suggest that the age is to be decided by the respective state across the country.

Section 38(4) stipulates that the Act, 2009 stipulates to provide free and qualitative education to the school going children in between the age group of 6 to 14 years and in that context the provision of section 23 has been

enshrined wherein the minimum eligibility educational qualification has been decided to be provided by the Apex Academic body to be appointed by the Central Government and in the light of the said provision the NCTE has notified a notification on 25th October, 2010 and 29th July, 2011, i.e. for fixing the minimum educational eligibility criteria.

Section 38(4) of the Act, 2009 concern with the eligibility conditions and the other conditions reflected U/s.38(1) wherein there is no stipulation regarding the age criteria. Section 38(4) provides that every rule or notification made by the State Government under this Act shall be laid down as soon as may be after it is made before the state legislature, but this provision will not be applicable so far as the issue raised in these writ petitions are concerned for the reason that fixing age criteria has already been enacted upon by the State Government in exercise of power conferred under the Proviso to Article 309 of the constitution of India by enacting the provision of Rules, 1989 or Rules, 1997 and there is no dispute about the fact that the legislation made under proviso to Article 309 of the constitution of India is having its statutory force, hence the same is not required to be placed before the Legislature. Moreover, since age criteria is not the subject matter of RTE Act, 2009, as such the same is also not within the provision of section 38(4) of the Act, 2009.

The principle of moulding the prayer by High Court sitting under Article 226 of the Constitution of India will not be applicable in the facts of these cases since this can be exercised only if the prayer made in the writ petition is consistent with the pleading, but here prayer is to allow them to participate in the selection process by either quashing the upper age limit of 32 years or in alternative to relax the same up to 42 years while the pleading made in para 29 of the writ petition is to declare the resolution void since the same has not been placed before the legislature under Section 38(4) of RTE Act, 2009, as such prayer and pleading (at paragraph 29 of the writ petition) are contradictory to each other.

In the entirety of facts and circumstances of the cases, this batch of writ petitions is dismissed.

CATEGORY-II

10. In this batch of writ petitions the following reliefs has been sought for:-

(i) To quash clause 6.1 of the resolution dtd.26.12.2016 in so far as in fixing the minimum qualification of 50% marks in Higher Secondary / graduation level;

(ii) To direct the opposite parties to act in conformity with the amended Regulation / Notification of the NCTE dated 29.07.2011 under Annexure-4 and also to direct the opposite parties to issue necessary corrigendum by fixing the minimum qualification as per the NCTE amended regulation dtd.29.07.2011.

11. The issue raised in this batch of writ petitions is as to whether the appointing authority can deviate from the statutory recruitment rules.

The grievance raised in these writ petitions is that under the Right to Education Act, 2009 National Council for Teacher Education, being the Apex Body, has formulated the eligibility qualifications, that cannot be deviated any way by the authorities but that has been done while issuing the impugned resolution and the advertisement by depriving a category of the candidates whose candidature ought to have been considered in the light of the NCTE notification which contains a condition that for Classes-I - V the Senior Secondary (or its equivalent) with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in accordance with the NCTE (Recognition Norms and Procedure), Regulations, 2002 likewise for Classes –VI to VIII the candidates having minimum qualification of graduation with at least 45% marks and 1-year Bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard. But in the impugned resolution such candidates who have got graduation degree with 45% marks and 1 year Bachelor in Education in accordance with the NCTE Regulation have been deprived.

12. Before appreciating the argument the minimum educational qualifications provided under NCTE regulation needs to be referred:-

"Minimum Qualifications:-
Classes-I-V

(a) Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Elementary Education (by whatever name known)

OR

Senior Secondary (or its equivalent with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in

accordance with the NCTE (Recognition Norms and Procedure), Regulations, 2002.

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor of Elementary Education (B.E./Ed.)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Education (Special Education)

OR

Graduation and two year Diploma in Elementary Education (by whatever name known)

AND

(b) Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with guidelines framed by the NCTE for the purpose.

Sub-para (ii) of Para I of the Principle Notification, the following shall be substituted, namely:-
Classes VI-VIII

(a) Graduation and 2-year Diploma in Elementary Education (by whatever name known)

OR

Graduation with at least 50% marks and 1-year Bachelor in Education (B.Ed.)

OR

Graduation with at least 45% marks and 1-year bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard.

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor in Elementary Education (B.E/Ed.)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4- year B.A./B.Sc.Ed. or B.A.Ed./B.Sc.Ed.

OR

Graduation with at least 50% marks and 1-year B.Ed. (Special Education)

AND

(b) Pass in Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the guideline framed by the NCTE for the purpose.

(III) For para 3 of the Principal Notification the following shall be substituted, namely:-

(i) Training to be undergone.- A person-

(a) With Graduation with at least 50% marks and B.Ed. qualification or with at least 45% marks and 1-year Bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard shall also be eligible for appointment to Class I to V up to 1st January, 2012, provided he / she undergoes, after appointment, an NCTE recognized 6-month Special Programme in Elementary Education;

(b) With D.Ed. (Special Education) or B.Ed. (Special Education) qualifications shall undergo, after appointment an NCTE recognized 6-mont Special Programme in Elementary Education."

13. This court, before answering the issue, thought it proper to discuss the legal position as to whether the appointing authority can deviate from the eligibility condition prescribed in the statute. It is cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other manner, reference in this regard may be made to the judgments rendered by Hon'ble Apex Court in the case of **Babu Verghese & Others Vrs. Bar Council of Kerala and Others** reported in 1999 3 SCC 422, **State of Jharkhand and Others Vrs. Ambay Cements and Another** reported in (2005) 1 SCC 368 and **Zuari Cement Limited Vrs. Regional Director, Employees' State Insurance Corporation, Hyderabad and Others** reported in (2015) 7 SCC 690.

It is evident from the proposition laid down in the judgments referred herein above that the authorities are to follow the statute and there cannot be any departure from the statutory provision.

14. The learned Advocate General, in order to strengthen his argument, has relied upon the judgment rendered by Hon'ble Apex Court in this regard that the eligibility condition is the absolute domain of the State Government, as such the same cannot be interfered with by the High Court sitting under Article 226 of the constitution of India, reliance has been put on the judgment rendered by Hon'ble Apex Court in the case of **Dr. Gangaprasad Verma and Others Vrs. State of Bihar and Others** reported in (1995) Supp. (1) SCC 192 wherein it has been held that the court must give effect to the Act if the language is clear and explicit.

The ratio laid down in this judgment rather supports the case of the petitioners since the NCTE notification prescribes an eligibility condition for these categories of the petitioners but the same has been omitted, as such the State has travelled beyond its jurisdiction in omitting the said eligibility condition with the statute is very clear and explicit in this regard.

In the case of **V. Lavanya and Others Vrs. State of Tamil Nadu and Others** reported in (2017) 1 SCC 322 the issue fell for consideration before the Hon'ble Supreme Court was to assess the legality and propriety of the order of the High Court wherein the State government circular issued on 6.2.2014 granting relaxation of 5% marks in passing marks for the candidates belong to SCs/STs/BCs, BCs (Muslim), most BCs, denotified communities and persons with disability while the minimum qualifying marks with regard to general candidates was retained as 60%, but the said relaxation of 5% marks for reserved category candidates was held applicable to Teacher Eligibility Test (TET) held on 17.08.2013 and 18.8.2013 and all future TETs. The High Court, while disposing of the petition, has upheld the validity of the Government Memorandum No.25 dtd.6.2.2014 but set aside the grading system adopted by the government in Government Memorandum No.252 dtd.5.10.2012 observing that it lacks rationality as it places a candidate with the difference of 1 to 9 marks in the same bracket. Pursuant to the order passed by the High Court, the sate government has come out with the subsequent order by way of issuing a Government Memorandum No.71 dtd.309.5.2014 in tune with the suggestion made by the Single Judge. The Government Memorandum No.71 dtd.30.5.2014 was challenged both on the ground of weightage having been awarded for the marks obtained in three qualifications and also the method of gradation.

The Madras Bench of the High Court dismissed the writ appeals as well as the petitions, as opposed to the view taken by the Madras Bench of the High court, the Madurai Bench quashed the relaxation given to reserved category candidates hence the matter fell for consideration before the Hon'ble Supreme Court and the Hon'ble Apex court has been pleased to hold at paragraph 42 that the Madras High Court rightly rejected the challenge to Government Memorandum Nos.25 dtd.6.2.2014 and 71 dtd.30.5.2014 holding that as per the NCTE guidelines, the State government has the power to grant relaxation on the marks obtained in TET for the candidates belonging to reserved category and the same is affirmed. The Madurai Bench did not keep in view the NCTE guidelines and the power of the State Government to

grant relaxation in terms of their extent reservation policy and erred in quashing the Government Memorandum no.25 dtd.6.2.2014, hence the same is liable to be set aside.

It is evident from this judgment that the Hon'ble Apex Court has also taken into consideration the fact that the Central Government or the State Government are duty bound to follow the NCTE guidelines and they cannot deviate in any manner unless counter rule is framed in accordance with law, hence this judgment rather suits the case of the petitioners.

In the case of **State of Gujurat & Others Vrs. Arvind Kumar T. Tiwari & Another** reported in (2012) 9 SCC 545 wherein the fact was regarding relaxation in the eligibility criteria and it has been laid down in the said judgment that the Court cannot issue direction to relax eligibility criteria.

The fact herein is not regarding the relaxation in the eligibility criteria, rather it is omission of the particular eligibility criteria depriving the candidates in participating in the selection process. However, this judgment will be applicable so far as it relates to issue related to category-I.

Further reliance has been placed in the case of **Pramod Kumar Vrs. U.P. Secondary Education Services Commission & Others** reported in (2008) 7 SCC 383. The fact related to the said case was regarding non-consideration of candidates having no valid eligibility criteria, but the fact in this batch of cases is not for getting any consideration in the lack of the eligibility criteria.

Reliance has further been placed in the judgment rendered in the case of **Visveswaraiah Technological University and Another Vrs. Krishnendu Halder and Others** reported in (2011) 4 SCC 606. The fact leading to the said case was as to whether on account of unfilled seats in a particular year, the eligibility criteria fixed by the State / University would cease to apply or that the minimum eligibility criteria suggested by AICTE alone would apply. Unless and until the State or the University chooses to modify the eligibility criteria fixed by them, they will continue to apply in spite of the fact that there are vacancies or unfilled seats in any year.

So far as the facts of this batch of writ petitions are concerned, the same is not regarding relaxation in the eligibility criteria on account of the unfilled vacancies, rather the issue is regarding omission of a particular eligibility criteria which has been provided under the NCTE guideline having been accepted by the state Government by way of enacting the Rule, 2010,

hence this judgment is not applicable in the facts and circumstances of the instant case.

Reliance has further been placed on the judgment rendered in the case of **Delhi Subordinate Services Selection Board Vrs. Praveen Kumar** (supra). It is not in dispute that it is the absolute domain of the State Government to lay down the eligibility criteria so far as it relates to the age as well as academic qualification, but this judgment will not be applicable in the facts and circumstances of the cases as because omission of the particular eligibility criteria which is in question in these batch of writ petitions are not in accordance with the NCTE Act, hence this judgment supports the contention of the petitioners so far as the eligibility criteria is concerned.

Reliance has further been placed on the judgment rendered in the case of **State of Tamil Nadu and Another Vrs. S.V. Bratheep (minor) and Others** reported in (2004) 4 SCC 513 wherein the issue was of providing higher minimum prescribed by the State Government than that has been prescribed by AICTE and as such it has been laid down therein that it is in any manner adverse to the standard fixed by the AICTE or reduces the standard fixed by AICTE, then only it can be said to be improper, but if it is higher, it would be permissible for the state government to prescribe the same for the purpose of admission in the engineering college that what has been prescribed by AICTE.

The fact of this judgment is regarding admission in the Engineering colleges and for that the higher minimum standard has been prescribed as fixed by the AICTE and in that pretext the judgment has been rendered by Hon'ble Apex Court laying down the proposition that fixing higher minimum criteria cannot be said to be improper, but here the fact is not like that of the fact of the judgment, rather the fact in the instant case is regarding consideration of candidature of a particular category who have got minimum 45% of marks in graduation with diploma in education under the NCTE regulation, so it is a case of depriving such category of candidates in participating in the selection process. Hence this judgment will not be applicable in the facts and circumstances of the instant case.

In view of the discussion made above the Centre or the State is duty bound to act in pursuance to the provision as contained in the statute / guideline and it is further stated herein that the State of Odisha has come out with a resolution in the year 2010 having been notified with effect from 27.9.2010, known as the Odisha Right to Free and Compulsory Education

Rule, 2010 whereby and where under the guideline issued by the NCTE has been adopted under the provision of Rule 15 of the said rule.

15. The fact which is not in dispute in these cases is that the State authorities have taken clear cut stand as per the requirement of law as provided under the provision of Right to Education Act, 2009 which contains a provision U/s.23 as has been quoted above which is being repeated at the risk of repetition that any person possessing such minimum qualification, as laid down by an academic authority, authorized by the Central Govt., by notification, shall be eligible for appointment as a teacher.

It is evident from this provision that an academic authority is to frame eligibility criteria to fix the minimum qualification. In view of such provision National Council for Teacher Education has notified a notification on 25.8.2010 wherein the minimum qualification has been prescribed for consideration of candidature of one or the other candidate from Classes-I - V and Classes- VI-VIII wherein candidate possessing senior secondary (or its equivalent) with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in accordance with the NCTE (Recognition Norms and Procedure), Regulations, 2002 are to be considered for their engagement, likewise for Classes- VI-VIII graduation with at least 45% marks and 1-year Bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard. This notification has undergone some amendments by virtue of notification issued on 29th July, 2011 but so far as it relates to the category of candidate possessing 45% marks in graduation with 1-year Bachelor in Education in accordance with NCTE regulation, so far as it relates to Classes-VI to VIII remained unchanged.

It is not in dispute that the NCTE is the Apex Body as per the provision of Section 23 having been authorized by the Central Govt. to fix the minimum qualification. It is also not in dispute that the state is bound to follow the rules/regulations governing the recruitment by the NCTE, i.e. the mandate of the central legislation, i.e. Right to Education Act 2009.

16. Learned Advocate General has raised the issue of locus of the petitioners by submitting that the petitioners have not got CT training as per the NCTE regulation, as such the writ petitions are fit to be dismissed on the ground of locus itself.

The argument of learned Advocate General, in this context, is not acceptable to this court for the reason that it is not the question of a candidate, rather it is the question of legality and propriety of the decision taken by the authorities which fell for consideration before this court in these writ petitions and if one section of candidates is being deprived from consideration of their candidature as per the right vested upon them under the statute promulgated by the competent body, then this court cannot shut its eyes, moreover, the petitioners are not seeking their engagement, rather they are only seeking consideration of their candidature, if the applications will be submitted, then only it will be said as to whether they are eligible on the ground of minimum educational qualification or not, but such category of candidates cannot be denied consideration of their candidature on conjectures by prejudging any thing when the statute provides to consider, even in the counter affidavit no specific response has been given to that effect save and except stating at paragraph 18 to the effect that there are enough qualified candidates with CT, B.Ed and OTET but they are not eligible due to fixation of 50% marks in the qualifying examination, some of the candidates secured less than 50% of marks but what is the justification in not inserting the criteria regarding 45% marks as provided under the NCTE Act, has not been reflected, meaning thereby the contention raised by the petitioners has been admitted by the state – opposite parties.

17. This court, after going through the impugned resolution as well as the advertisement, has found that the category of candidates who are possessing graduation with 1-year Bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard have been deprived from participating in the selection process since this is lacking in the impugned resolution as well as in the advertisement which is contrary to the Rule framed by the State Government in exercise of power conferred under Section 38 of the RTE Act, 2009, known as "The Orissa Right of Children to Free and Compulsory Education Rule, 2010, effected w.e.f. 27.09.2010 wherein under Part VI, Rule 15, minimum qualifications for appointment as teacher in elementary schools have been provided as the qualification shall be in consonance with the qualification laid down by the academic authority constituted by the Central Government.

The NCTE being the apex academic authority, came out with notification bringing down minimum educational qualifications as quoted

above wherein the eligibility condition in question find place but in the resolution impugned, this criteria of eligibility condition has been omitted.

The State in the counter affidavit also not given reasonable explanation and that cannot be given since it is admitted case of the State that the Right to Education Act, 2009 is mandatorily to be followed as also the rules and regulations governing the recruitment process by the Apex Authority having been notified by the State Government, hence the action of the State Govt., depriving these sections of the candidates from participating in the selection process, cannot be approved by this court, in view thereof the prayer made by the writ petitioners in this batch of writ petitions is fit to be allowed and accordingly the same are allowed.

18. In the result the matter is remitted before the State authorities to take consequential steps with respect to such category of employees strictly as per the NCTE regulation as per the discussion made herein above before proceeding further in the selection process.

CATEGORY-III

19. In this batch of writ petitions the following relief has been sought for:-

(i) To quash the direction issued by the opposite party no.1 dtd.26.12.2016 to the State Project Director (opposite party no.2) for reserving 60% vacancies to be filled up by candidates having Science (+2 Science / +3 Science) and 40% to be filled up by candidates having Arts / Commerce background (+2 Arts or Commerce / + 3 Arts).

(ii) To incorporate the eligibility criteria meant for teachers to be appointed in classes- VI to VIII, i.e. B.A./B.Sc. 2-years Diploma in elementary education (by whatever name known) in terms of the NCTE Notification No.215 as one of the eligibility criteria in the impugned guidelines dtd.26.12.2016.

(iii) To issue direction upon the opposite parties to treat all the vacancies as advertised for engagement of Sikhya Sahayak during the year 2016-17 as one category particularly in respect of Classes – 1 to V and to consider the petitioners as against all the vacancies advertised for engagement of Sikhya Sahayak meant for Classes – VI to VIII.

20. The case of the petitioners in this batch of writ petitions is that they have acquired required qualification, i.e. +2 Arts with Diploma in Elementary Education (CT). Some of the petitioners have also acquired +3 Degree, i.e. (B.A.) and have also possessed Diploma in Elementary Education

(D.E.L.Ed.). All these petitioners, after acquiring training, i.e. D.E.L.Ed. (CT), have also appeared the Odisha Teacher Training-I examination conducted by the Board of Secondary Education and declared as successful in the said examination. After coming into effect the RTE Act, 2009 the "Elementary Education" has been defined which means the education from Class-I to Class-VIII. Section 23(1) of the Act prescribes the qualification and terms and conditions of service of Teachers. Section 19 of the said Act provides that no school shall be established without obtaining certificate of recognition unless it fulfills the norms and standard of the school. From the schedule it appears that numbers of teachers are required to be appointed from Class-I to Class-V and the norms and standards for engagement of such teachers have also been provided. Similarly from Class-VI to VIII a separate category of teachers have been provided.

From joint reading of Sections 19 and 23 of the Act read with Rule 15(2) of the said Rule it is evident that it is only the academic authority authorized by the Central Government, i.e. NCTE to lay down the minimum qualification by virtue of notification. It is evident from the minimum qualification as laid down by the NCTE notification that from Class-I to Class-V that candidates who have acquired qualification, i.e. senior secondary (+2) with at least 45% marks and 2-years diploma in elementary education (D.E.L.Ed.) (whatever names known) i.e., C.T. and candidates having senior secondary (or its equivalent) with 50% marks and 2-years diploma in elementary education (D.E.L.Ed.) are the minimum qualification to be considered for appointment of teachers in respect of Classes-I to V. Similarly the norms have been prescribed under the NCTE regulation in respect of other category of classes in elementary education from Classes-VI to VIII.

The opposite party no.1 issued a revised guideline for engagement of Sikhya Sahayak during the year 2016-17 wherein the minimum qualifications have been laid down pursuant to the NCTE notification with respect to both the category of classes, i.e. from Classes-I to V and Class-VI to VIII but though it has specifically been provided in the said guideline, the minimum qualification has not been reflected in the impugned resolution since in the resolution no provision has been made making the reservation of vacancies for Science and for Arts category of teachers in both the +2 Arts or Commerce of +3 Arts and Commerce. The state government has also issued one communication on 26.12.2016 indicating therein the procedure for selection of Sikhya Sahayak by fixing 50% of vacancies from the candidates

having the qualification of higher secondary education with CT / D.E.L.Ed) and rest 50% will be filled up from the candidates having graduate with B.Ed. It has further been provided that in such category 60% of vacancies will be filled up from the candidates having Science (+2 Science/+3 Science) and 40% will be filled up from Arts/Commerce (+2 Arts / Commerce / +3 Arts) background.

The case of the petitioners is that such reservation of post of 60% having Science and the rest 40% having the background of Arts / Commerce is contrary to the procedure laid down by the academic authority, i.e. NCTE, hence these writ petitions.

21. The contention of the petitioners is that when there is no bifurcation of posts to be filled up from amongst the Arts / Science category of candidates, as such it would be justified for the State to proportion it in between the Science and Arts / Commerce candidates in the equal ratio otherwise the candidates having Arts/Commerce background will be discriminated in the matter of selection since larger number of vacancies have been earmarked for the candidates having Science background.

So far as the second prayer, it has been contended by them that the NCTE notification provides provision to provide opportunity to such candidates having graduation and 2-years diploma in elementary education by whatever name known, but in complete violation of the same this category of candidates have been deprived from consideration of their candidature.

It has further been contended that the candidates possessing B.A./ B.Sc. and 2 years diploma in elementary education or whatever name known has been omitted from the minimum eligibility criteria for the category-II and thereby such type of candidates have been deprived from consideration of their candidature.

The contention raised by the State in this regard is that since the aforesaid minimum eligibility criteria has already been prescribed in respect of category-I which is meant for classes-I to V, as such the same has not been prescribed for category-II, i.e. for Classes-VI to VIII.

It is the further contention that although the NCTE has prescribed the minimum qualification as per the notification dtd.29th July, 2011, but the state can fix higher qualification than the minimum qualification, fixing higher qualification as minimum qualification is not in violation of the notification

dtd.29.7.2011, had the state fixed lower qualification than the minimum qualification prescribed by the NCTE, then it would have in violation of the minimum qualification.

It has further been contended that even if the qualification of graduation and 2 year diploma in elementary education by (whatever name known) is included for one of the qualification for category-2, then also the present petitioners cannot be eligible for consideration against category-2 as in clause-b of category-2, it has been made mandatory passing in OTET but none of the petitioners have acquired the eligibility of OTET-2, hence on this ground the relief sought for by these writ petitioners are fit to be rejected.

22. Heard the learned counsels for the parties and perused the documents available on record.

This court, after considering the rival submission of the parties so far as first prayer is concerned, i.e. regarding earmarking the higher number of vacancies from the candidates having science background and lesser number of vacancies to the candidates having Arts/Commerce background, it is not in dispute that the NCTE notification does not prescribe any criteria of earmarking the vacancies on the basis of faculty, but however the pupil – teacher ratio has been provided therein for keeping the post filled up from amongst the teachers as would be evident from the schedule referred under the RTE Act, 2009 in consonance with the provision of Section 19 and 25 of the said Act. It is not in dispute that filling up of the vacancies depends upon the exigency and need of the appointing authority. It is evident from the intent of the provision of RTE Act, 2009 read with NCTE notification that the primary object of the government to provide free education to the children of the age group of 6 to 14 years and their standard of the education is also to be maintained uniformity across the country, meaning thereby if a candidate who lives in a particular state is to be prepared in such a way that he / she may compete in high competitive examination at any level with the candidates living in other parts of the country and to achieve this aim and qualitative improvement in the human resources well foundation is to be given to the school going children and for that the state government is duty bound to provide qualitative teaching, keeping this fact into consideration in larger issue the appointing authority will be said to be the competent authority to fill up the vacancies depending upon the urgency, need and to provide qualitative teaching.

It is not in dispute that the students require uniform standard of teaching in all the faculties i.e. arts, science or commerce. Admittedly for classes-I to V the subject having science background is less excepting the reading of mathematic, etc., but now we are living in the era where even the mathematics is being taught from Class-I in ICSE course or in the CBSE course.

Here, in the instant case, the state government is concerned with the education to be imparted to such category of candidates through its own board known as secondary board having 10+2 syllabus side by side the courses being run by Central Board of Secondary Education (in short CBSE) Indian Certificate of Secondary Education (in short ICSE) are also going on, hence the requirement of the day is that the children studying in the state secondary board is to compete with the students studying with CBSE course or ICSE course.

In this predicament it is the state government who is the best to judge the persons to be inducted in the service of teachers to strengthen the foundation of the children of category-1 which imparts studies to class-I to class-V candidates. If this fact would be taken into consideration, as has been argued orally by the learned Advocate General, the justification shown by learned Advocate General that since the quota of fixing vacancy is not available in the NCTE notification, as such the state government is the best judge to earmark the vacancies to be filled up from amongst the science or Arts or Commerce category, according to him, keeping the larger interest of the children which is the sole aim of enacting the RTE Act, 2009, the state has taken a conscious decision to earmark 60% of vacancies to be filled up from Science background teacher to impart teaching from Class-I to Class-V.

In that view of the matter, according to the considered view of this court, the reasoning given by the learned Advocate General seems to be just and proper and it does not seem to suffer from the vice of malice or the arbitrariness.

Since it has not been provided under the statute earmarking the quota of science or arts or commerce background, rather it depends upon the need and exigency, the government in future can also take decision of reducing this percentage of quota as has been submitted by learned Advocate General. This also led this court to come to the conclusion that the state action cannot be said to be unreasonable.

Overall providing any qualification fixing any quota of engagement of a category of employee since is the policy decision of the State government, unless arbitrary, the scope of judicial review is very limited that too when no specific criteria has been fixed in this regard under the statute.

In that view of the matter, according to the conscious view of this court, showing interference in any manner in this regard by this court sitting under Art. 226 of the constitution of India will only lead to interference with the scope of the state government in making out the policy decision which is for the larger interest of the pupil.

In that view of the matter, this court restrains itself to exercise the power of judicial review as has been prayed by the petitioners, accordingly this prayer of the petitioners is declined to be interfered with.

23. So far as the second prayer regarding omission of consideration of candidature of B.A./B.Sc. and 2-years diploma in elementary education by whatever name known, in the State of Odisha it is known as certification on training is concerned, this court is not in agreement with the reasoning given by the state through the learned Advocate General rather reiterating the view which has been taken by this court while deciding the issue raised in the writ petitions referred as category-II above, is of the considered view that the state is supposed to act strictly in pursuance to the legislation.

Furthermore, the resolution reflects that the candidates are to apply either in category-I or category-II as per their qualification as would be evident from clause 6.2, if this minimum educational qualification is not under category-II then such candidates will be deprived from making their applications for category-II.

The contention that since this is provided under category-I as such the same is not required to be referred under Category-II, but this is also not convincing to this court as because so far as insertion of graduation and 2 years diploma in elementary education/ 2 year diploma in special education has been inserted in category-I that is also not required under the NCTE notification as would be evident from the quoted portion while discussing the writ petitions related to category-II, and as already been held while dealing with batch of cases falling under Category-II as such the same is not repeated for the shake of brevity.

In that view of the matter the matter needs consideration by the authorities, hence the second prayer of the petitioners is fit to be allowed with

a direction to the state authorities to act strictly in pursuance to the minimum educational qualification provided under the NCTE notification before proceeding further in the selection process.

In the result this batch of writ petitions are partly allowed.

CATEGORY-IV

24. In these batch of writ petitions prayer has been made to quash the resolution on the ground that there is inconsistency in between clause 6.1 and 6.2 of the resolution so far passing of Odiya, as M.I.L. up to class-X.

The contention raised by the petitioners in these batch of writ petitions is that the resolution impugned contains an eligibility condition under clause 6.1 for category-I under (C) that candidate must have Odiya as M.I.L. up to class-X or pass in Odiya language test equivalent to Matric standards conducted or declared equivalent by Board of Secondary Education, Odisha except the candidates as mentioned under para-6.2, while on the other hand under clause 6.2 it has been provided that the eligibility condition for Urdu, Bengali, Telgu Sikhya Sahayaks candidates to have passed Urdu, Bengali, Telgu as the case may be as MIL up to HSC standard. According to the petitioners both these eligibility conditions are contradictory to each other, as such not sustainable in the eye of law.

25. While on the other hand, learned AG has submitted that there is no inconsistency in between the eligibility condition as provided under clause 6.1(C) and 6.2 of the resolution for the reason that Category-I provides the eligibility conditions of having Odiya pass as Mother Indian Language (MIL) from the recognized Board, but that is in exception to the provision made in the eligibility condition as contained in clause 6.2 which is meant for the Urdu, Bengali, Telgu Sikhya Sahayaks and they have to pass Urdu, Bengali, Telgu as M.I.L. up to HSC standard along with certificate from the Head Master of the concerned schools to the effect that she / he has passed H.S.C. examination in Odia medium, since they are to teach in bilingual schools.

In view thereof it has been contended that it is not inconsistent rather it is required in the State of Odisha to extend education not only to the Odiya knowing people, but also to Urdu, Bengali, Telgu knowing candidates who are residing in the fore corners of the state of Odisha and for them the SS are required to teach them.

26. Having heard learned counsels for the parties and on perusal of the resolution it is evident that the NCTE notification does not provide minimum eligibility condition so far as it relates to the language and it has rightly not been provided since the main subject has been taken into consideration by providing the minimum educational qualification leaving open to the respective state governments to make out its own policy decision to provide education to the children on the basis of language.

Since in the State of Odisha it is the requirement of appointment of teacher having known with the odiya language, as such for category-I the odiya language has been made mandatory except the candidates mentioned under para 6.2 while 6.2. which relates to providing education to the Urdu, Bengali, Telgu background of the children and for them Urdu, Bengali and Telgu has been made mandatory language to be passed up to the H.S.C. standard, simultaneously they are also required to give the certificate from their Head Masters that they have passed H.S.C. examination in the Odia medium and the candidate has been asked to apply either in Category-I or Category-II as per their requirements.

In view of the same the candidates having not passed Odiya language as required under t he provision of 6.1(C), they will be declared to be not possessing the minimum required qualifications and likewise the candidates having not passed Urdu, Bengali and Telgu as M.I.L. up to H.S.C. standard along with knowledge of the Odiya pass H.S.C. examination, they will not be eligible to participate in the selection process, the whole intention is that they impart teaching in Urdu, Bengali and Telgu language but since such type of children are living in the state of Odisha and they are much acquainted with the Odiya language it is required that such teachers must know the odiya language, hence it cannot be said to be inconsistent rather it is the requirement for the State of Odisha, as such the same has been taken as a policy decision.

Further, the provision of clause 6.1(C) and 6.2 are quite different to each other, while under clause 6.1(C) the requirement is that Odiya as M.I.L. up to Class-X while under 6.2 a certificate is to be produced from the Head Master of the concerned school that he / she has passed H.S.C. examination in Odiya medium, as such while one reflects passing of H.S.C. examination with Odiya as M.I.L. while other reflects passing of H.S.C. in Odiya medium, hence both are different to each other.

In view thereof this court is declined to interfere with the same, accordingly this batch of writ petitions stand dismissed.

CATEGORY-IV

27. In these batch of writ petitions which have been filed by the candidates who have discharged their duties as non-formal educator wherein prayer has been made by these writ petitioners to quash the upper age limit fixed as 32 years as prescribed in clause No.7 of the resolution dtd.26.12.2016 and allow them to participate in the selection process by granting relaxation in view of the government decision taken on dtd.4th December, 2007 and 20th February, 2010.

28. The fact of the cases is that these writ petitioners have been appointed under a scheme known as non-formal education scheme, introduced by the Central Government and implemented by the respective States, including the State of Odisha to achieve the aim and object of providing elementary education to the children within the age group of 6 to 14 years. The said non-formal education scheme was replaced by the Central Govt. with effect from 31.3.2001, as such the State Government has decided that non-formal education instructors / supervisors working in the said scheme and who were retrenched due to abolition of such scheme will be given relaxation to compete for the post of S.S., though these writ petitioners have fulfilled all eligibility criteria as prescribed in the resolution dtd.26.12.2016 but no relaxation has been provided as per the government decision contained in the letter dtd.4.12.2007 and 20.02.2010, hence these writ petitions.

Learned Sr. Counsel appearing for the petitioners has submitted that the petitioners have been given the benefit of relaxation vide resolution dtd.19.11.2009 by taking a decision to relax their upper age limit wherever necessary and their past experience shall be taken into consideration for the purpose as per the instruction issued by School and Mass Education Department letter No.7196 dtd.19.3.2006 and 3358 dtd.16.8.2008. According to the petitioners the said benefit has not been provided in the impugned resolution, as such these batch of writ petitioners have been deprived from participating in the selection process, hence they be given relaxation in the upper age limit so that their candidature may be considered on merit.

29. Stand has been taken by the opposite parties in the counter affidavit that as per the Right to Education Act, 2009, section 23(1) provides that any person possessing qualification as laid down by the academic authority,

authorized by the Central Government by notification, shall be eligible for appointment as S.S. (teacher). Considering the eligibility criteria, no relaxation clause kept for any ex-non-formal educator volunteers, so, if the ex-non-formal educator volunteers having requisite qualification, i.e. training, TET and within the prescribed age limit, may come to compete and get selected as there is no bar for them.

30. This court, after having heard the learned counsels for the parties and on appreciation of rival submission advanced on their behalf, found that the Central Govt. has launched a scheme known as non-formal education scheme to impart education to the children in the age group of 6 to 14 years. The said non-formal education scheme was replaced by the Central Govt. w.e.f.31.3.2001, the State Government had decided that the non-formal educator instructors / supervisors working under the said scheme, who were retrenched due to abolition of such scheme, will be given relaxation to compete for the post of S.S. and accordingly decision was taken to that effect by the Government vide office order dtd.4.12.2007 whereby and where under it has been decided that their candidature will be considered for engagement as S.S. by giving relaxation to their upper age limit wherever necessary and taking their past experience into consideration as given to D.P.E.P./E.F.A. and para teachers at the rate of 5 marks per year up to maximum 3 years (5X3=15 marks).

The Joint Secretary to Government has issued a letter on 20th February, 2010 addressed to the State Project Director, wherein it has been communicated to give them grace marks and age relaxation.

It is evident from the material available on record that the scheme of S.S. has been launched under the Sarva sikhya Aviyan under the scheme of the Central Government and to implement it the government of Odisha has issued a resolution on 3.10.2000 wherein under clause 4.7 a provision has been made with respect to non-formal education instructors / supervisors and left out Sikhya Karmis giving them opportunity to apply along with others and **compete on merit**.

On the basis of this resolution the State Government has proceeded in making selection of Swechha Sevi Sikhya Sahayak. It is admitted position that the non-formal education scheme has already been closed prior to introduction of Sarva Sikshya Aviyan having been introduced by way of resolution dtd.3.10.2000 but the condition mentioned in clause 4.7 has not

been questioned by the ex-non-formal educators for getting any benefit in the age relaxation. The said practice continued up to the date of issuance of resolution No.18536 dated 19.11.2009. The State Government when issued resolution dtd.19.11.2009 a clause has been inserted therein under Clause No.19 wherein the persons engaged by the Government in different schemes such as District Primary Education Programme (DPEP), Education for All (EFA), non-formal educator (NFE), Gana Sikhyaks having requisite qualifications may be considered for engagement as S.S. by relaxing their upper age limit wherever necessary and their past experiences will be taken into consideration for the purpose as per instruction issued vide S & M E Department letter no.7198 dtd.19.3.2006 and resolution No.3358 dtd.16.2.2008.

Another resolution has been issued on 10.01.2011 but no provision has been made in the said resolution granting relaxation or any weightage to this category of persons who have rendered their services under these schemes. But this has also not been questioned by any of the ex-engagee who have worked under these schemes.

Thereafter the Right to Education Act, 2009 has come and the authorities have been vested with National Council of Teacher Education by virtue of notification dtd.25th August, 2010 whereby and where under there is no clause for giving relaxation to any of the candidates or weightage. The NCTE has fixed minimum educational qualification. After coming into effect of Right to Education Act, 2009 or the NCTE Act, 2010, other resolutions have been issued by the State Government on 6.8.2013 wherein there is no reference of giving any weightage to this category of candidates, likewise in the present resolution.

In view of this admitted position it is evident that this category of candidates are seeking relaxation in age and to give weightage after lapse of seven years, i.e. from issuance of resolution dtd.19.11.2009 thereafter also resolution has come but no body has questioned that.

It has already been dealt with while answering the question raised by the batch of writ petitioners pertaining to Category-I that in case of absence of any eligibility condition so far as it relates to qualification or age, it is the domain of the State authorities to fix the minimum eligibility criteria, after all seeking relaxation cannot be claimed as a matter of right.

31. In the instant case the petitioners have been directed to be given weightage in the year 2009 in view of the decision taken by the State authorities so that the candidates who have rendered their services under these schemes may avail the opportunity and be selected if found to be eligible in other respect, but it does not mean that a right has been conferred upon these categories of candidates to get relaxation and weightage in the marks on account of rendering the past services.

32. In view of the settled proposition as has been discussed herein above relating to the policy decision of the State Government, the jurisdiction of the High Court, sitting under Article 226 of the Constitution is very limited to direct the State authorities to come out with a particular criteria fixing the eligibility criteria by directing the State authorities to grant relaxation in age or any eligibility criteria unless it is found to be arbitrary or unreasonable, but nothing has been found by this court that the action of the authorities is arbitrary, rather chance has been given to such category of candidates.

In view of such discussion these category of writ petitions lack merit, hence dismissed.

CATEGORY-V

33. In these batch of writ petition the following prayers has been made:-

(i) To quash / modify the impugned resolution dtd.26.12.2016 under Annexure-5 to the extent in directing the State Government to allow untrained OTET pass SC/ST candidates to submit their application forms for engagement of Sikhya Sahayaks;

(ii) To issue necessary corrigendum to allow the untrained SC / ST candidates who have passed OTET to be considered as per resolution dtd.26.12.2016 as has been done in the previous resolutions dtd.10.1.2011 and 6.8.2013 and the advertisement dtd.11.9.2014 under Annexures-2, 3 and 4 and to consider the candidatures of the present petitioner and to allow them to participate in the selection process for engagement of Sikhya Sahayaks.

34. Learned counsel representing the petitioners has relied upon the resolution dtd.6.8.2013 as contained in resolution No.18668 wherein the provision has been made for the untrained category of candidates. They further rely upon the communication dtd.11.9.2014 wherein the provision has been made for PH/SC/ST category candidates who are untrained but OTET pass. They have further submitted that in the impugned resolution the untrained candidates belonging to PH/SC/ST have been deprived from participating in the selection process, hence these writ petitions.

35. The learned Advocate General, while countering the argument advanced on behalf of the petitioners, has submitted that there is no question of deletion of any qualification pertaining to this category of candidates as because it is already provided under Right to Education Act, 2009 U/s.23 wherein under Sub-Section (2) the State has been empowered to make requisition before the Central Government if the trained candidate is not coming forward, as such since this condition itself is mentioned in the statute, hence the cases of these category of candidates will not in any way being prejudiced.

He further submits that these writ petitions are premature since the State has invited applications from the candidates and the statute provides that if in case of inadequate number of trained candidates then only requisition can be made by the State Govt. before the Central Govt. for relaxation, but that stage has not yet come, hence the writ petitions are fit to be dismissed by holding that these are premature writ petitions.

36. Heard the learned counsels for the parties and perused the documents available on record.

For appreciating the argument advanced on behalf of the parties with respect to the issue involved in these cases, reference of Sec.23 sub-section (2) needs to be made which has already been quoted herein above.

As per the said provision the State has been empowered in case of exigency of non-availability of trained teachers, if the State Govt. will make requisition before the Central Govt., the Central Govt. may, if it deems necessary, by notification, to relax the minimum qualification required for appointment as teachers for such period, not exceeding 5 years as may be specified in that notification.

It is evident from the said provision that the power to relax has been conferred by the statute upon the Central Government. The resolution dtd.6.8.2013, upon which the learned counsel appearing for the petitioners have given much emphasis, contains a provision under clause no.6.2 which speaks that in case trained qualified candidates of above categories are not available, the State Government shall request the Central Government for relaxation of the prescribed minimum qualification as laid down by the academic authority for engagement of the S.S. (teachers) in accordance with the provisions made under section 23(2) of the said Act, read with Rule 16(2) and (4) of the said Rules. The candidates having requisite academic

qualification without training qualification with OTET pass may be considered for engagement only on the basis of qualification so relaxed by the Central Govt.

The provision of clause 6.3 speaks that the untrained candidates having requisite academic qualification required for teacher's training courses as decided by NCTE from time to time and passing the OTET may only be eligible for appointment as teacher. The condition contained in provision 6.4 speaks that untrained candidates selected as per the relaxed standard shall have to furnish an affidavit at the time of engagement to the effect that they shall acquire the required training qualification within the stipulated period in accordance with the provisions of the Act or as decided by the Government of India from time to time. Candidates unable to acquire the training qualification within the stipulated period shall be disengaged automatically.

It is evident from the joint reading of the provisions as contained in clause nos.6.2, 6.3 & 6.4 that it has been laid down in the resolution dtd.6.8.2013 in the light of the statutory provision contained under Section 23(2) of the Right to Education Act, 2009. It is further evident from the said provision that these are only to be exercised in case of non-availability of trained candidates and in that situation the State Government will make requisition before the Central Government to grant relaxation and it is up to the Central Government to relax it in view of the provision of Section 23(2) of the Right to Education Act, 2009.

37. This court has gathered that the stage of providing relaxation to untrained categories of candidates has not yet come since the recruitment process is in the initial stage and unless it will be completed, the number of posts occupied by the trained candidates cannot be ascertained and it is then only question of seeking relaxation would come.

In view thereof the petitioners, cannot be granted any relief since the writ petitions are premature in view of the provision as contained in Section 23(2) or even on the basis of the condition mentioned in the resolution dtd.6.8.2013 under clause 6.2 which itself indicates that in case of non-availability of trained candidates but that stage has not yet come.

Accordingly these writ petitions are dismissed.

CATEGORY-VI

38. In these batch of writ petitions the following prayers has been made:-

(i) To quash the impugned resolution dtd.26.12.2016 under Annexure-6 wherein there is no provision for giving relaxation of age and additional weightage of marks towards experience in terms of the decision dtd.23.12.2013.

(ii) To issue corrigendum giving relaxation of age and additional weightage of marks for the experience to the disengaged NLCP instructors in terms of the government decision dtd.23.12.2015 and allow the petitioners to be considered for engagement of Sikhya Sahayak pursuant to the resolution as well as the advertisement dtd.26.12.2016.

39. The case of the petitioners is that they were working under National Child Labour Project (in short NCLP) vide engagement order dtd.26.8.2004, continued in service, thereafter after coming into effect the Right to Education Act, 2009 decision has been taken for closure of NCLP special child labour school as per the instruction issued by the Govt. of India, accordingly the State Govt. has taken decision in its meeting held on 23.12.2013 to bring the children of NCLP school in the mainstream under the school run by the school and mass Education Department.

The rehabilitation of the educational instructors and volunteers of the erstwhile NCLP schools have been decided to be considered by the School and mass Education Department as per the decision taken in the meeting of the Chief Secretary on 23.12.2013.

40. Learned Sr. Counsel representing the petitioners has submitted that in the proceeding dtd.23.12.2013 the decision was taken to give appropriate relaxation in age and additional marks for experience, to enable them to participate in regular selection process for engagement of S.S. by the S and M E Department. However, they should have the requisite education and training qualification for the post as per the provided norms.

It has further been stipulated therein that in order to enable the teachers of NCLP teachers/instructors/ to acquire necessary educational / training qualification, the relaxation in age would be applicable for a period of three years from their disengagement from the NCLP school. The contention of the petitioners is that three years from the date of engagement has not yet come, as such they are entitled to be given relaxation in age as per the decision taken in its meeting held on 23.12.2013.

It has been submitted by learned counsel for the petitioners that although averments made in the counter affidavit at paragraph 22 with respect to weightage to be given to the ex-non-formal education volunteers but no statement has been given with respect to consideration of the candidature of such teachers who have been directed to be given relaxation as per the minutes of the meeting dtd.23.12.2013.

It is the contention of the petitioners that they have requisite educational qualifications as per the Right to Education Act, 2009 norms.

41. Countering the submission of learned Sr. Counsel for the petitioner, learned Advocate General has submitted that although the Chief Secretary has taken a decision in its meeting dtd.23.12.2013 but since the government has come out with the impugned resolution by way of policy decision in consonance with the provision of Right to Education Act, 2009 fixing the upper age limit as 32 years as per the provision of Rules, 1989, in view thereof this category of candidates cannot claim benefit of relaxation in age in pursuance to the decision of the meeting held on 23.12.2013.

In the minutes of meeting dtd.23.12.2013 decision has been taken to give relaxation of age subject to the condition that they should have the requisite educational qualification and training qualification as per the Right to Education norms, in view thereof the writ petitions has got no substance, accordingly the same are liable to be dismissed.

42. Heard the learned counsels for the parties and on appreciation of the factual aspects it is evident from the material available on record that the petitioners were working under the NCLP Schools. After coming into effect the Act, 2009, the Govt. has taken decision for closure of NCLP Special Child Labour School since under the Right to Education Act, the schools cannot be allowed to run.

The authorities have taken decision with respect to the future of the teachers working therein and to that effect a meeting was convened on 23.12.2013 under the chairmanship of the Chief Secretary of the State of Odisha wherein decision has been taken to give appropriate relaxation in age and additional marks for experience subject to the conditions that they should have the requisite qualification and training qualification as per the RTE norms.

It is not in dispute that the Chief Secretary of the State under his chairmanship has taken a decision to grant relaxation in age but when the

Government has taken a policy decision by way of resolution in the name of His Excellency the Governor of the State, the decision taken by the Chief Secretary will not prevail upon the decision taken by the State under the rules of Executive business.

As has already been decided relaxation cannot be claimed by way of matter of right rather it is the domain of the State Government to grant relaxation or not, but the High Court, sitting under Article 226 of the constitution of India, cannot issue mandamus upon the State authorities to grant relaxation in the age unless it is arbitrary and suffers with malice but the petitioners have failed to make out a case of arbitrariness over and above the decision taken by the State Government.

43. This court has found that the all along case of the opposite parties is to maintain the education standard by following the statutory provision and in that view of the matter interference by this court under Article 226 of the Constitution of India will amount to transgressing in its jurisdiction, in the result the writ petition lacks merit and accordingly dismissed.

CATEGORY-VII

44. These batch of writ petitions have been filed for quashing the resolution dtd.26.12.2016 under Annexure-15 on the ground that they are the candidates who were the petitioners in W.P.(C) No.18542 of 2014 and in view of the direction passed by this court basing upon the decision taken by the High Power Committee granting relaxation in age up to 42 years. The day when this court has passed an order, the selection process has commenced and reached to 3rd preference stage but in the 3rd preference their cases has not been considered and thereafter the 4th and 5th preference has been closed, thereby the petitioners have been deprived from consideration of their candidature even in the light of the order passed by this court in W.P.(C) No.18542 of 2014.

The petitioners in that background have filed these writ petitions to grant them relaxation up to the age of 42 years by quashing the upper age limit of 32 years as contained in clause 7 of the resolution dtd.26.12.2016.

45. It has been submitted by the learned Sr. Counsel appearing for the petitioners that these petitioners have approached before this court in W.P.(C) Nos.18904 of 2015, 16711 of 2016, 18768 of 2015 and 22369 of 2015 and these cases are pending for consideration before this court.

46. Learned Advocate General, countering the argument and submission of learned Sr. Counsel, has submitted that the petitioners cannot be extended relief in these writ petitions merely on the ground of non-consideration in the previous selection process in the light of the order passed by this court in W.P.(C) No.18542 of 2014, the upper age limit fixed up to the age of 32 years cannot be quashed.

He submits that the ground taken by the petitioners regarding non-consideration is pending consideration in other writ petitions before this court.

47. Heard the learned counsels for the parties and perused the documents available on record.

After hearing the learned counsels for the parties, the fact which is not in dispute in these cases is that all the petitioners were petitioners in W.P.(C) No.18542 of 2014 (quoted above) wherein a coordinate Bench of this court has directed the State Government to constitute a High power Committee and consider to extend the benefit of relaxation in upper age limit and in view thereof the State Govt. constituted a High Power Committee who gave its recommendation in the light of availability of vacancy to grant relaxation by way of one time exercise by relaxing the age up to the age of 42 years and accordingly the writ petition has also been disposed of, although the decision of High Power Committee and this Court's order have been referred above, but for the convenience and at the risk of repetition, the same are again been referred here under as:-

> *"A meeting was held under the Chairmanship of Commissioner-cum-Secretary to Govt., S & M E Deptt. in pursuance to the direction of hon'ble High Court, odisha in W.P.(C) No.18542 of 2014 for relaxation of upper age limit for engagement of Siksha Sahayak on 24.2.2015 at 12.00 Noon.*
>
> *The following officers were present in the meeting:-*
>
> *6. SPD, OPEPA*
> *7. Addl. Secretary to Govt., S & M E Deptt.*
> *8. Addl. Director (General), OPEPA*
> *9. U.C. Mohanty, Consultant, S & M E Deptt.*
> *10. Asst. Director (MIS), OPEPA*
>
> *Commissioner-cum-Secretary wanted to know the total number of candidates joined as Shiksha Sahayak till date. It was informed that as per the available date only 6449 candidates have joined as Shiksha Sahayaks till date as per the first preference offered by candidates.*

On analysis of the eligibility conditions of the applicants, it is observed that after completion of all the preferences, the no. of posts advertised may not be filled up due to want of trained candidate and a large number of posts will remain vacant. On the other hand, it is ascertained that 513 no. of candidates beyond the upper age limit but within 42 years of age have applied for SS. Out of these, about 150 no. of SS have taken shelter in Hon'ble high Court which is under sub judice.

Keeping the mandate of RTE in view and taking the vacancies into consideration, the committee decided that the Deptt. will have no objection if the candidates beyond the upper age limit, i.e. up to 42 years of general candidates with 5 years age relaxation for SC/ST/OBC/SEBC/Women/Ex-Serviceman and 10 years age relaxation as per Order No.20199 dated 24.08.2013 of S & M E Deptt. are allowed by Hon'ble High Court for consideration for their engagement as per merit only who are otherwise eligible. But this will be one time and only based on Court order. It cannot be considered as precedent.

However, as the case is pending the final order of the Hon'ble High Court will adhered to for relaxation of upper age limit, i.e., 42 years for Shiksha Sahayaks.

The meeting ended with vote of thanks of the Chair."

The decision of the high power committee has been placed before this court at the time of hearing of W.P.(C) No.18542 of 2014, a coordinate Bench of this court has disposed of the writ petition vide order dtd.2.3.2015 by passing the following order:-

"Heard learned counsel for the petitioners and Mr. B. P. Tripathy, learned Standing Counsel for the School & Mass Education Department and Mr. P.K. Mohanty, learned senior counsel for the OPEPA.

The petitioners have filed this writ petition challenging the order dated 11.9.2014 issued by the Commissioner-cum-Secretary to Government in School & Mass Education Department reducing the maximum age limit to 35 years for making applications by the general candidates for the post of Sikhya Sahayak.

Counter affidavit sworn to by Sri Manoj Kumar Mohanty, Joint Secretary to Government, has been filed on behalf of the Commissioner-cum-Secretary to Government, School & Mass Education Department, O.P.1 enclosing the copy of the proceeding of the meeting (Annexure-A/1) held under the Chairmanship of O.P.1 on 24.2.2015 in pursuance of the direction of this Court issued on 30.1.2015, wherein they have taken the following decision:-

Keeping the mandate of RTE in view and taking the vacancies into consideration, the committee decided that the Deptt. will have no objection if the candidates beyond the upper age limit, i.e. up to 42 years of general candidates with 5 years age relaxation for SC/ST/OBC/SEBC/Women/Ex-Serviceman and 10 years age relaxation as per Order No.20199 dated 24.08.2013 of S & M E Deptt. are allowed by Hon'ble High Court for consideration for their engagement as per merit only who are otherwise eligible. But this will be one time and only based on Court order. It cannot be considered as precedent.

In view of such decision of the High Power Committee, the writ petition is allowed.

Since the Government in its resolution under Annexure-A/1 has no objection for relaxation of the upper age limit up to 42 years for general candidates for engagement of Sikhya Sahayak, I direct that the upper age limit shall be fixed to 42 years for consideration of engagement of Sikhya Sahayak of the petitioners. The applications, which have been rejected on the ground of over-age, shall be considered accordingly.

However, this order shall not be a precedent for other cases in future.
The Misc. Case also stands disposed of.

Issue urgent certified copy.

Let a free copy of this order be supplied to the learned counsel for the School & Mass Education Department."

The day when the writ petition was disposed of, the selection process has already commenced and reached to the stage of 3rd preference district since the selection was directed to be done in pursuance to the decision of the government preference-wise giving preference of 5 districts. The selection process has commenced in view of the fact that no interim order was granted by this court in W.P.(C) No.18542 of 2014. The petitioners' candidature has been considered at the time of consideration of 3rd preference district but they have not been found to be qualified accordingly not selected.

According to the petitioners they have secured higher marks and if their cases would have been considered at the time of consideration of 1st or 2nd preference, they would have been selected and engaged.

Their further contention is that after conclusion of the selection process at the time of 3rd preference district even the authorities have not preceded with the consideration of candidature for 4th and 5th preference district.

48. Here, the petitioners have challenged the resolution dtd.26.12.2016 by assailing it so far as it relates to fixation of the maximum age of 32 years with a prayer to give them relaxation, but they cannot be granted relaxation in these writ petitions in the light of the order passed by the High Power Committee which contains a condition that relaxation would be granted to those category of candidates who were applicants by way of one time exercise and not to be treated as precedent.

The high court has ordered in W.P.(C) No.18542 of 2014 that the said order will be by way of one time exercise and no benefit will be granted in the future vacancies.

In view of such admitted position, the petitioners cannot get any relief in these writ petitions.

In view thereof this batch of writ petitions lacks merit and accordingly dismissed.

It is made clear that this court has not gone into the claims of the petitioners which is pending for its consideration in W.P.(C) Nos.18904 of 2015, 16711 of 2016, 18768 of 2015 and 22369 of 2015 before this court. Accordingly all the writ petitions stand disposed of.

Writ petitions disposed of.

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J. P. DAS, J.

CRLMC NO. 4466 OF 2015

DR. PRABHAT KU. JAIN .....Petitioner

.Vrs.

STATE OF ORISSA .....Opp.Party

PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994 – Ss.18(1), 28(1)(a) r/w Rule 8 of the Rules, 1996

No Court shall take cognizance of an offence under the Act, 1994 except on the complaint made by the Appropriate Authority, or

any other officer authorized by the Central Govt. or State Govt. or the Appropriate Authority.

In this case CDMO, Jharsuguda was the appropriate authority till 26.07.2007 – However, the Govt. of Odisha in its Health and Family Welfare Department office memorandum Dt. 27.07.2007 appointed the District Magistrate of each District as the District Appropriate Authority for the district under the Act, 1994, superseding the earlier notification appointing CDMO as the appropriate authority – So in the present case the search and seizure having been conducted on 27.07.2007 was not valid as the CDMO was not the appropriate authority on that day so as to validate the search and seizure conducted by the ADMO on the authorization of the CDMO.

Second allegation against the petitioner is non-renewal of the registration certificate – Since it was not the case of non-registration it would not attract section 18(1) of the Act, 1994 – Further as per Rule-8 of the relevant Rules, 1996 there is no provision for punishment in case of delay in making application for renewal – Moreover, the petitioner made application for renewal of the registration depositing the registration fee as well as penalty – Held, prosecution having failed to establish the alleged offences, the impugned criminal proceeding against the petitioner is quashed. (Paras 10 to13)

For Petitioner : M/s. Sanjeev Udgata, S.Udgata & A.Mishra
For Opp.Party : Addl. Standing Counsel

Date of hearing : 18. 01.2018
Date of Judgment: 01.02. 2018

JUDGMENT

J.P. DAS, J.

This is an application under Section 482 of the Code of Criminal Procedure assailing the order dated 25.01.2008 passed by the learned S.D.J.M., Jharsuguda in C.T. No.210 of 2008 taking cognizance of the offence punishable under Sections 23 and 25 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 against the present petitioner (hereinafter referred to as the "Act, 1994").

2. The impugned order was passed by the learned S.D.J.M., Jharsuguda on the complaint petition filed by the C.D.M.O., Jharsuguda being authorized by the District Magistrate and Collector, Jharsuguda, the appropriate

authority under the Act, 1994 with the allegation that the Genetic Center run by the present petitioner was visited by the Dr. Narayan Acharya, C.D.M.O.-in-charge on 27.04.2007 and it was found out that one Ultrasound Machine was functioning in the center in respect of which the registration had expired since 31.12.2006. It was alleged that functioning of the Ultrasound Machine without valid registration violated the provisions of Section 18(1) of the Act, 1994 and Rule 8 of the Rules framed thereunder. It was mentioned in the complaint petition that the machine was seized and sealed in presence of the witnesses. Necessary prayer was made to the court to take cognizance of offence and punish the petitioner-accused according to law.

3. In the present petition, the petitioner has assailed the legality of the impugned order of cognizance on the grounds that the search and seizure were not conducted as per statutory procedure and provisions and that it was conducted by an officer, who was not authorized under the law to conduct such inspection. It was also submitted that the C.D.M.O., Jharsuguda, who has filed the complaint petition, was also not legally entitled to file such a complaint. It was further submitted that the only allegation against the petitioner was that the period of registration certificate has expired and he had not made proper application for renewal. It was submitted that there was no other allegation of committing any offence or violating any provision of the Act, 1994, apart from the fact that only there was a delay in applying for the renewal of registration, which escaped notice of the petitioner. It was submitted that immediately after alleged search and seizure, the petitioner had made an application for renewal of the registration depositing the registration fee as well as five times of amount of registration fees towards penalty. The said amount in shape of Bank draft has already been received by the concerned authority. Thus, it was submitted that the prosecution of the petitioner after making application for renewal of registration paying the penalty for delay would put him to double jeopardy. It was also submitted that the said application for renewal as well as the payment of the amount were prior to filing of the complaint petition on 25.01.2008.

4. Per contra, it was submitted by learned counsel for the State that all the formalities of search and seizure as well as of filing the complaint have been complied as per mandates of the statute as well as of the Government Notification. It was further submitted that the petitioner having admitted that the validity of his registration to run the Ultrasound Clinic had expired and he had not made proper application for renewal, the commission of the offence under the Act, 1994 remained established.

5. Coming to the point wise submissions, it was strenuously contended by the learned counsel for the petitioner that the alleged inspection followed by seizure was conducted by Dr. Narayan Acharya, A.D.M.O., Jharsuguda on 27.07.2007 but as per the office Memorandum of the Health and Family Welfare Department, Government of Odisha dated 24.01.2002, the C.D.M.O. of the District was the appropriate authority. It was further submitted that the inspection having been conducted by the A.D.M.O., Jharsuguda was violative of the notification and hence, was illegal. It was also pointed out that on such inspection report, the said A.D.M.O., Jharsuguda has signed "for C.D.M.O., Jharsuguda" and not as the authorized officer. A copy of the said report is annexed to the application as Annexure-3. It was further submitted that as per Rule-12 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rule, 1996, the appropriate authority or any officer authorized on this behalf may conduct search and seizure in presence of two or more independent witnesses but in the report as per Annexure-3, the search and seizure was conducted only in presence of one Executive Magistrate and one A.S.I. of Police, Jharsuguda Police Station. Thus, it was submitted that the alleged search and seizure as have been conducted to form the basis of the complaint petition was illegal for being not according to the statutory procedures. It was also submitted that mere admission of the petitioner of having not applied for registration would not exonerate the prosecution from carrying out the enquiry and filing of complaint according to statutory procedures.

6. In this regard, it was submitted by the learned counsel for the State by placing the copies of certain documents that by an office order dated 26.07.2007, the Appropriate Authority-cum-District Medical Officer, Jharsuguda had authorized Dr. Narayan Acharya to conduct search and seizure of the unauthorized Ultrasound Machines for further action as per law.

7. In this regard, it was submitted by the learned counsel for the petitioner that the said authorization was subsequently manufactured for the purpose of the case, otherwise the A.D.M.O., Jharsuguda could not have signed mentioning as "for C.D.M.O," more so, the inspection report nowhere mentions that the A.D.M.O., Jharsuguda was duly authorized by the appropriate authority, namely, the C.D.M.O., Jharsuguda for the specific purpose.

8. As regards the absence of two independent witnesses, the prosecution had no answer. Another point was raised on behalf of the petitioner that the C.D.M.O., Jharsuguda was the appropriate authority till 26.07.2007, since because by the Health and Family Welfare Department, Government of Odisha office Memorandum dated 27.07.2007, the District Magistrate of each district was appointed as the District Appropriate Authority for the district under the Act, 1994 superseding the earlier notification appointing the C.D.M.O. as the appropriate authority. Thus, it was submitted that on 27.07.2007 when the search and seizure were conducted in the clinic of the present petitioner, the C.D.M.O. was no more the appropriate authority so as to sustain his authorization to the A.D.M.O., Jharsuguda concerned to conduct the search and seizure. The fact of such notification dated 27.07.2007 is not in dispute and copy thereof is on record.

It was tried to be submitted by learned counsel for the State that the authorization was issued by the C.D.M.O., Jharsuguda concerned on the day before and it continued in its validity under the statutory provisions. But the contention made on behalf of the petitioner that the Office Memorandum of the Health and Family Welfare Department, Government of Odisha dated 27.07.2007 took away the authority of the C.D.M.O. cannot be lightly brushed aside.

9. In view of the Office Memorandum of the Health and Family Welfare Department, Government of Odisha, which specifically superseded the earlier notification it cannot be legally held that the C.D.M.O. concerned was the appropriate authority on the relevant day so as to validate the search and seizure conducted by the A.D.M.O. concerned on his authorization.

10. Now coming to the complaint petition, it was submitted by learned counsel for the petitioner that the complaint can only be filed by the appropriate authority concerned and there can be no authorization in view of Section 28(1)(a) of the Act, 1994. The relevant provision is as under:-

> "**28.Cognizance of offences**.-(1) No court shall take cognizance of an offence under this Act except on a complaint made by—
>
> (a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority;"
>
> xx xx xx xx xx

11. Pointing out to the 'comma' given after the words "as the case may be", it was submitted by learned counsel for the petitioner that it makes mandatory that no court shall take cognizance of an offence under the Act, 1994 except on the complaint made by the appropriate authority himself. In this respect, learned counsel for the petitioner relied on a decision of Hon'ble Apex Court reported in ***A.I.R. 1996 Supreme Court 569***. With due respect to cited the decision, it may be stated that the facts and circumstances of the reported case were absolutely different as to the position of the 'comma' in the relevant provision. In this case, as per Section 28, the appropriate authority concerned has been mentioned at the first instance. Thereafter in case of any other officer to be authorized in this behalf by the Central Government or the State Government the words, "as the case may be" have been used followed by the words" or the appropriate authority". It obviously meant that authorization can be by the Central Government or the State Government as the case may be or also by the appropriate authority. The 'comma' before and after the words "as the case may be" is only to differentiate the Central Government or the State Government. Thus, the contentions raised in this regard by learned counsel for the petitioner are not tenable.

12. Lastly, it was submitted by learned counsel for the petitioner that the only allegation against the petitioner was non-renewal of the registration certificate and it was not the case of non-registration so as to make out an offence under Section 18(1) of the Act, 1994, which makes registration mandatory before opening of any genetic clinic. It was further submitted that the renewal of registration has been provided under Rule-8 of the relevant rules and there has been no provision for punishment in case of any delay in making application for renewal. In this regard, learned counsel for the petitioner placed before the Court a copy of the letter issued by the Director of the Health and Family Welfare Department, Government of Odisha, the appropriate authority under the Act, 1994 dated 15.09.2011 addressed to all the Collector-cum-District Appropriate Authorities, wherein it has been mentioned that as per amendments to Rules 11 and 12 of the Act, 1994 by the Government of India providing confiscation of unregistered Ultrasound Machines and punishment to three years of imprisonment so also fine up to Rs.50,000/- for un-registered clinic, the earlier provision, which enablespd unregistered Ultrasound Machine / Clinics to go scot-free on payment of penalty of five times of registration fee stands deleted. Thus, it was submitted that by the time the inspection of the clinic of the petitioner was made in the

year 2007, there was no prosecution for delay in obtaining the renewal of registration and the matter could have been settled by paying the registration fee along with penalty, which the petitioner has done at the right earnest. The copies of the renewal application along with acceptance of the fees have been placed on record.

13. In the cumulative effect of the facts and circumstances as detailed hereinbefore, I am of the view that the prosecution of the petitioner for the alleged offences in the given circumstances was uncalled for, more so, for the statutory lacuna as pointed out in conducting the search and seizure. Accordingly, the CRLMC is allowed and the entire proceeding in Criminal Trial No.210 of 2008 on the file of learned S.D.J.M., Jharsuguda against the petitioner stands quashed.

Petition allowed.

2018 (I) ILR - CUT- 458

DR. D.P.CHOUDHURY, J.

CRLMC NO. 512 OF 2007
WITH BATCH

AJAYA KUMAR CHOUDHURY .....Petitioner

.Vrs.

SMT. SARADA NANDA .....Opp. Party

(A) NEGOTIABLE INSTRUMENTS ACT, 1881 – S.138

Cheque issued towards advance payment, for acquiring land – Non-existence of legally enforceable debt or other liability – Held, there being no existing liability, it does not attract the provision – The impugned order taking cognizance U/s. 138 N.I. Act is quashed.

(Paras 13,14)

(B) NEGOTIABLE INSTRUMENTS ACT, 1881 – Ss.138, 141

Offence by Company – Company is to be made an accused alongwith the person represented the Company.

In this case, the petitioner being the Managing Director, issued cheques on behalf of the Company – So the complaint cannot sustain in the absence of company as an accused because of the doctrine

of vicarious liability – Held, the impugned order taking cognizance against the petitioner U/s. 138 N.I. Act is quashed.

(Paras 10,11)

Case Laws Referred to : -

1. AIR 2012 SC 2795 : Aneeta Hada -V- M/s. Godfather Travels & Tours Pvt. Ltd.
2. (2014) 12 SCC 539 : Indus Airways Pvt. Ltd. & Ors. -V- Magnum Aviation Pvt. Ltd. & Anr.

For Petitioner : Mr. B.Baug
For Opp.Party : None

Date of Order : 17.01.2018

ORDER

DR. D.P.CHOUDHURY, J.

Heard Mr. B. Baug, learned counsel for the petitioner in all these cases. None appears on behalf of the opposite party.

Since similar question of law are involved in all these matters, the same are being disposed of by this common order.

2. CRLMC Nos. 512, 513 and 514 of 2007 have been filed under Section 482 Cr.P.C. to quash the order of taking cognizance for the offence under Section 138 of the N.I. Act dated 26.8.2006 passed by the learned S.D.J.M., Bhubaneswar in I.C.C. Case Nos.1904, 1905 and 1906 of 2006 respectively against the petitioner.

3. CRLMC No. 515 of 2007 has been filed under Section 482 Cr.P.C. to quash the order of taking cognizance for the offence under Section 138 of the N.I. Act dated 5.8.2006 passed by the learned S.D.J.M., Bhubaneswar in I.C.C. Case No.1694 of 2006 against the petitioner.

4. Mr. Baug, learned counsel for the petitioner submits that the petitioner being the Managing Director of M/s. Keshari Estates Private Limited had made agreement on behalf of the company with the opposite party to purchase her property at Bhubaneswar. Accordingly, the petitioner on behalf of the company had issued four post-dated cheques of dated 30.5.2006, 30.6.2006, 28.6.2006 and 29.6.2006 each amounting to Rs.2,50,000/- in total Rs.10,00,000/-.

5. Mr. Baug, learned counsel for the petitioner further submits that cheques were issued as advance for purchase of the land in addition to the payment of

advance already made amounting to Rs.14,50,000/- but there was some inter-se dispute between the L.Rs. of opposite party after receiving a letter from the daughter of the opposite party asking the bank of the company to stop payment in respect of the cheques even if deposited. In the meantime, the said agreement was cancelled but after the cheques were returned to the opposite party, the petitioner falsely filed the complaint under Section 138 of the N.I. Act.

6. Learned counsel for the petitioner further submits that the order of taking cognizance for the offence passed by the learned Magistrate against the petitioner is illegal and improper because the company has not been made as co-accused along with the petitioner. He further submits that since payment has been made for advance, the provisions of Section 138 of the N.I. Act will not be made applicable. In support of his submissions, he has cited the decisions reported in **AIR 2012 SC 2795**; **Aneeta Hada v.M/s. Godfather Travels and Tours Pvt. Ltd.** and **(2014) 12 SCC 539**; **Indus Airways Private Limited and others-vrs.-Magnum Aviation Private Limited and another**.

7. Although the opposite party is absent but had filed the counter affidavit which is available on record. From the counter affidavit, it appears that there was an agreement and cheques were issued but due to non-payment of the money, the agreement has been cancelled.

8. Considered the submissions of the learned counsel for the petitioner and counter. It is admitted fact that the petitioner being the Managing Director of M/s. Keshari Estates Private Limited had made agreement with the opposite party for purchasing the property from the opposite party. It is also admitted fact that the cheques were issued by the petitioner representing the company and the same was dishonoured. It is also averred in the complaint that the petitioner alone was made as an accused but not the company.

9. It is reported in **Aneeta Hada (supra)** where Their Lordships observed at paragraphs-42,43 and 45:-

> **"42.** We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by

the company. The learned counsel for the respondents have vehemently urged that the use of the term aswellas in the Section is of immense signify cance and, in its tentacle, it brings in the company as well as the director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the directors or other officers is tenable even if the company is not arraigned as an accused. The words aswellas have to be understood in the context. In Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others, it has been laid down that the entire statute must be first read as a whole, then section by section, clause by clause, phrase by phrase and word by word. The same principle has been reiterated in Deewan Singh and others v. Rajendra Prasad Ardevi and others and Sarabjit Rick Singh v. Union of India. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words as well as the company appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.

43. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (AIR) 1994 SC 1824 (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada (supra) is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove.

45. Resultantly, the Criminal Appeal Nos. 838 of 2008 and 842 of 2008 are allowed and the proceedings initiated under Section 138 of the Act are quashed."

10. With due regard to the aforesaid decision, it appears that the larger Bench of the Hon'ble Supreme Court have categorically held that the complaint

against the persons responsible for the company cannot be made as an accused in absence of company because of the doctrine of the vicarious liability. In the said case many decisions have been discussed and also overruled. Finally, the criminal appeals were allowed and the proceeding under Section 138 of the N.I. Act was quashed.

11. Now adverting to this case, since the petitioner has been arrayed as a party without the company being made a party, the aforesaid decisions are applied to these cases and as such the proceeding under Section 138 of N.I. Act cannot run against the petitioner.

12. It is also reported in **Indus Airways Private Limited and others (supra)** where Their Lordships observed at paragraph-9 in the following manner:-

> "9. The explanation appended to Section 138 explains the meaning of the expression 'debt or other liability' for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The explanation leaves no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, in our considered view, the cheque cannot be held to have been drawn for an existing debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability."

13. With due regard to the aforesaid decision, it is made clear that the payment of cheque in the nature of advance cannot be said to be an existing liability, which is one of the ingredient for setting the prosecution under Section 138 into motion. Therefore, in the instant case, admittedly the advance was made for acquiring the land is not in the nature of the liability for which the said decision also applies to this present case.

14. In terms of the above discussion, the order of taking cognizance for the offence under Section 138 of the N.I. Act against the petitioner in all four cases stands quashed. The CRLMCs are disposed of accordingly. The interim order, in

the Criminal Misc. Cases stands vacated.Registry is directed to communicate this order to the Court below forthwith.

Application disposed of.

2018 (I) ILR - CUT- 463

DR. D.P.CHOUDHURY, J.

CRLMC NO. 835 OF 2005

PRADEEP KU. MAHANANDA ……..Petitioner

.Vrs.

STATE OF ORISSA …….Opp. Party

PENAL CODE, 1860 – S.493

Offence U/s. 493 I.P.C. – Ingredients – There must be allegation that a man caused deception on a woman, that she is lawfully married to him and made sexual intercourse in that belief, when they are actually not lawfully married – Mere sexual relationship with a promise to marry in future will not attract the offence U/s. 493 I.P.C, rather it attracts the offence U/s. 417 I.P.C – Held, the impugned order taking cognizance U/s. 493 I.P.C. is quashed.

Case Laws Referred to : -

1. AIR 1987 Kerala 184 : Moideenkutty Haji & Ors. -V- Kunhihoya & Ors.
2. 1993 Cri.L.J. 1022 : Amruta Goddia -V- Trilochan Pradhan
3. 76 (1993) CLT 428 : Sauraua Barik -V- Smt. Gouri Kaudi @Gouri
4. (1990) 3 OCR, 367 : Janaki Kumar Das -V- Gajendra Das

For Petitioner : M/s. D.P.Dhal, P.K.Routray, B.S.Dasparida & A.K.Mishra

For Opp.Party : Addl. Standing Counsel

Date of hearing : 27.11.2017
Date of Judgment: 29.01.2018

JUDGMENT

DR. D.P. CHOUDHURY, J.

This is an application under Section 482, Cr.P.C. to quash the proceeding initiated against the petitioner in G.R.Case No. 343 of 2004

arising out of Boudh P.S.Case No. 146 of 2004 pending in the court of learned SDJM, Boudh.

FACTS

Sworn of unnecessary details, the prosecution case is that the victim woman, aged about 21 years, was working as maid-servant in the house of Sambhu Mahanandia. During the course of her stay there, the petitioner being the son of Sambhu Mahanandia was in love with the victim woman. With the promise to marry, the petitioner kept illicit relationship with the victim woman**.** During the course of sexual intercourse, the victim woman became pregnant and gave birth to a male child. Later on, the petitioner did not marry her. As such, she was cheated by the petitioner. When she asked the petitioner to marry, the petitioner threatened her to kill. Finding no other way, she lodged the F.I.R. The case was registered under Sections 506, 493, 417 of the Indian Penal Code. After completion of investigation, the Investigating Officer submitted charge-sheet against the petitioner under Sections 493, 417/506, IPC and cognizance of the said offences was taken by the learned Magistrate. Since the petitioner did not appear, the learned Magistrate issued non-bailable warrant of arrest against the petitioner. Challenging the said order, the petitioner moved this Court to set aside the criminal proceeding initiated against the petitioner.

SUBMISSIONS

2. Mr.D.P.Dhal, learned counsel for the petitioner submitted that the offence under Section 493, IPC is not made out even if the F.I.R. is gone through because there is nothing available from the F.I.R. that the petitioner deceitfully made her to believe that she has lawfully married to the petitioner for which one of the ingredients of the offence under Section 493, IPC is not made out. Similarly, the ingredients of the offence under Sections 417 and 506, IPC are not made out for which the registration of the F.I.R. for the commission of such offences should be quashed. In support of his submission, he has cited the decisions in **Moideenkutty Haji and others v. Kunhihoya and others**, AIR 1987 Kerala 184, **Amruta Goddia v. Trilochan Pradhan,** 1993 Cri.L.J., 1022 and **Sauraua Barik v. Smt.Gouri Kaudi @ Gouri**, 76(1993) CLT 428.

3. Learned Addl.Standing counsel submitted that the F.I.R. makes out a cognizable offence and no affidavit has been filed by the victim woman in this Court. Even also, the informant has not been arrayed as a party in this case. In such situation, the proceeding should not be quashed.

4. **The main point for consideration:-**
Whether the order of taking cognizance is liable to be quashed and consequently the entire criminal proceeding is also liable to be quashed ?

DISCUSSIONS

5. Section 493, IPC has the following ingredients:

(i) The deceit that causes a false belief in the existence of lawful marriage.

(ii) Cohabitation or sexual intercourse with the person causing such belief.

6. The Full Bench of Kerala High Court in **Moideenkutty Haji (supra)** have observed as follows:

> " xx x x The essence of the section is therefore the deception caused by a man on a woman in consequence of which she is led to believe that she is lawfully married to him while in fact they are not lawfully married. In order to establish deception there must first be allegations that the accused falsely induced her to believe that she is legally wedded to him. In the complaint in this case there is no allegation of any such deception of inducement. In a case where both the man and woman fully knew that they are not husband and wife and no ceremony of marriage took place between then, there is no question of one of them believing otherwise. Even if the entire allegations in the complaint are taken as true, the section is not being attracted. The allegation is that though they are not husband and wife, they had sexual union during late hours in the night for a pretty long time. What is alleged in the complaint is only a promise to marry in future. The strange part of it is, there is the further allegation that one day they went for registering the marriage, but the petitioner ran away from there and even thereafter she was submitting herself to him regularly for liaison. The facts cannot at any rate attract Section 493, IPC ."

7. With due regard to the aforesaid decision, it is found that the ingredients must be proved and one of the main ingredients is to prove when the man deceitfully induces a woman to believe that she is lawfully married to him. In fact they are not lawfully married. Moreover, the meaning of 'deception' caused by the man or woman should be proved. Not only this, but also the Single Bench of this Court in **Janaki Kumar Das v. Gajendra Das**, (1990) 3 OCR,367 has observed as follows :

> "Sec.493, IPC does not penalize mere cohabitation or sexual intercourse when a woman, who is not lawfully married to the accused. This section is attracted when certain other ingredients are also associated therewith. The section envisages the case when a man deceitfully induces a woman to have sexual intercourse with him causing her to believe that she is lawfully married to him."

8. With due regard to the aforesaid decision, it appears that in order to prove the offence under Section 493, IPC, there must be averment that the petitioner deceitfully made to believe the opposite party that they have been lawfully married although the petitioner has not married to the opposite party. If such ingredient is not proved, mere sexual relationship with the petitioner does not prove any offence under Section 493, IPC. By going through the F.I.R. nothing is revealed except the petitioner promising to marry the informant and this is not sufficient to prove the ingredients of the offence under Section 493, IPC. Hence, the ingredients of the offence under Section 493, IPC is not made out in the F.I.R. itself.

9. Section 417 IPC has got the following ingredients:

(i) that the person deceived delivered to someone, or consented that some person shall retain certain property;

(ii) that the person deceived was induced by the accused to do as above;

(iii) that such person acted upon such inducement in consequence of his having been deceived by the accused;

(iv) that the accused acted fraudulently or dishonestly when so inducing that person

Or prove (i) that the person deceived did, or omitted to do, something which he was not bound to do or omit to do.

(ii) and (iii) as above;

(v) That the accused so induced that person intentionally;

(vi) That such act or omission caused, or was likely to cause, damage or harm to that person in body, mind, reputation or property."

10. In order to find out the above ingredients in the F.I.R. and other materials, the F.I.R. story clearly reveals that the petitioner having induced with deceitful means to marry the informant and later on, he cohabitated with the victim lady and made her pregnant. In the F.I.R. it is clearly mentioned by the informant that she was cheated by the petitioner because after promise

to marry, he cohabitated with her and later he left her without marrying. The body, mind and reputation of the victim have been really damaged by such deceitful way of promising to marry the victim. Since prima facie materials are available from the F.I.R. to make out the offence under Section 417, IPC, registration of the F.I.R. is not to be quashed.

11. So far as Section 506, IPC is concerned, there is allegation of intimidation in the F.I.R., for which the offence under Section 506, IPC at this stage, cannot be said to have not been made out. The claim of the petitioner that the matter has been compromised between the parties, cannot be acceptable at present because the petitioner did not make her a party in this proceeding and thus, the compromise is yet to be placed in proper place under proper affidavit. So, the fact of compromise between the petitioner and the victim woman is yet to be proved.

12. The latest position of the G.R. case was called for from the concerned court and from the report it appears that cognizance of the offence under Sections 493,417, 506, IPC has already been taken and process has been issued on 26.3.2008. Since then the non-bailable warrant of arrest has been stayed by this Court. Now it is not only the F.I.R. has been registered but also charge-sheet has been submitted and cognizance of the offence has already been taken. Since Section 493, IPC is prima facie not made out, the order of taking cognizance under Section 493, IPC is quashed. So far as the offences under Sections 417 and 506, IPC is concerned, the same would continue against the petitioner.

CONCLUSIONS

13. In view of the aforesaid analysis, the criminal prosecution and the order of taking cognizance is modified to the extent as aforesaid and the petitioner is directed to face trial for the offence under Sections 417 and 506, IPC.

14. Learned counsel for the petitioner submitted that the non-bailable warrant has been issued, but the same has been stayed by this Court. According to him, the petitioner should be allowed to surrender and go on bail. Considering such submission, in the event the petitioner surrenders before the court below within a period of three weeks from today and on such surrender, he shall be released on bail on such terms and conditions as the learned Magistrate may deem just and proper. Since the G.R. Case is of the year 2004, the learned Magistrate shall do well to conclude the trial

within a period of four months. The petitioner is at liberty to raise the contention as raised before this Court in the trial court at the time of framing of charge. It is made clear that this Court has not expressed any opinion on the merits of the case and the case would be disposed of on the basis of the materials available before the concerned Court.

15. With the aforesaid observation and direction, the CRLMC stands disposed of.

Petition disposed of.

2018 (I) ILR - CUT- 468

DR. D.P. CHOUDHURY, J.

JCRLA NO. 34 OF 2016

DEBENDRA PRADHAN .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

N.D.P.S. ACT, 1985 – S. 20(b)(ii)(B)

Conviction of the appellant U/s. 20(b)(ii)(B) of the Act 1985 and he was sentenced to undergo R.I. for 10 years – Hence the appeal.

There was allegation of recovery of 5 K.Gs. 200 grams of Ganja from the exclusive conscious possession of the appellant – When small quantity of Ganja as described in the Act is one K.G. and commercial quantity is 20 K.Gs., the punishment of 10 years for seizure of 5 K.Gs. 200 grams of Ganja cannot be said to be proportionate to the quantity of Ganja seized – Held, there being no criminal antecedent or previous conviction proved against the petitioner and the appellant being only 42 years old, the sentence of 10 years R.I. awarded by the learned trial Court is reduced to R.I. for five years.

(Paras 20,21)

Case Laws Referred to :-

1. 2001(1) Crimes 176 : State Govt.of NCT of Delhi -V- Sunil & Anr.
2. (1999) 6 SCC 172 : State of Punjab -V- Baldev Singh
3. (1996) 1 SCC 288 : State of Punjab -V- Jasbir Singh & Ors.

For Appellant : Mrs Jyostna Rani Tripathy
For Respondent : Mr. A.K. Patnaik, Addl.Govt.Adv.

Date of hearing : 16.12.2017
Date of judgment: 29.01.2018

JUDGMENT

DR. D.P. CHOUDHURY, J.

The appellant assails the judgment of conviction and order of sentence passed by the learned 1st Addl. Sessions Judge-cum Special Judge, Puri in T.R. Case No.01/15 of 2013 in convicting him under section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act").

2. The conspectus of the case of the prosecution is that on 2.8.2013 at about 5.30 A.M. while the Inspector of Excise, Bhubaneswar patrolling with the staff at village Muninda, found that the appellant was coming with a heavy jerry bag in his hand. Out of suspicion said Excise Officer detained the appellant and asked as to what articles he was carrying and he confessed to have carried Ganja. The Excise Officer after disclosing his identity asked the appellant as to whether he would be searched by a Gazetted Officer or by Excise Officials and the appellant told that he would be searched by the Excise Officer. After maintaining all formalities the Inspector of Excise seized 5 K.Gs. 200 grams of Ganja contained in the jerry bag. From the colour and smell he could know that same was contraband article namely, Ganja. He took sample of the seized Ganja and sent for chemical examination. After the chemical examination report being received, confirming the same as Ganja, the Inspector of Excise submitted charge sheet against the appellant.

3. The plea of the appellant as revealed from the statement recorded under section 313 of Cr.P.C. and the suggestion given during cross-examination to the prosecution witnesses that he has been falsely implicated in this case and pleads innocence.

4. The prosecution in order to prove the charge against the appellant examined three witnesses, out of whom P.Ws.1 and 3 are Excise officials, whereas P.W.2 is an outsider. The defence examined none.

5. The learned trial court after analyzing the evidence on record found the appellant guilty under section 20(b)(ii)(B) of the Act and sentenced him to undergo R.I. for ten years and to pay a fine of Rs.25,000/-, in default to undergo further R.I. for a period of six months.

SUBMISSIONS:

6. Learned counsel for the appellant submitted that the learned trial court has erred in law relying on the evidence of P.Ws. 1 and 3 as they are Excise officials, but did not rely upon the evidence of P.W.2 who being an outsider has not supported the case of the prosecution. According to her, the learned trial court has erred in law to observe that section 50 of the Act would not be applicable in the fact of the case although the observance of section 50 of the Act is applicable in this case because of the allegation of the prosecution that the appellant was in exclusive conscious possession of the Ganja, but the prosecution has failed to prove the same. When section 50 of the Act is not proved, the appellant is entitled to acquittal as per the settled law.

7. Learned counsel for the appellant further submitted that section 42 of the Act has not been complied, but learned trial court has incorrectly held that section 42 of the act has been complied. Lastly she submitted that if the appellant is found guilty, the sentence awarded, may be reduced as the sentence should be proportionate to the quantum of the contraband article seized. Moreover, there is no any previous conviction against the appellant.

8. Mr. Patnaik, learned Addl. Government Advocate submitted that there is no bar in law to rely upon the evidence of the Excise Officials. Moreover, the appellant was carrying the jerry bag in his hand and following compliance of section 50 of the Act, the search and seizure has been made. So, even if section 50 is applied, the case of the prosecution has got sufficient evidence to prove compliance of section 50 of the Act.

9. Learned counsel for the State further stated that section 42 of the Act has also been complied as after detaining the appellant the Excise Officer sent information to the higher authority and recorded such fact as per the provisions of the act and the rules framed thereunder. It is settled in law that the evidence of Excise officials cannot be thrown away merely because they are official witnesses, but their evidence consistently proved that the appellant was in exclusive conscious possession of 5 K.Gs. 200 grams of the contraband article. So, he supported the judgment of conviction and sentence passed by the learned trial court.

DISCUSSION:

10. It is reported in the case of **State Government of NCT of Delhi v. Sunil and another; 2001(1) Crimes 176**, wherein it has been held as follows at paragraph-20:-

> "We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during British period and policemen also knew about it. Its hang over persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions."

11. The aforesaid proposition as expounded by the Hon'ble Apex Court certainly relate to the appreciation of evidence of the official witnesses. It is true that the evidence of official witnesses or the Investigating Officer cannot be discarded merely because at their instance the search and seizure has been made, but their evidence requires close scrutiny to find out whether the same requires any corroboration from independent witnesses. Moreover, it is well settled in law that the evidence of single witness can be the basis for conviction if it is found to be consistent, cogent and clear and above the reproach. It is also trite in law that the Court should weigh the evidence, but not count the same. Not only this, but also the appellate court must re-

appreciate the evidence on record and reach the conclusion whether the conclusion arrived at by the trial court is correct or not.

12. Bearing in mind the above principle of law, let the evidence of the prosecution witnesses be assessed. No doubt, P.Ws. 1 and 3 are official witnesses, but P.W.2 is an outsider.

13. On perusal of the evidence of P.W.3 it appears that he is the I.O. of this case. No doubt, his evidence shows that while patrolling, he found the appellant was coming with a jerry bag in his hand and out of suspicion detained him. In compliance of section 42 of the Act, information was sent to his superior authority about intention to search of the person of the appellant.

Under the provision of section 42 of the Act, it is settled in law that the Officer concerned without waiting for the consent of the superior authority, as the evidence may be washed out and the accused may run away from the spot, may continue the search and seizure. In fact the evidence of P.W.3 shows the compliance of section 42 of the Act.

14. It appears from the evidence of P.W.3 that on being asked the appellant desired to be searched by the Excise Officer, for which after giving his personal search, he searched the appellant and found that he was in possession of the jerry bag containing 5 K.Gs. 200 grams of Ganja and after measurement he followed the procedure of search and seizure as embodied in the Act. No doubt the statement of the appellant has been proved in compliance of section 50 of the Act. Not only this, but also his statement finds corroboration from the seizure list, where he has recorded the entire procedure of search and seizure.

15. P.W.3 has testified that he took sample of the Ganja and sealed the jerry bag and sent the sample for chemical examination vide Ext.9. In cross-examination it is only stated that he has not sent written application intending to search to the Superintendent of Excise. It is found that he has not informed by writing to the Superintendent of Excise, but sent oral information through one constable. Since compliance of section 42 of the Act depends upon the circumstance, it has been held by the decision that the compliance of said section is directory, but not mandatory. So, the cross-examination of P.W.3 cannot be said to have been well shaken to disprove compliance of section 42 or section 50 of the Act. There is no fruitful further cross-examination made to P.W.3. On close perusal of the judgment of the trial court it appears that the said court has appreciated the evidence of P.W.3 with proper perspective.

16. P.W.1 corroborating the evidence of P.W.3 stated about search and seizure of 5 K.Gs. 200 Grams of Ganja from the exclusive conscious possession of the appellant. He is also a signatory to the seizure list. The cross-examination made to P.W.1 has no effect. So, his evidence also proved the compliance of section 50 of the Act. The assessment of evidence of P.W.1 by the trial court is amply found to be legal and proper.

17. P.W.2 did not corroborate the prosecution case about search and seizure of Ganja from the possession of the appellant, but he admitted his signatures in all the papers including the seizure list and the consent memo of the appellant for his personal search. Only it is available from his evidence that some persons called him and the Inspector of excise obtained his signatures. Nothing found from his cross-examination by the defence or the examination-in-chief that he has signed in blank paper. Nothing is found from his evidence that as to why he signed vide Ext.1/2 to Ext.7/2. Thus, it appears that he has avoided to support the case of the prosecution, for which did not corroborate P.Ws. 1 and 3. When there is no explanation found from P.W.2 about reason of his signature on those exhibits, it must be held that he was present at the time of search and seizure and accordingly, he has put his signatures. On the whole it is found that P.W.2 has been declared hostile by the prosecution, but it is settled in law that evidence of hostile witness cannot be discarded straightway, but should be used to the extent required for the prosecution. So, the evidence of P.W.2 supports the evidence of P.Ws.1 and 3 that the documents were prepared in his presence after due search and seizure of the contraband article from the possession of the appellant. In this regard the judgment of the learned trial court is well articulated.

18. Learned trial court has observed that section 50 of the Act is not applicable, because the search was not made from the person, but from the jerry bag held by him. In this regard learned trial court has relied on the decision in the case of **State of Punjab v. Baldev Singh, reported in (1999) 6 SCC 172** and **State of Punjab v. Jasbir Singh and others, reported in (1996) 1 SCC 288**, wherein compliance of section 50 of the N.D.P.S. Act was discussed. The learned trial court after going through the said decision reached the conclusion that section 50 of the Act would apply only when the search of a person is concerned, but not the baggage of a person. It is true that the aforesaid decisions are rendered in the said fact and circumstances of the case. The case of **State of Punjab v. Baldev Singh (supra)** is a Constitutional Bench judgment, wherein at paragraph-12 it is clearly observed by the Hon'ble Supreme Court that section 50 of the Act come into

play only in case of search of a person as distinguished from search of any premises etc.

19. With due regard to the aforesaid decision, it appears that the learned trial court has not followed the decision properly, but it is clear from the decision that in case of search of a person, compliance of section 50 of the Act is mandatory, but if any bag, dickey or anything not being held by him, search of same does not require the compliance of section 50 of the Act. In the instant case the appellant while coming has held a jerry bag containing 5 K.Gs. 200 Grams of Ganja, compliance of section 50 of the Act is required and it has been proved. In terms of the above discussion, it appears that the offence under section 20(b)(ii)(B) of the Act is well proved against the appellant and conviction thereunder is well confirmed.

20. It is only urged by the learned counsel for the appellant that since the charge has been made under section 20(b)(ii)(B) of the Act, the maximum sentence of ten years is disproportionate to the charge leveled against him, because there is only allegation of recovery of 5 K.Gs. 200 Grams of Ganja from exclusive conscious possession of the appellant and the small quantity of Ganja in the Act is one K.G. and commercial quantity of Ganja is 20 K.Gs. Learned Additional Government Advocate fairly conceded with the principle of law while awarding sentence to the convict.

21. Since in the instant case, there is seizure of 5 K.Gs. 200 Grams of Ganja and there is no previous conviction proved in this case, the punishment cannot be said to be proportionate to the quantity of Ganja seized from the possession of the appellant. Hence, keeping in view the quantity of Ganja seized, fact that the appellant has no previous conviction proved or any criminal antecedent proved and the appellant is only 42 years old, he is awarded R.I. for five years instead of ten years as awarded by the learned trial court, but the sentence of fine with the default sentence as awarded by the learned trial court would remain as such. In the result, the Jail Criminal Appeal is partly allowed by modifying the sentence as discussed above. The L.C.R. be returned forthwith.

Appeal allowed in part.