



# THE INDIAN LAW REPORTS

(CUTTACK SERIES)

Containing Judgments of the High Court of Orissa and some  
important decisions of the Supreme Court of India.

Mode of Citation  
2018 (I) I L R- CUT.

**MARCH - 2018**

Pages : 475 to 658

Edited By

**Bikram Kishore Nayak, LL.B.,**  
**ADVOCATE & LAW REPORTER**  
**HIGH COURT OF ORISSA, CUTTACK.**

Published by : High Court of Orissa.  
At/PO-Chandini Chowk, Cuttack-753002

Printed at - Odisha Government Press, Madhupatna, Cuttack-10

Price : ₹ 25/-

**All Rights Reserved.**

Every care has been taken to avoid any mistake or omission. The Publisher, Editor or Printer would not be held liable in any manner to any person by reason of any mistake or omission in this publication.

# ORISSA HIGH COURT, CUTTACK

## CHIEF JUSTICE

*The Hon'ble Shri Justice VINEET SARAN, B.A., LL.B.*

## PUISNE JUDGES

*The Hon'ble Shri Justice INDRAJIT MAHANTY, LL.M.*

*The Hon'ble Justice KUMARI SANJU PANDA, B.A., LL.B.*

*The Hon'ble Shri Justice S.C. PARIJA, LL.B.*

*The Hon'ble Shri Justice S.K. MISHRA, M.Com., LL.B.*

*The Hon'ble Shri Justice C.R. DASH, LL.M.*

*The Hon'ble Shri Justice Dr. A.K. RATH, LL.M., Ph.D.*

*The Hon'ble Shri Justice BISWAJIT MOHANTY, M.A., LL.B.*

*The Hon'ble Shri Justice Dr. B.R. SARANGI, B.Com.(Hons.), LL.M., Ph.D.*

*The Hon'ble Shri Justice DEBABRATA DASH, B.Sc. (Hons.), LL.B.*

*The Hon'ble Shri Justice BISWANATH RATH, B.A., LL.B.*

*The Hon'ble Shri Justice S.K. SAHOO, B.Sc., M.A. (Eng.&Oriya), LL.B.*

*The Hon'ble Shri Justice SUJIT NARAYAN PRASAD, M.A., LL.B.*

*The Hon'ble Shri Justice K.R. MOHAPATRA, B.A., LL.B.*

*The Hon'ble Shri Justice J. P. DAS, M.A., LL.B.*

*The Hon'ble Shri Justice Dr. D.P. CHOUDHURY, B.Sc., LL.M., Ph.D.*

## ADVOCATE GENERAL

*Shri SURYA PRASAD MISRA, B.Sc., LL.B.*

## NOMINAL INDEX

	<b>PAGE</b>
Arati Mohapatra-V- Deputy Registrar, State Administrative Tribunal & Ors.	514
Ashok Kumar Dash -V- Chintamani Mohanty& Ors.	527
Baishnab Charan Barik –V- State of Orissa.	585
Bhagyadhar Dash -V- State of Odisha & Ors.	550
Bhimsen Tanty @ Ganda -V- Ghassia Oram & Anr.	534
Ganesh Prasad Dubey & Ors.-V- Premlata dei @ Pani & Ors.	543
Golakh Chandra Das -V- Braja Kamini Das & Ors.	531
Goura Mohan Singh-V- State of Orissa	500
Hadi Sisa -V- State of Orissa.	507
Jagabandhu Parida -V- Sukuti Parida& Anr.	548
Ladi Chandrasekhar Rao & Anr. -V- Kondagiri Sukadev & Ors.	572
M/s Ranjit Construction -V- State Of Odisha & Ors.	488
M/s. Konark Infra Solution Pvt. Ltd.-V- Sanjukta Das & Ors.	558
M/s. L.N. Infrastructure & Construction Pvt. Ltd.-V- Odisha State Police Housing & Welfare Corporation Ltd. & Anr.	484
M/s. Lotus Chemeicals Pvt-V- ASST. Provident Fund Commissioner, (COMPL.)Rourkela	627
M/s. Subas & Company, Bhubaneswar-V- DY. Commissioner of Sales Tax, Bhubaneswar II Circle & Ors.	493
Mantu Kumar Mahanta -V- Director, General, C.R.P.F., O.G.O. Complex, Lodhi Road & Ors	552
Narayan Prasad Agarwal @ Narayan Prasad Bhawania -V- State Of Orissa & Anr	579
National Insurance Company Ltd. –V- Ahalya Swain & Ors.	520
Nayan Majhi & Ors. -V- Chhita Majhiani & Anr	539
Pranakrushna Dash & Anr. -V- Dinakrushna Dash & Ors.	570
Ramakrushna Sahu –V- State of Orissa	599
Sanatan Dash -V- CM-CUM-Director, OPTC Ltd. BBSR & Ors.	636
Saswat Mishra & Anr. -V- Dayanidhi Sharma & Anr	646
Smt. Janaki pathak-V- State of Odisha & Ors.	525
Suresh Ch. Sahoo-V- State of Orissa & Ors.	475
Susama Sethi @ Susama Sethy -V- State Of Orissa & Anr	574

**ACTS , RULE & REGULATIONS****Acts**

1908-5....	Civil Procedure Code,1908
1973-2....	Criminal Procedure Code, 1973
1950	Constitution of India, 1950
1952-19...	Employees Provident Fund And Miscellaneous Provisions of The Act, 1952
1988-59...	Motor Vehicles Act, 1988
1985-61....	Narcotic Drugs And Psychotropic Substances Act, 1985
2004-4....	Odisha Value Added Tax Act, 2004
1860-45....	Indian Penal Code, 1860
1882-4.....	Transfer Of Property Act, 1882

**Rule:-** OCS (Pension) Rules, 1992

**Regulation:-** Orissa Schedule Area Transfer of Immovable Property By (ST)  
Regulations, 1956

**SUBJECT INDEX**

	<b>PAGE</b>
<p><b>CODE OF CIVIL PROCEDURE, 1908 – Section 96</b> – First appeal – Question arose as to whether the appeal filed by the non-party to the suit against any observation made by the trial court against him is maintainable? – Held, no – The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. <i>Ashok Kumar Dash-V- Chintamani Mohanty&amp; Ors.</i></p>	527
2018 (I) I.L.R. Cut.....	
<p><b>Section 96</b> – First Appeal, a valuable right of the parties – How it is to be dealt with – Discussed – 2010 (13) SCC 530 B.V. Nagesh &amp; another .V. H.V. Sreenivasa Murthy, relied on. <i>Golakh Chandra Das -V- Braja Kamini Das &amp; Ors.</i></p>	531
2018 (I) I.L.R. Cut.....	
<p><b>Section 149</b> – Payment of deficit Court fee – Application by petitioner to permit him to pay the court fee in installment – Rejected by Trial Court – Considering the provision High Court directed payment of 50% within seven days &amp; balance before settlement of issues. <i>Bhagyadhar Dash -V- State of Odisha &amp; Ors.</i></p>	550
2018 (I) I.L.R. Cut.....	
<p><b>Order-7-</b> Suit by plaintiff/appellant for realization of money – Decreed - Some observations were made against a person who was not a party to the suit – Such person filed first appeal – Held, the observation by the Trial Court was wholly unwarranted and there is no provision in the code for appeal by a person who is not a party to the suit – Respondent No. I in second appeal not being a party to the suit filed first appeal – First appellate court without considering the petition for condonation of delay in granting leave to appeal heard the appeal on merit – Held not justified. <i>Ashok Kumar Dash-V- Chintamani Mohanty&amp; Ors.</i></p>	527
2018 (I) I.L.R. Cut.....	
<p><b>Order 8 Rule 5</b> – Provisions under – Passing of decree on the</p>	

basis of plaint averments – Applicability of the provision – Discussed.

*Bhimsen Tanty @ Ganda -V- Ghassia Oram & Anr.*

2018 (I) I.L.R. Cut..... 534

**Order 18 Rule 1** – Application under – Rejected by Trial Court considering the proceeding is a suit for partition only – Other contingencies – Not looked into – Matter remitted with observations.

*Pranakrushna Dash & Anr. -V- Dinakrushna Dash & Ors.*

2018 (I) I.L.R. Cut..... 570

**Order 23 Rule 1** – Withdrawal of suit allowed by Trial Court after death of defendant No.1 – Legal heir of D-1 challenges the order permitting withdrawal of the suit to be illegal on the ground that after death of D-1, the suit abated – Pleadings in the plaint confirms there is claim of relief against D-2 who is alive – Held, suit has not been abated, order permitting withdrawal cannot be interfered with.

*Jagabandhu Parida -V- Sukuti Parida & Anr.*

2018 (I) I.L.R. Cut..... 548

**Order 41 Rule 27** – Provisions under – Prayer for adducing additional evidence in appeal – Delay – Reasons – Attributing misconduct on the part of the counsel – Held, such ground cannot be accepted for admitting additional evidence – Four years after filing of appeal an application for additional evidence was filed – Effect of – Held – The provisions under order 41 Rule 27 are not intended to patch up lacuna.

*Ganesh Prasad Dubey & Ors.-V- Premlata dei @ Pani & Ors.*

2018 (I) I.L.R. Cut..... 543

**CODE OF CRIMINAL PROCEDURE, 1973 – Section – 205** – Application under – Rejected by the Magistrate on the ground that accused petitioner involved in an offence under section 409 of IPC – Petitioner a Bank employee – Held, a good ground for allowing her to appear through a lawyer – Discretion exercised.

*Smt. Janaki Pathak -V- State of Odisha & Ors.*

2018 (I) I.L.R. Cut..... 525

**Section 239** – Framing of charge – Duty of the Trial Court while framing the charge – Indicated.

*Baishnab Charan Barik –V- State of Orissa.*

2018 (I) I.L.R. Cut..... 585

**Section 378** – Leave to appeal against the order of acquittal – Alleged offence is under section 306 of IPC – Petitioner, widow of the deceased who committed suicide – Allegations of harassment by the accused – Evidence available on record though permit for two views, yet, the appellate court should be slow in disturbing the finding of fact of the trial court– Principles – Indicated.

*Susama Sethi @ Susama Sethy -V- State Of Orissa & Anr*

2018 (I) I.L.R. Cut..... 574

**Section 482** – Inherent power – Prayer for quashing of order taking cognizance against the Collector & Culture Officer – Offence alleged under section 7 of Lotteries (Regulation) Act, 1998 r/w sections 4 & 5 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978 – No sanction obtained – Held, if the act complained of has got nexus with the discharge of public duty. Even if, it is excess of any public servant while discharging public duty, Section 197, Cr.P.C. will protect him– Order of cognizance quashed.

*Saswat Mishra & Anr. -V- Dayanidhi Sharma & Anr.*

2018 (I) I.L.R. Cut..... 646

**Section 482** – Inherent power – Petition under – Injured challenging the order not framing charge under section 307 of IPC – Evidence of witnesses coupled with the nature of injuries sufficient to form an opinion that there was ground for presuming that the accused committed an offence U/s 307 of IPC – Held, the trial court was not justified in not framing the charge U/s 307 – Direction issued.

*Narayan Prasad Agarwal @ Narayan Prasad Bhawania –V- State of Orissa & Anr.*

2018 (I) I.L.R. Cut..... 579

**CRIMINAL TRIAL – Conviction** – Appeal filed – Held, appeal is not the continuation of the criminal proceeding as the higher court will exercise its power by way of separate proceeding to test the finding of the judgment – The convicted person can get the service benefit if in the appeal, the order of conviction is stayed.

*Sanatan Dash -V- CM-CUM-Director, OPTC Ltd. BBSR & Ors.*

2018 (I) I.L.R. Cut..... 636

**CONSTITUTION OF INDIA, 1950 – Articles 226 and 227** – Writ petition challenging order of dismissal from service – Petitioner a CRPF constable serving in border area – Leave for 15 days – Over stayed for about four months – In spite of submission of Medical Certificates from Govt. Medical that he was suffering from jaundice, authority dismissed him from service – Held, the authority could not have disbelieved the Medical certificates issued by a Govt. medical unless proved by contrary evidence – Order of dismissal shockingly disproportionate to the gravity of offence involved and does not commensurate with the gravity of charge – Order set aside – Matter remanded for imposing lesser penalty.

*Mantu Kumar Mahanta-V- Director, General, C.R.P.F., O.G.O. Complex, Lodhi Road & Ors*

2018 (I) I.L.R. Cut..... 552

**Articles 226 & 227** – Writ Petition challenging award of Tender in favour of O.P. 5 as a Schedule Caste Tenderer – O.P. 5, a Partnership Firm constituted in 1989 – In 2016 the Firm changed its status by inducting a Schedule Caste member as partner having 52% share and got the benefit of the Govt. Resolution dated 11.10.1977 which provides certain benefits to Schedule Caste Bidders – Whether the benefit under the Resolution in such a state of affair can be extended to the said Partnership Firm – Held, No.– Writ petition allowed, award of tender quashed.

*Suresh Ch. Sahoo-V- State of Orissa & Ors.*

2018 (I) I.L.R. Cut..... 475

**Articles 226 & 227** – Writ Petition – Tender matter – Benefit

under Govt. Resolution dated 11.10.1977 for the Schedule Caste Contractor – When can be extended – Indicated.

*Suresh Ch. Sahoo-V- State of Orissa & Ors.*

2018 (I) I.L.R. Cut..... 475

**Articles 226 & 227** – Writ Petition challenging the rejection of Tender at the stage of Technical bid evaluation for not furnishing the valid electrical license – Plea of petitioner that submission of electrical License being a non-essential or ancillary/subsidiary condition, the authorities should have permitted the petitioner to supply such information at a later stage – Held, possession of a valid electrical license as on the date of opening of the technical bids is an essential condition – Failure to submit qualifying documents in tender, asking for explanation, and/or to accept or reject the tender is within the domain of the authority.

*M/s. L.N.Infrastructure & Construction Pvt. Ltd.-V- Odisha State Police Housing & Welfare Corporation Ltd. & Anr.*

2018 (I) I.L.R. Cut..... 484

**Articles 226 & 227** – Tender call notice inviting bids – Bids submitted – Process completed by selecting the successful bidder – At this stage the authority cancelled the Tender without assigning any reason – Reason stated in the counter affidavit that the tender may have been fixed – Held, such a reason cannot be accepted as the same can be construed as an afterthought – Order cancelling the tender set aside.

*M/s Ranjit Construction-V- State Of Odisha & Ors.*

2018 (I) I.L.R. Cut..... 488

**Articles – 227**– Writ petition/C.M.P. arising out of Civil Proceeding – Suit for declaration - IA filed for injunction under Order 39, Rule 1 & 2 – Disposed of by Trial Court – Appeal against the order passed in IA of suit - IA filed before the appellate Court – IA disposed of with direction to maintain status quo – CMP challenging the order disposing the IA filed in appeal, whether maintainable – Held, yes.

*M/s. Konark Infra Solution Pvt. Ltd.-V- Sanjukta Das & Ors.*

2018 (I) I.L.R. Cut..... 558

**EMPLOYEES PROVIDENT FUND AND MISCELLANEOUS PROVISIONS OF THE ACT, 1952 –**

**Section 7-A** read with 7-Q – Proceeding under – Petitioner a manufacturer, not deposited statutory dues of EPF – Order directing depositing of the amount due – Challenge is made on the ground that petitioner was not given opportunity before passing of the order – Record proves contrary to the plea taken – Held, the orders impugned not required interference – Writ petition dismissed.

*M/s. Lotus Chemicals Pvt-V- ASST. Provident Fund Commissioner, (COMPL.) Rourkela.*

2018 (I) I.L.R. Cut..... 627

**INDIAN PENAL CODE, 1860 – Section 302** – Offence under – Conviction – Appellant submits that the prosecution has not proved the statement recorded under section 27 of the Evidence Act and there are discrepancies in the evidence of eye witnesses – P.W.18 says that in his presence the appellant, during police custody, produce the weapon of offence with blood stain and napkin – Held, the evidence of leading to discovery being proved with consistent evidence, the complicity of the appellant is beyond any doubt – Conviction upheld.

*Goura Mohan Singh-V- State of Orissa.*

2018 (I) I.L.R. Cut..... 500

**Section 302** – Offence under – Conviction – Appellant killed the deceased by shooting arrow from his bow – P.Ws. do not say anything about previous enmity between the parties – Material shows, the assault, an outcome of sudden overt act – Doctor's evidence – The deceased had only one single blow by arrow and could have been saved had he been given treatment at the right time – Held, the appellant had no intention to kill but to cause serious injuries – Conviction modified to one under 304-I, IPC.

*Hadi Sisa -V- State of Orissa.*

2018 (I) I.L.R. Cut..... 507

**LEGAL MAXIM** – There is well recognized maxim of equity, namely, *actus urine neminem gravabit* which means an act of

the court shall prejudice no man – A party cannot be made to suffer on account of an act of the court – This maxim is founded upon Justice and good sense which serves a safe and certain guide for the administration of law.

*Ashok Kumar Dash -V- Chintamani Mohanty & Ors.*

2018 (I) I.L.R. Cut..... 527

**MOTOR VEHICLES ACT, 1988 – Section 173** – Appeal by Insurance Company – Award of compensation – Head on collision of two vehicles due to rash and negligence driving – Prayer for apportionment of the compensation amount between the insurers of both the vehicles – Evidence of eye witness confirms rash and negligence driving of both the vehicle drivers – Direction of apportionment of the compensation amount at the ratio of 70:30 between both insurer.

*National Insurance Company Ltd. –V- Ahalya Swain & Ors.*

2018 (I) I.L.R. Cut..... 520

**NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 (N.D.P.S. Act')** – **Section 42**, sub-sections (1) and (2) – Provisions under – Non-compliance thereof – Held, law is well settled that total non-compliance with the provisions under sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible and it vitiates the conviction and renders the entire prosecution case suspect and cause prejudice to the accused – Evidence show there has been total non-compliance of the mandatory requirements – Effect of– Conviction liable to be set aside.

*Ramakrushna Sahu -V- State of Orissa.*

2018 (I) I.L.R. Cut..... 599

**Section 55** read with Rule 119 of the Orissa Police Rules which deals with malkhana register – Provisions under – Duty of the police officer – Indicated – Non-compliance thereof – Entitles the accused the benefit of acquittal.

*Ramakrushna Sahu -V- State Of Orissa.*

2018 (I) I.L.R. Cut..... 599

**Sections 20(b)(ii)(C) & 29** r/w sections 482/34 of the Indian Penal Code, 1860- Offence under – Appellants were found transporting 595 kgs. 500 grams of contraband ganja in 66 polythene packets through three four wheeler vehicles in contravention of the provisions of section 8(c) of the N.D.P.S. Act and they abetted the commission of offence and were party to criminal conspiracy and used fake number plates in furtherance of their common intention – Only material available on record against the appellant Firoz Alli Khan @ Bulu is the confessional statement of co-accused persons before P.W.14, the Inspector in Charge of Jarada police station, Informant – Held, a confessional statement made by a person whilst he is in custody of a police officer shall not be proved as against him unless it is made in the immediate presence of a Magistrate in view of section 26 of the Evidence Act – Conviction only on the basis of confessional statement of co-accused person is liable to be set aside.

*Ramakrushna Sahu –V- State Of Orissa.*

2018 (I) I.L.R. Cut..... 599

**ODISHA VALUE ADDED TAX ACT, 2004 – Section 43** – Assessment order followed by demand – Prayer of the petitioner to quash the same on the ground that the officer recommending further investigation and officer passing the assessment order are one and the same – The question arose before the court, as to whether the officer who on finding discrepancies in the VAT returns recommended for further investigation and wanted submission of detailed enquiry report/evasion report, was competent to assess the petitioner u/s. 43 of the OVAT Act – Held, No, the likely hood of bias of the officer while doing assessment cannot be ruled out – Order of demand quashed – Reassessment directed.

*M/s. Subas & Company, Bhubaneswar-V- DY. Commissioner of Sales Tax, Bhubaneswar II Circle & Ors.*

2018 (I) I.L.R. Cut..... 493

**OCS (PENSION) RULES, 1992 – Rule 66** – Sanction of provisional pension – Can only be during pendency of

- departmental or judicial proceeding – Petitioner convicted by order dated 23.12.2003 in a criminal case – Provisional pension sanctioned on 05.04.2005 after superannuation on 31.08.2004 – Effect of sanction – Held – Illegal and liable to be struck down.  
*Sanatan Dash -V- CM-CUM-Director, OPTC Ltd. BBSR & Ors.*  
2018 (I) I.L.R. Cut..... 636
- ODISHA LOKPAL & LOKAYUKTAS ACT** – Proceeding before him – Observations – Effect of – Held, it is well settled in law that the learned Lokpal is the recommending authority and any observation of the Lokpal can be only laid before the Assembly for necessary action by the State Government.  
*Saswat Mishra & Anr. -V- Dayanidhi Sharma & Anr.*  
2018 (I) I.L.R. Cut..... 646
- SERVICE** – Petitioner selected by a duly constituted selection committee in 1997, appointed – Challenging such selection, OA filed by other unsuccessful candidates without making the petitioner a party – In consequence of the Tribunal’s order petitioner’s service was terminated – OA filed by petitioner challenging such termination on various grounds – OA dismissed following wrong appreciation of facts and law – Prayer for review also dismissed on technical grounds – order cryptic and non-speaking – Set aside – High Court directives.  
*Arati Mohapatra-V- Deputy Registrar, State Administrative Tribunal & Ors.*  
2018 (I) I.L.R. Cut..... 514
- ORISSA SCHEDULE AREA TRANSFER OF IMMOVABLE PROPERTY BY (ST) REGULATIONS, 1956 – Section (3-a) (i)** – Review proceeding initiated after five years – Consequential order – Provision permits review within five years from the date of order – Review filed after five years – Order set aside.  
*Ladi Chandrasekhar Rao & Anr. -V- Kondagiri Sukadev & Ors.*  
2018 (I) I.L.R. Cut..... 572

**TRANSFER OF PROPERTY ACT, 1882 – Section 123 –**  
Provisions under – Unregistered gift deed – Reliance on such  
document – Held, not acceptable.

*Nayan Majhi And Ors.-V- Chhita Majhiani & Anr.*

2018 (I) I.L.R. Cut..... 539

**Section 123 – Provisions under – Unregistered gift deed –**  
Reliance on such document – Held, not acceptable.

*Nayan Majhi & Ors. -V- Chhita Majhiani & Anr*

2018 (I) I.L.R. Cut..... 539

## 2018 (I) ILR - CUT- 475

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

W.P.(C) NO. 11600 OF 2017

SURESH CH. SAHOO

.....Petitioner

. Vrs.

STATE OF ORISSA &amp; ORS.

.....Opp. Parties

**(A) CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – Writ Petition challenging award of Tender in favour of O.P. 5 as a Schedule Caste Tenderer – O.P. 5, a Partnership Firm constituted in 1989 – In 2016 the Firm changed its status by inducting a Schedule Caste member as partner having 52% share and got the benefit of the Govt. Resolution dated 11.10.1977 which provides certain benefits to Schedule Caste Bidders – Whether the benefit under the Resolution in such a state of affair can be extended to the said Partnership Firm – Held, No.– Writ petition allowed, award of tender quashed.**

**(B) CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – Writ Petition – Tender matter – Benefit under Govt. Resolution dated 11.10.1977 for the Schedule Caste Contractor – When can be extended – Indicated.**

(Paras 9, 8 &amp; 10)

*In our opinion, if with such change of constitution of the partnership firm, the benefit of a super class contractor is permitted to be continued and the benefit of government resolution dated 11.10.1977 is given, then in our view the very object of reservation or benefit to be granted in favour of scheduled caste person or firms would be frustrated. A firm is granted special status of super class contractor because of composition of its partner and their experience. If subsequently the entire composition is changed and the fresh partners are inducted, then in this way the firm would take the benefit of being registered as a super class contractor at the time when it had highly qualified partners and thereafter change the composition to induct scheduled caste partner to take the benefit of concession granted by the government by its resolution dated 11.10.1977. Take for example that a partnership firm is constituted with five qualified engineers, who successfully carry out certain works and because of such experience, get the firm registered as super class contractor firm, and thereafter taking the benefit of its registration as super class contractor, change the composition of its partners to reduce the qualified engineers as partners to one or two and may be nil, and induct a scheduled caste person with 51% or more as shareholders, then in this way very conveniently fraud can be played by first getting the firm registered as super class contractor firm, and then induct new partner(s) to avail the benefit of the reservation given to the scheduled caste and scheduled tribe persons. This cannot be permitted in law. Giving registration as super class contractor is with a purpose that qualified persons/firms alone should get such registration so that quality of high value contract work is maintained. Such benefit cannot be transferred when the composition of the firm is changed and a new majority shareholder is inducted with the purpose of getting benefit under the circular of the State Government dated 11.10.1977.”*

(Para 10)

**Case Laws Relied on and Referred to :-**

1. AIR 2011 SC 1463 : DLF Universal Ltd. & Anr. -V- Director, T. & C. Planning Department Haryana & Ors.
2. AIR 2013 SC 1241 : The Rajasthan State Industrial Development & Investment Corporation & Anr. -V- Diamond & Gem Development Corporation Ltd. & Anr.
3. AIR 2004 SC 4794 : United India Insurance Co. Ltd. -V- Harchand Rai Chandan Lal
4. AIR 2005 SC 286 : Polymat India P. Ltd. & Anr. -V- National Insurance Co. Ltd. & Ors.

For Petitioner : Mr.Pitambar Acharya, Sr.Adv.,  
M/s.D.Panigrahi,N.Jena,S.P.Behera & A.Satpathy

For Opp. Parties : Mr. B.P.Pradhan, A.G.A.  
Mr. Milan Kanungo, Sr. Counsel  
M/s.Rajeet Roy, A.Pradhan, S.K.Singh & S.Sourav

---

Decided on : 02.02.2018

**JUDGMENT*****VINEET SARAN, C.J.***

The Government of Odisha in Works Department floated a detailed tender call notice on 01.03.20017 for works “improvement to Khalisahi-Koska-Adakata road from 0.0 to 18.000 KM in the district of Nayagarh under NABARD Assistance RIDF-XXII”, the estimated cost of which was Rs.17,29,10,926/-. In response to the said tender call notice, the petitioner as well as opposite party no.5-M/s. Jagannath Construction Company and certain other contractors had applied. The petitioner as well as opposite party no.5 and 3 other contractors (total five) were found to be technically qualified. The bid of the petitioner was the lowest at 11.87% less than the estimated cost i.e. Rs.15,23,86,398.99 and the bid of opposite party no.5 was 2.51% less than the estimated cost i.e. Rs.16,85,70,861.66. Opposite party no.5, claiming to be a scheduled caste partnership firm, claimed the benefit of the circular of the State Government dated 11.10.1977, and was given the benefit of 10%, meaning thereby that its bid, which was 2.51% less than the estimated cost, was to be treated as 12.51% less and thus it was treated to be the lowest bidder. The petitioner, vide its communication dated 25.04.2017, objected to opposite party no.5 being given the benefit of being a Scheduled Caste firm, and that the circular dated 11.10.1977 would not be applicable to the case of opposite party no.5. However, after rejecting the objections of the petitioner, the Chief Engineer-opposite party no.3 required opposite party no.5 to bring down the rate to match that of the lowest bid of the petitioner, which was 11.87% less than the estimated cost, to which opposite party no.5 agreed and thus giving the benefit of the circular of the State Government

dated 11.10.1977, the contract was awarded in favour of opposite party no.5, which was then required to submit the Additional Performance Security for the differential amount as required in law.

2. Challenging the order dated 19.05.2017 whereby the work order was issued in favour of opposite party no.5, this writ petition has been filed, with the further prayer that the bid of the petitioner be accepted and he be selected to execute the work in question, being the lowest bidder.

3. On 13.06.2017, this Court had passed an interim order to the effect that no agreement would be executed in respect of the contract work in question pursuant to the communication dated 19.05.2017, and thus in pursuance there of no contract has been finalized in favour of any party.

4. The submission of Sri P. Acharya, learned Senior Counsel for the petitioner is that the opposite party no.5-M/s. Jagannath Construction Company had been constituted as a partnership firm in the year 1989 and registered as such with the opposite party as a Super Class Contractor firm in the general category and not in scheduled caste category. Admittedly the firm had been reconstituted on 01.04.2016, whereby the composition of partnership firm was changed and one Santosh Kumar Bhoi, who is a Scheduled Caste person, was inducted as a partner with 52% shares. As per Clause-4 of the said partnership deed, it was provided that "*the firm comes into existence w.e.f. today and its' duration is at will*". The registration of the firm as Super Class Contractor was given in the year 2010-11 and it is submitted that after reconstitution of the firm it would no longer be a valid super class contractor as admittedly in terms of the own partnership deed, the said firm came into existence w.e.f. 01.04.2016 only and the reconstituted firm was not there in 2010-11 when the registration was given. It is contended that the new Scheduled Caste partner with 52% shares was inducted only to get the benefit of the circular of the State Government dated 11.10.1977 and after the induction of such partner no fresh registration as a Super Class Contractor has been obtained by opposite party no.5 and as such, it did not qualify for participating in the tender call notice dated 01.03.2017. It is further contended that an essential criteria in the tender call notice was that the firm should have at least five years experience of execution of similar work, and since according to the partnership deed dated 01.04.2016, the firm itself had come into existence on that date i.e. 01.04.2016, the work experience of the said firm of 5 years could not be there and as such, the firm did not have essential qualification for participating in the tender call notice.

It is thus contended that firstly, the benefit of the circular of the State Government dated 11.10.1977 could not have been given in the case of petitioner, and alternatively, even if the same could be given, then it was not eligible for participating in the bid as it did not have the essential qualification of five years of work experience. It is thus submitted that the award of contract in favour of opposite party no.5 be quashed and be awarded in favour of the petitioner, who was the lowest bidder.

5. Per contra, Sri M. Kanungo, learned Senior Counsel appearing for the contesting private opposite party no.5-M/s. Jagannath Construction Company has submitted that by the partnership deed dated 01.04.2016 the firm was reconstituted with change of partners, but the entity of the partnership firm continued and thus the experience of the firm and the registration of the said firm as Super Class Contractor with the opposite party would still continue and it was thus qualified to participate in response to the tender call notice dated 01.03.2017. It is further contended that after reconstitution and induction of Sri Santosh Kumar Bhoi, a Scheduled Caste person as a partner with 52% share, the firm qualified for getting the benefit of the circular/resolution of the State Government dated 11.10.1977 and as such, the contract which has been awarded in favour of opposite party no.5, after giving benefit of the aforesaid circular, is perfectly justified and therefore, no interference is called for.

6. Sri B.P. Pradhan, learned Additional Government Advocate appearing for the State opposite parties has contended that though the firm had been reconstituted on 01.04.2016, it still continues as M/s.Jagannath Construction Company, which had a valid registration as a Super Class Contractor granted in the year 2010-11, which is still valid and as such, the contract has rightly been awarded in favour of opposite party no.5 after granting benefit of the circular dated 11.10.1977 in its favour, because after reconstitution of the firm, it had a scheduled caste partner holding shares of more than 51% in the firm. He has also prayed that this writ petition be dismissed as the award of contract in favour of opposite party no.5 is perfectly justified in law.

7. We have heard Sri Pitambar Acharya, learned Senior Counsel appearing along with Sri A. Satpathy, learned counsel for the petitioner; as well as Sri B.P. Pradhan, learned Addl. Government Advocate appearing for State opposite parties no.1 to 4; and Sri Milan Kanungo, learned Senior Counsel appearing along with Sri R. Roy, learned counsel for contesting opposite party no.5 and perused the record. Pleadings between the parties

have been exchanged and with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the admission stage.

8. The relevant State Government Resolution dated 11.10.1977 is reproduced hereunder for ready reference:

**“GOVT. INSTRUCTIONS**

**1. Grant of Concession to Scheduled Caste and Scheduled Tribe Contractors.**

*The question of providing certain concessions to S.C. and S.T. Contractors regarding award of works had engaged the attention of Govt. for some time past. On the basis of the recommendation of the Committee of Chief Engineers it has now been decided to allow the following facilities to individual S.C. and S.T. Contractors Private Limited Companies and partnership firms in which at least 51% of the share are held by members of Scheduled Caste and Scheduled Tribe for execution of PWD works.*

*The Scheduled Caste and Scheduled Tribe applicants desirous of enrolling themselves as contractors may furnish solvency certificate to the extent of 50% only of the amount of solvency prescribed for various classes of Contractors under Rule 7 of the PWD Contractors registration rules 1967.*

***If the tender of the following type of Scheduled Caste and Scheduled Tribe Contractors is within 10% of the rate quoted by the lowest tender for any work, the work may be considered for award to him/them at the lowest tenders rate in the relaxation of Rule 18 of the O.G.F.R. Vol.-I and Para 3.5.14 of the OPWD Code.***

- (a) *Individual registered Contractors belongs to the S.C. and S.T.*
- (b) *Private Limited companies in which at least 51% of the share are held by members of Scheduled Caste and/or Scheduled Tribes.*
- (c) ***Partnership Firms in which at least 51% of the share are held by members of Scheduled Caste and/or Scheduled Tribe.***

*The security deposit (earnest money initial security and performance security) at half the usual rate may be deposited realized by/from the Scheduled Caste or Scheduled Tribe Contractors coming under the categories upto 'B' Class only as against the prescribed percentage under Rule 13 of the PWD Contractors registration rules. The above concession will take effect from date of issue of the resolution.*

(No.16/37-27748, Dt.11.10.1977)

By order of the Governor

A.C. Padhi

Secretary to Government”

The relevant clause-27(ii) of the tender call notice relating to grant of benefit of the Government Resolution dated 11.10.1977 is reproduced below:



*b. Completed in any year, in the last five years of the base year as per Para 121.2 above, at least one work of similar nature as indicated in Contract Data. To arrive at this criteria, experience certificates issued by principal employer as per Para 121.3 (a) during last five years will be considered for evaluation.*

*c) For evaluation on experience as required at 121.3(b) above, the bidder must have **experience as a prime contractor or nominated sub-contractor in a similar nature of work** for which the information should be furnished as per requirement of Clause 13 above & in the forms in Schedule-D1 for completed works and in Schedule D2 for ongoing works completed more than 90% value of work supported with experience certificate not below the rank of Executive Engineer.”*

Paragraph-4 of the reconstitution deed of partnership dated 01.04.2016, on which reliance has been placed by learned Senior Counsel for the petitioner, is reproduced below:

*“4. That the firm comes into existence w.e.f. today and its duration is at will.”*

9. From a plain reading of the Government Resolution dated 11.10.1977, it is clear that the said instructions have been issued with the intention to provide certain concession to the Scheduled Caste and Scheduled Tribe contractors so that they could get the benefit of government contracts after being given the concession of 10% of the rate, meaning thereby in case the general class contractor quotes a particular price and the price quoted by the Scheduled Caste/Scheduled Tribe contractors is 10% higher or lower, the same shall be treated at par with that of the general class contractors. The object for issuing the said instructions was to give reservation to the deserving Scheduled Caste/Scheduled Tribe persons, who would be benefited by the concession given therein. In the present case, opposite party no.5 was registered as a partnership firm in the year 1989 without there being any scheduled caste person as its partner and was thereafter registered as a super class contractor firm in the year 2010-11 with the State Government so as to qualify for grant of contracts of high value for which only super class contractors qualify and could be given contracts. After having obtained the registration as a super class contractor under the general category, the constitution of the firm was changed and one scheduled caste person, who may or may not have any experience as a contractor, was inducted on 01.04.2016 with 52% share in the partnership firm so that the firm, which was registered as a super class contractor initially in the general category, could now avail the benefit of the Government Resolution dated 11.10.1977.

10. In our opinion, if with such change of constitution of the partnership firm, the benefit of a super class contractor is permitted to be continued and the benefit of government resolution dated 11.10.1977 is given, then in our view the very object of reservation or benefit to be granted in favour of scheduled caste person or firms would be frustrated. A firm is granted special status of super class contractor because of composition of its partner and their experience. If subsequently the entire composition is changed and the fresh partners are inducted, then in this way the firm would take the benefit of being registered as a super class contractor at the time when it had highly qualified partners and thereafter change the composition to induct scheduled caste partner to take the benefit of concession granted by the government by its resolution dated 11.10.1977. Take for example that a partnership firm is constituted with five qualified engineers, who successfully carry out certain works and because of such experience, get the firm registered as super class contractor firm, and thereafter taking the benefit of its registration as super class contractor, change the composition of its partners to reduce the qualified engineers as partners to one or two and may be nil, and induct a scheduled caste person with 51% or more as shareholders, then in this way very conveniently fraud can be played by first getting the firm registered as super class contractor firm, and then induct new partner(s) to avail the benefit of the reservation given to the scheduled caste and scheduled tribe persons. This cannot be permitted in law. Giving registration as super class contractor is with a purpose that qualified persons/firms alone should get such registration so that quality of high value contract work is maintained. Such benefit cannot be transferred when the composition of the firm is changed and a new majority shareholder is inducted with the purpose of getting benefit under the circular of the State Government dated 11.10.1977.

11. It is noteworthy that the qualifying experience criteria of a firm or contractor is specified in clauses-121.1 and 121.3 to be that the “*annual turn over during the last five years shall not be less than 40 percent of the value of contract applied for*”. In the present case, since the reconstituted firm was to be treated as a firm which had come into existence w.e.f. 01.04.2016 itself, the question of newly constituted firm having five years experience, would thus not be there. Along with the tender papers, opposite party no.5 had filed an affidavit of one Ramesh Chandra Naik, aged about 76 years, who claimed to be the Managing Partner of opposite party no.5, wherein it was stated in paragraph-1 that “*I possess a valid license for execution of work contract issued by E.I.C. (Civil), Odisha Bhubaneswar belong to Super Class bearing*

*Registration No.226 and is valid upto dt.31.03.2019 .....". Thereafter, in paragraph-3 of the affidavit it is stated that "since our firm constitute 52% share of scheduled caste partner Santosh Kumar Bhoi so we want to take price preference of 10% to the lowest tendered rate in the above tender as per of Works Department Resolution No.16/77-27748, dated 11.10.1977."*

12. It is thus clear that super class contractor registration was awarded in favour of Ramesh Chandra Naik as Managing Partner of firm M/s Jagannath Construction Company in the year 2010-11, and the firm was reconstituted subsequently on 01.04.2016 so as to avail the benefit of the resolution of the State Government dated 11.10.1977. Thus, in our view, opposite party no.5, in the present facts and circumstances, ought not to have been granted the benefit of the resolution of the State Government dated 11.10.1977 and if at all any such benefit is granted, it is to be granted as if the firm had been constituted w.e.f. 01.04.2016 as has been specifically provided in paragraph-4 of the reconstituted deed of partnership. If the firm is treated as having come into existence w.e.f. 01.04.2016, it would neither have five years experience as required in tender call notice nor could it be treated as super class contractor for which registration was granted in the year 2010-11.

13. In ***DLF Universal Ltd. and Anr. v. Director, T. and C. Planning Department Haryana and Ors.***, AIR 2011 SC 1463, the apex Court held:

*"It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation. As is stated in Anson's Law of Contract, "a basic principle of the Common Law of Contract is that the parties are free to determine for themselves what primary obligations they will accept...Today, the position is seen in a different light. Freedom of contract is generally regarded as a reasonable, social, ideal only to the extent that equality of bargaining power between the contracting parties can be assumed and no injury is done to the interests of the community at large." The Court assumes "that the parties to the contract are reasonable persons who seek to achieve reasonable results, fairness and efficiency...In a contract between the joint intent of the parties and the intent of the reasonable person, joint intent trumps, and the Judge should interpret the contract accordingly."*

14. In *The Rajasthan State Industrial Development and Investment Corporation and Anr. v. Diamond and Gem Development Corporation Ltd. and Anr.*, AIR 2013 SC 1241, the apex Court while considering the interpretation of terms of contract and its scope observed as follows:

*“A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely.”*

Similar view has also been taken by the apex Court in *United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal*, AIR 2004 SC 4794 and *Polymat India P. Ltd. and Anr. v. National Insurance Co. Ltd. and Ors.*, AIR 2005 SC 286.

15. In the aforesaid facts and circumstances, we are of the opinion that this writ petition deserves to be allowed. Accordingly the award of contract in favour of opposite party no.5 vide work order dated 19.05.2017 is quashed. The State opposite parties shall reconsider the matter and take a fresh decision of awarding the contract in favour of the lowest bidder who had qualified in the tender process, as expeditiously as possible, preferably within a period of three weeks from the date of filing of a certified copy of this order before opposite party no.3.

16. The writ petition is allowed to the extent indicated above. No order as to cost. Writ petition allowed.

**2018 (I) ILR - CUT- 484**

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

W.P. (C) NO. 10461 OF 2017

**M/S. L.N.INFRASTRUCTURE & CONSTRUCTION  
PVT. LTD.**

.....Petitioner

.Vrs.

**ODISHA STATE POLICE HOUSING & WELFARE  
CORPORATION LTD. & ANR.**

.....Opp. Parties

**CONSTITUTION OF INDIA, 1950 – ARTs. 226 & 227 – Writ Petition challenging the rejection of Tender at the stage of Technical bid evaluation for not furnishing the valid electrical license – Plea of petitioner that submission of electrical License being a non-essential or ancillary/subsidiary condition, the authorities should have permitted the petitioner to supply such information at a later stage – Held, possession of a valid electrical license as on the date of opening of the technical bids is an essential condition – Failure to submit qualifying documents in tender, asking for explanation, and/or to accept or reject the tender is within the domain of the authority.**

(Paras 6,7,8 & 9)

**Case Laws Relied on and Referred to :-**

1. 110(2010) CLT 722 : Jagadamba Packaging Pvt. Ltd. -V- Union of India & Ors.
2. (2008) 16 SCC 215 : AIR 2009 SC 1204 : Siemens Public Communication Network Pvt. Ltd. -V- Union of India & Ors.
3. (1990) 2 SCC 486 : Ram Gajadhar Nishad -V- State of U.P.
4. (2009) 11 SCC 9 : Sorath Builders -V- Shreejirupa Buildcon Ltd.

For Petitioner : M/s. P.C.Nayak & S.K.Rout

For Opp. Parties : M/s. G.P. Dutta, S.K.Mohanty & B.K.Sahoo

---

Decided on: 06.03.2018

**JUDGMENT**

**VINEET SARAN, C.J.**

The opposite party-Odisha State Police Housing & Welfare Corporation Ltd. had issued a tender call notice on 20.04.2017 inviting tenders for various works. The last date of submission of the tenders was 06.05.2017. The petitioner had applied for construction of certain quarters and composite electrical works within the stipulated time. The technical bids of the bidders were to be opened on 09.05.2017. At the time of opening of the technical bid, it was found that the bid of the petitioner was rejected on the ground

*“due to invalid electrical license as per the condition mentioning in the uploaded documents”.*

Challenging the said rejection order, this writ petition has been filed.

2. We have heard Shri P.C. Nayak, learned counsel for the petitioner as well as Shri G.P. Dutta, learned counsel for the opposite party and perused the record. Pleadings between the parties have been exchanged and with consent of learned counsel for the parties, this writ petition is being disposed of at this stage.

3. The submission of learned counsel for the petitioner is that though at the time of submission of the documents and evaluation of the technical bids on 09.05.2017, the license submitted by the petitioner was technically invalid as the condition in the license that the same would become invalid if permit/certificate of any of the staff becomes invalid and admittedly, as per the document/licence submitted by the petitioner, the permit/certificate of two of the staff, namely, S. Parija and S.K Hota had already expired on 11.06.2016 and 31.07.2016 respectively, but learned counsel for the petitioner contends that on the very next day i.e. on 10.05.2017, the petitioner had submitted renewed certificate of the licence of the staff and, as such, the licence of the petitioner-firm could not have been treated as invalid. In support of his submission, learned counsel for the petitioner relies on Clause-22.1 of the detailed tender call notice relating to clarification of bids, which reads as under:

**“22. CLARIFICATION OF BIDS**

*22.1 To assist in the examination, evaluation, and comparison of bids, the officer inviting the bid may, at his discretion, ask any bidders in writing/online (in their registered e-mail ids) to clarify on the upload documents provided in the Technical Bid, if necessary, with respect to any doubts or illegible documents. The officer inviting tender may ask for any other document of historical nature during Technical Evaluation of the tender, provided in all such cases, furnishing of any document in no way alters the Bidder's price bid. Non-submission of legible documents may render the bid non-responsive. The authority inviting bid may reserve the right to accept any additional document. The bidder will respond in not more than 7 (seven) days of issue of the clarification letter, failing which the bid of the bidder will be evaluated on its own merits.”*

Learned counsel for the petitioner also relies on Clause-3.2.m of the detailed tender call notice relating to possession of valid licence, which reads as under:

*“3.2.m: The contractor or his identified sub-contractor (Permissible in case of Composite bids only) should possess and furnish required valid license for executing the electrical installation works/mechanical works/building electrification works and should have executed similar engineering works for a minimum amount as indicated in Contract data in any one year.”*

4. Shri Nayak, learned counsel for the petitioner contends that in the present case the opposite party ought to have exercised its discretion and sought clarification with regard to validity of the licence from the petitioner as, according to Shri Nayak, in case there being any doubt, such clarification ought to have been sought. It is further submitted that in case of non-essential or ancillary/subsidiary condition as was in the present case, the opposite party

should have permitted the petitioner to supply such information at a later stage and, in support thereof, he relies on a Division Bench decision of this Court in the case of *Jagadamba Packaging Pvt. Ltd. v. Union of India (UOI) and Ors, 110 (2010) CLT 722*.

5. *Per contra*, Shri Dutta, learned counsel for the opposite party has vehemently submitted that possessing of a valid licence was as per the essential condition, and since there was no doubt that the same was invalid on the date of opening of the technical bid i.e. on 09.05.2017, there was no necessity for seeking clarification from the petitioner as the same would be necessary only when there was any doubt, which is not so in the present case. He has also contended that the condition of having a valid licence was an essential condition and the same could not be treated as ancillary/subsidiary condition.

6. Having heard learned counsel for the parties and on examining the record, we are of the opinion that there is no doubt about the fact that possession of a valid electrical licence as on the date of opening of the technical bids i.e. on 09.05.2017 was an essential condition. As such the ratio of the decision in the case of *Jagadamba Packaging* (supra) would not apply to the fact of this case.

7. A perusal of the licence, which was submitted by the petitioner along with the tender documents, as has been filed as Annexure-3 to the writ petition, would go to show that the permits/certificates of two of the employees out of four furnished by the petitioner-firm, had become invalid because the same had expired on 11.06.2016 and 31.07.2016 respectively. The note along with the said licences clearly provide that “*this licence will become invalid if Permit/Certificate of any of the above staff becomes invalid*”

8. In such view of the matter, it cannot be said that there was any doubt with regard to validity of the licence of the petitioner firm, on which count, the opposite party ought to have exercised discretion in favour of the petitioner to seek a clarification as provided under Clause 22.1 of the detailed tender call notice. Reading of such clause would make it clear that clarification could be sought by the opposite party only when there was any doubt or there was filing of any illegible documents. Since both the conditions were not existing in the present case, the action of the opposite party in not seeking any clarification is fully justified.

9. In *Siemens Public Communication Network Pvt. Ltd. V Union of India and Ors, (2008) 16 SCC 215: AIR 2009 SC 1204*, the Apex Court held that failure to submit qualifying documents in tender, explanation for, is within

the domain of the authority to accept or reject the tender itself, Similar view has also been taken by the apex Court in *Ram Gajadhar Nishad .VShreejkrupa Buildcon Ltd.*, (2009) 11 SCC9.

10. In view of the aforesaid discussions, the petition lacks merit and is dismissed as such. No order as to costs.

In view of dismissal of the writ petition, the interim order passed on 01.06.2017 stands vacated.

Writ petition dismissed.

2018 (I) ILR - CUT- 488

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

W.P.(C) NO. 11836 OF 2017

M/S RANJIT CONSTRUCTION

.....Petitioner

.Vrs.

STATE OF ODISHA & ORS.

.....Opp. Parties

**CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – Tender call notice inviting bids – Bids submitted – Process completed by selecting the successful bidder – At this stage the authority cancelled the Tender without assigning any reason – Reason stated in the counter affidavit that the tender may have been fixed – Held, such a reason cannot be accepted as the same can be construed as an afterthought – Order cancelling the tender set aside.**

*“It is made clear that the reasons for rejecting the tender of the petitioner, which have been mentioned in the counter affidavit for the first time, were never communicated to the petitioner, and as such the same cannot be accepted.*

*“when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.*

*Orders are not like old wine becoming better as they grow old.”*

(AIR 1978 SC 851)

**Case Laws Relied on and Referred to :-**

1. (1980)2 All ER 634 (HL) : Racal Communications Ltd.
2. (1968) 1 All E.R. 694 : Padfield v. Minister of Agriculture, Fisheries & Food
3. AIR 1974 SC 87 : Union of India v. Mohan Lal Capoor
4. AIR 1981 SC 1915 : Uma Charan v. State of Madhya Pradesh.
5. AIR 1978 SC 851 : Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi

For petitioner : M/s Prabodha Chandra Nayak  
and S.K. Rout, Advocates

For opp. parties : Mr. P.K. Muduli, Addl. Government Advocate

---

Decided on : 21.03.2018

**JUDGMENT**

***DR.B.R.SARANGI,J.***

M/s Ranjit Construction, registered as a partnership firm, is a special class contractor having valid license, according to prescribed revised classification, and has obtained a certificate in Form "B" of Certificate of Registration under Rule-6 of the PWD Contractors Registration Rules, 1967. The Superintending Engineer, Rural Works Circle, Bhawanipatna-opposite party no.4 invited public tender on 09.09.2016 in respect of 66 packages for construction of road under Pradhan Mantri Gramya Sadak Yojana (PMGSY). In respect of the work, vide Package No. OR-24-140, i.e., "LO28 Bharuamunda to Gambhariguda" the approximate estimate cost was fixed to Rs.240.21 lakhs and the period of completion was within 9 months. In respect of the said package, the petitioner participated, by submitting all required documents, along with 5 other bidders. On evaluation of the technical bid, its result was published on 26.12.2016, in which the petitioner, along with 3 other bidders, was found to be qualified. Thereafter, the price bid was opened, in which it was found that the petitioner and one Sanjay Kumar Agrawal had quoted equal rate. Therefore, a lottery was conducted in which the petitioner was declared successful. The tender inviting authority recommended the name of the petitioner, for approval of the tender, to the Chief Engineer, PMGSY. As the bid of the petitioner was not approved, no work order has been issued in favour of the petitioner, hence this application.

2. Mr. P.C. Nayak, learned counsel for the petitioner strenuously urged that in respect of the work in question in the tender process 6 bidders, including the petitioner, had participated and 4 bidders (including the petitioner) were qualified in the technical bid. When price bid was opened, the rate quoted by the petitioner and one Sanjay Kumar Agrawal was found to be equal, for which a lottery was conducted. In the lottery, as the petitioner was found successful, the tender inviting authority recommended its name for approval. But, so far as other packages are concerned, though the tender bids have been approved by the appropriate authority and work orders have been issued, the petitioner having stood in the same footing and being equal to them, is entitled to be treated fairly and reasonably and allowed to work by issuing work order in its favour by approving the recommendation made by

the competent authority. Due to such unequal treatment, the petitioner has approached this Court ventilating its grievance. Even though the petitioner made a representation on 06.06.2017, the same was not replied to. Against such arbitrary and unreasonable action of the authority concerned, finding no other way out, the petitioner has approached this Court by invoking extraordinary jurisdiction of this Court.

3. Mr. P.K. Muduli, learned Addl. Govt. Advocate, with reference to the counter affidavit filed by the opposite parties, contended that the bid evaluation committee apprehended lack of transparency and fair play in the bidding process and therefore decided to cancel the tender in respect of the package. Therefore, pursuant to letter dated 01.05.2017, the tender process has been rejected.

4. We have heard Mr. P.C. Nayak, learned counsel for the petitioner, as well as Mr. P.K. Muduli, learned Addl. Govt. Advocate and perused the record. Pleadings between the parties having been exchanged, with the consent of learned counsel for the parties, the writ petition is finally disposed of at the stage of admission.

5. The facts narrated above are undisputed. Pradhan Mantri Gramya Sadak Yojana (PMGSY) scheme was launched by the Government of India, Ministry of Rural Development, and operated through National Rural Road Development Agency (NRRDA). In order to make the tender fair and competitive, the NRRDA prescribed guidelines for approval of the project and also for the tender process. Pursuant to the tender invited by the Superintending Engineer in respect of package no.OR-24-140, six agencies had participated in the bidding process. The bid of the Haresh Agarwal and Arjun Agarwal was declared disqualified, as sufficient EMD in original were not submitted along with the respective tender documents. Therefore, out of four qualified bidders, when the financial bid was opened, it was found that the lowest quoted bidder, namely, Sri Laxmi Chand Mital who had quoted 4.50% less than the estimated cost put to tender, had not furnished the APS in original and, therefore, his bid was also rejected. The petitioner along with Sri Sanjay Kumar Agarwal, both quoted equal price of 2% excess than the estimated cost. Consequentially, opposite party no.4, as per the procedure prescribed, followed the lottery procedure in which the petitioner's name came out to be successful. Accordingly, opposite party no.4, vide its letter dated 30.01.2007, recommended the name of the petitioner to opposite party no.3 for consideration and approval. When the matter was thus stood, the recommendation was placed in the bid evaluation committee meeting of

Odisha State Rural Road Agency (OSSRA) held on 01.05.2017 under the Chairmanship of opposite party no.2. Then, comparison of bid of package no.OR-24-140 was made with that of other bids in respect of other packages, where it was found that Sri Laxmi Chand Mital became L-1 bidder by quoting 2% excess in respect of the package no.OR-24-148/B-II whereas for the selfsame package Sri Sanjay Kumar Agarwal, who had quoted 4.10% less, had not furnished the original APS deposit, but in respect of package no. OR-24-140-B-II Sri Laxmi Chand Mital quoted 4.50% less and had not furnished the APS deposit in original whereas Sri Sanjay Kumar Agarwal quoted his bid 2% excess. Therefore, the bid evaluation committee apprehended lack of transparency and fair play in the bidding process and decided to cancel the tender in respect of both the packages and further recommended to block the Digital Signature Certificate (DSC) of both the bidders, i.e., Laxmi Chand Mital and Sanjay Kumar Agarwal. Thereafter, opposite party no.3, vide letter dated 19.05.2017, intimated opposite party no.4 that as per the recommendation dated 01.05.2017 of the Chief Executive Officer, OSSRA, the tender process has been rejected. The bid evaluation committee, OSSRA in the meeting held on 01.05.2017 found that in respect of packages no. OR-24-140 and OR-24-148, there is internal coalition between some agencies, who have quoted less amount than the estimated cost put to tender but intentionally did not submit their original APS. Therefore, the bid evaluation committee, which is the apex authority in the State, with regard to taking decision on awarding PMGSY works basing on the bidding documents, decided to cancel the tender process in respect of both the packages. Accordingly, the opposite parties have tried to justify their action by assigning reasons in the counter affidavit, which is not available in any of the documents prior to filing of the writ petition.

6. Needless to say that this Court passed an interim order on 15.07.2017 that status quo as on date, with regard to tender package no. OR-24-140, out of 66 packages for which tenders were invited on 09.09.2016, would be maintained by the parties. Before passing of such interim order, vide orders dated 03.07.2017 and 13.07.2017, opportunity was given to the opposite parties to obtain instructions or file counter affidavit. Even though instruction was received on 15.07.2017, no counter affidavit had been filed. Therefore, this Court passed the interim order as mentioned above.

7. As a matter of fact, the reasons which have been assigned are based on apprehension with regard to conspiracy leading to tender fixing and it is stated that on scrutiny of the records, it was apprehend that some of the

bidders, who had not submitted original documents, had conspired for tender fixing and thus the tender process was rejected at the Chief Engineer level. In the absence of there being any material on record itself, the authority could not have apprehended anything and on that basis rejection of the tender could not have been done, which is the settled position of law. Furthermore, the tendering authority, finding the petitioner as lowest tenderer and was successful in the lottery, having recommended its name for approval, instead of approving the same, on the basis of apprehension of tender fixing the rejection of recommendation should not have been made. More so, the reasons which have been assigned in the counter affidavit can be construed as an afterthought and as such the same cannot be accepted.

8. 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. The order dated 01.05.2017 rejecting the tender, having been passed without any reason and the reasons which have been attempted to be justified by way of filing counter affidavit having never been communicated to the petitioner, cannot be tenable in the eye of law.

11. The apex Court in *Gordhandas Bhanji*, AIR 1952 SC 16 held as follows:

*“Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the*

*order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.”*

12. The Constitution Bench of the apex Court in ***Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi***, AIR 1978 SC 851, the apex Court held :

*“ ..... when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.*

*Orders are not like old wine becoming better as they grow old.”*

13. In view of the law laid down by the apex Court, as discussed above, and applying the same to the present context, it is made clear that the reasons for rejecting the tender of the petitioner, which have been mentioned in the counter affidavit for the first time, were never communicated to the petitioner, and as such the same cannot be accepted. Therefore, the order dated 01.05.2017 rejecting the tender process, which has been communicated to the petitioner vide letter dated 19.05.2017 in Annexure-A to the counter affidavit, cannot sustain in the eye of law. Consequentially, the same is hereby quashed. Opposite party no.3 is directed to approve the work in respect of package no.OR-24-140, pursuant to the recommendation made by the tender inviting committee vide Annexure-3, as expeditiously as possible and take necessary follow up action in accordance with law.

14. The writ petition is accordingly allowed. No order as to costs.

Writ petition allowed.

**2018 (I) ILR - CUT- 493**

**I.MAHANTY, J. & BISWAJIT MOHANTY, J.**

W.P.(C) NO. 10715 OF 2014

**M/S. SUBAS & COMPANY, BHUBANESWAR**

.....Petitioner

.Vrs.

**DY.COMMISSIONER OF SALES TAX,  
BHUBANESWAR II CIRCLE & ORS.**

.....Opp. Parties

**ODISHA VALUE ADDED TAX ACT, 2004 – Section 43 – Assessment order followed by demand – Prayer of the petitioner to quash the same on the ground that the officer recommending further investigation and officer passing the assessment order are one and the same – The question arose before the court, as to whether the officer who on finding discrepancies in the VAT returns recommended for further investigation and wanted submission of detailed enquiry report/evasion report, was competent to assess the petitioner u/s. 43 of the OVAT Act – Held, No, the likely hood of bias of the officer while doing assessment cannot be ruled out – Order of demand quashed – Reassessment directed.**

*It is well settled that the principles of natural justice demand that nobody shall be a judge of his own cause. It is equally well settled that justice should not only be done but also should be manifestly be seen to have been done.* (Para 7)

**Case Laws Relied on and Referred to :-**

1. (2015) 77 VST 124 (Orissa) : ABB India Ltd. -V- State of Odisha & Ors.
2. (2012) 49 VST 33 (Orissa) : TATA Sponge Iron Ltd. -V- Commissioner of Sales Tax, Orissa & Ors.

For Petitioner : M/s. Prakash Ku. Jena, S.P.Dalei,  
S.C. Sahoo, L.N. Sahoo & A.R.Mishra

For Opp. Parties : Mr. Debadutta Beura, Standing Counsel  
(Sales Tax Department)

---

Decided on 20.02.2018

**JUDGMENT**

***BISWAJIT MOHANTY, J.***

An assessee has filed this writ application with prayers to quash the assessment order dated 19.3.2014 (Annexure-1) passed under Section 43 of the Odisha Value Added Tax Act, 2004 and the demand notice under Annexure-2 both passed by the Deputy Commissioner of Sales Tax, (Opposite Party No.1). The assessee has also prayed for a direction to the Assessing Officer to re- compute / reassess the turnover and tax after accepting the revised returns and allowing the petitioner all his rights to file returns revising the turnover as permitted under law. In the alternative, it has prayed for a direction to waive the precondition of payment of 20% of the disputed tax and interest in the event a direction is given for filing of the appeal under the Odisha Value Added Tax Act, 2004, for short “the OVAT Act”.

2. According to the petitioner it operates a sole Proprietorship business and deals in Gold Bullion and Ornaments. Most of its purchases are made

from the Punjab National Bank, for short, “the Bank”. The petitioner-assessee purchases Gold Bullion under a rate cutting contract and “the Bank” in turn purchases Bullion from the foreign dealers. As per the Bullion agreement with “the Bank” under Annexure-3, the petitioner places order for Bullion with “the Bank” in the form of an indent and “the Bank” negotiates with the foreign Bullion dealers for the consignment. On receiving the same, “the Bank” informs the petitioner to take delivery of it. When the petitioner takes delivery of stock, a delivery challan is issued at the rate of gold price prevailing on that day. But according to the petitioner, the same is not final sale price. Since the transaction of purchase of Gold bullion by “the Bank” from the foreign Bullion dealers are in terms of international rates of Bullion and foreign exchange rates, both of which keep fluctuating; as per terms of business with “the Bank”, “the Bank” allows a grace period of 11 days to the petitioner for choosing the price as per the lowest Bullion rate in the international markets at London/New York and also gives the assessee a choice for choosing prevailing rate of foreign exchange. “The Bank” permits the petitioner to fix the price as per its choice when the rates are the lowest which is termed as “Rate Cutting”. When the petitioner communicates to “the Bank” about the finalization of the rate on a particular day during the grace period, “the Bank” concludes the sale on its part and raises the Invoice, which may be days after the transaction and receipt of the stock by the petitioner. For accounting purposes, the petitioner accounts for the purchase as soon as it receives the Bullion from “the Bank” along with the delivery challan and records it at the price shown in the challan, which is as per the rate prevailing on that day and also computes the tax and accounts for it. Accordingly, it files monthly VAT returns. When finally the sale price is fixed as indicated earlier and on receiving the tax invoice from “the Bank”, which are often issued after 15 days; the petitioner files the revised returns to adjust the actual sale price of the goods and tax thereon. Further, according to the petitioner the opposite parties conducted the tax audit under Section 41 of “the OVAT Act” for the period 1.4.2007 to 31.10.2012. In its Audit Visit Report under Annexure-4, the method of fixing the sale price and the rate cutting have been reflected. According to the petitioner on the basis of the above noted Audit Visit Report, audit assessment was completed under Section 42 of “the OVAT Act” for the period 1.4.2007 to 30.11.2012 and accordingly, the assessment order under Annexure-5 was issued on 18.5.2013. Subsequently, in the very next month the opposite party no.1 vide letter no.5476/CT dated 6.6.2013 informed the Joint Commissioner of Commercial Taxes, Bhubaneswar Range, Bhubaneswar that discrepancies have been detected in

the VAT return filed for the period 1.4.2013 to 30.4.2013 by the petitioner, which necessitated further investigation. Accordingly, the opposite party no.1 informed the Joint Commissioner of Commercial Taxes that the matter has been discussed with DCCT Enforcement, Bhubaneswar for detailed enquiry and for submission of enquiry report. Accordingly, the report dated 29.6.2013 under Annexure-6 was prepared, which fallaciously showed that return filed by the assessee claiming input tax credit continuously resulted in eating away the output tax actually generated thereby defaulting in payment of output tax by claiming erroneous input tax credit. Hence, the Sales Tax Officer, Enforcement Range, Bhubaneswar recommended for initiation of action under Section 43 of “the OVAT Act” under Annexure-6. According to the petitioner, basing on the report under Annexure-6, the Assessing Officer passed the impugned order of Assessment under Section 43 of “the OVAT Act” as per Annexure-1 on the ground that the petitioner-assessee is continuously claiming excess input tax credit than what was actually admissible. Consequently, the impugned demand notice under Annexure-2 has been issued.

3. Heard Mr. Dalei, learned counsel for the petitioner and Mr. Debadutta Beura, learned Standing Counsel for Commercial Taxes.

4. Mr. Dalei, learned counsel for the petitioner submitted that the entire decision making process resulting in passing of assessment order under Annexure-1 and consequential demand notice under Annexure-2 has been vitiated as the Officer/Deputy Commissioner of Commercial Taxes, Bhubaneswar-II Circle, Bhubaneswar, who vide letter no.5476 dated 6.6.2013 addressed to the Joint Commissioner of Commercial Taxes, Bhubaneswar Range, Bhubaneswar with copy endorsed to Deputy Commissioner of Commercial Taxes, Enforcement Range, Bhubaneswar highlighted about the discrepancies detected on verification of VAT returns filed for the period 1.4.2013 to 30.4.2013 filed by the petitioner as well as Punjab National Bank and who accordingly recommended further investigation; has himself passed the assessment order under Section 43 of the OVAT Act under Annexure-1. Thus, according to Mr. Dalei, the opposite party no.1 has become a judge in his own cause. In other words, he pointed out that since at his instance enquiry for the investigation was initiated after he detected the so-called huge mismatch and excess claim of ITC by the petitioner, therefore, the said opposite party no.1 ought not to have acted as an Assessing Officer while passing the order under Section 43 of “the OVAT Act” under Annexure-1. He strenuously submitted the officer recommending

further investigation and the officer passing the assessment order under Annexure-1 are one and the same. In such background, he prayed that since the impugned assessment order under Annexure-1 has been issued in violation of the principles of natural justice, the same is liable to be quashed along with consequential demand notice under Annexure-2. In this connection, he relied upon a decision of this Court as rendered in **ABB India Limited –v- State of Odisha and Others** as reported in (2015) 77 VST 124 (Orissa).

5. Mr. Debadutta Beura, learned Standing Counsel for commercial Taxes defended the impugned order of assessment and submitted that the said order under Annexure-1 did not suffer from any illegality or infirmity. However, upon instruction he fairly submitted that the officer, who has issued letter no.5476 dated 6.6.2013 to the Joint Commissioner of Commercial Taxes, Bhubaneswar Range, Bhubaneswar highlighting the discrepancy in the VAT returns filed for the period 1.4.2013 to 30.4.2013 and huge mismatch and excess of claim of ITC recommending further investigation, has acted as an Assessment Officer under Section 43 of “the OVAT Act” resulting in issuance of Assessment Order under Annexure-1. He further submitted that the said officer has been transferred from the said post and a different Assessing Officer is presently posted.

6. Having heard the parties, the sole issue that falls for our consideration is whether the opposite party no.2, who on finding discrepancies in the VAT returns had recommended further investigation and wanted submission of detailed enquiry report/evasion report, was competent to assess the petitioner under Section 43 of “the OVAT Act”? As per direction of this Court, Mr. Beura, learned Standing Counsel produced the relevant records including the letter dated 6.6.2013 referred to above.

7. In order to appreciate the issue in a proper manner, we think it appropriate to extract the letter dated 6.6.2013 written by opposite party no.2 to the Joint Commissioner of Commercial Taxes in full as hereunder:-

“OFFICE OF THE DEPUTY COMMISSIONER OF COMMERCIAL TAXES,  
BHUBANESWAR II CIRCLE, BHUBANESWAR.

No.\_\_\_\_\_CT., Date\_\_\_\_\_

To

The Joint Commissioner of Commercial Taxes,  
Bhubaneswar Range, Bhubaneswar.

Sub: Discrepancies detected on verification of Column No.57 of M/s. Subash & Company, Bhubaneswar, TIN-21191106567 and M/s. Punjab National Bank, Bhubaneswar, TIN-21301117904, in the VAT return filed for the period 01.04.2013 to 30.04.2013, both the dealers registered in Bhubaneswar II Circle, Bhubaneswar.

Sir,

In inviting a reference to the subject stated above, I am to say that M/s. Subash & Company, TIN-21191106567 is a registered dealer under Bhubaneswar II Circle engaged in trading of Gold Bullion and God Ornaments. On verification of Column 57 of VAT return for the period 01.04.2013 to 30.04.2013, it is found that the dealer has purchased goods of value Rs.81,34,49,267/- with payment of VAT Rs.81,34,495/- from M/s Punjab National Bank, Bhubaneswar, Tin-21301117904. Cross verification of sale invoice issued by the selling dealer M/s Punjab National Bank, Bhubaneswar, TIN-21301117904 at Column 57 reveals that the total sale vide invoice no.229-236, 238-242, 244-249, 255-258 to M/s Subash & Company, TIN-21191106567 for Rs.67,43,30,468/- with collection of VAT of Rs.67,43,306/-. Hence, prima facie, there is a huge mismatch and excess claim of ITC by M/s Subash & Company, Tin-21191106567 necessitating further investigation.

The matter has been discussed with the DCCT, Enforcement, Bhubaneswar for detailed enquiry at both the ends and submission of enquiry report/evasion report.

This is submitted for kind information.

Yours faithfully,

Deputy Commissioner of Commercial Taxes  
Bhubaneswar II Circle, Bhubaneswar

Memo No:5477/CT, Dt:06.06.2013

Copy submitted to the Deputy Commissioner of Commercial Taxes, Enforcement Range, Bhubaneswar for information for necessary action.

Sd/- 6.6.2013

Deputy Commissioner of Commercial Taxes  
Bhubaneswar II Circle, Bhubaneswar".(underlined for emphasis)

The above letter clearly shows the opposite party no.1 has clearly highlighted the discrepancies and accordingly wanted further investigation in the matter. As indicated earlier as admitted by the learned counsel for the Revenue, the same officer, who made the above noted communication has later acted as the Assessing Officer resulting in issuance of the assessment order under Annexure-1. A perusal of the assessment order shows that he himself has referred to his own proposal sent vide above noted letter dated 6.6.2013 for conducting further investigation regarding mismatch in claim of ITC and consequential loss of revenue. The assessment order further shows that the gist of letter dated 6.6.2013 has been reflected in the 2<sup>nd</sup> and 3<sup>rd</sup>

Paragraphs of the assessment order itself. In such background, the likelihood of bias of opposite party no.2 while doing assessment cannot be ruled out. It is well settled that the principles of natural justice demand that nobody shall be a judge of his own cause. It is equally well settled that justice should not only be done but also should be manifestly be seen to have been done. In this context, it would be appropriate to quote the observations made by this Court in **Tata Sponge Iron Limited –v- Commissioner of Sales Tax, Orissa and Others** reported in (2012) 49 VST 33 (Orissa) has held as follows:-

“Therefore, we are of the view that in order to maintain transparency, any officer who is involved in any manner or has acted with the process of audit and preparation of the audit report in respect of the dealer should not be the assessing officer of that dealer. Otherwise, there will be violation of cardinal principles of natural justice. Our view is fortified by the judgment of this court in National Trading Co. [2001] 122 STC 212 (Orissa) wherein this court held as follows:- (page 213 in 122 STC) :

“...Although many contentions were raised in support of the writ petition, we need not examine them as the matter can be decided on the following: short point being that the reporting officer himself cannot be the assessing officer. It is said that justice should not only be done but should manifestly be seen to be done. Justice can never be seen to be done if a person acts as a Judge in his own cause or is himself interested in its outcome. This principle applies not only to judicial proceedings but also to quasi-judicial and administrative proceedings. In the case at hand, there is no dispute that the reporting officer himself took up the impugned assessment proceedings and completed the same. This he could not have done”.

9. Lastly, in **ABB India Limited** (supra) this Court has also made it clear that when a Deputy Commissioner involved in the audit process passes an assessment order based on that report the same clearly results in passing an order in violation of principles of natural justice. In the present case, the undisputed facts as indicated earlier show that the officer at whose instance further investigation was initiated on the basis of his prima facie finding relating to huge mismatch and excess claim of inputs tax credit by the petitioner, has himself conducted the assessment resulting in issuance of impugned assessment order under Annexure-1 and consequential demand notice under Annexure-2. Thus as stated earlier here the reasonable likelihood of bias cannot be ruled out. The officer, who was the author of letter dated 6.6.2013 quoted supra should not have acted as the Assessment Officer. In such background, this Court has no hesitation in quashing both the assessment order under Annexure-1 and demand notice under Annexure-2. However, we make it clear that we have expressed no opinion on the merits of this case. Accordingly, we direct the competent authority to re-assess the assessee and complete the reassessment, preferably, within a period of eight



Manu Singh to his house, the appellant came with a spade and assaulted by the handle of the spade to the head of the father of the informant causing injury on his head. Then the deceased fell down on the ground, but the appellant went on assaulting him. The deceased remained laying on the ground with a pool of blood on his person. When the villagers shouted, the appellant fled away. Then the deceased was removed to the hospital, but on the way the deceased expired. Then F.I.R. was lodged before the police.

3. During investigation police examined witnesses, visited the spot and made inquest over the dead body of the deceased. The police sent the dead body for post-mortem examination, seized the wearing apparel of the deceased and the appellant. In course of investigation the accused under custody made disclosed statement and gave recovery of a "Kata" wrapped with cloth from a concealed place. Police seized all these properties and set the same for chemical examination. After completion of investigation charge sheet was submitted.

4. 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, is squarely denial to the occurrence and he pleads innocence.

5. The prosecution in order to prove the charge, examined 28 witnesses but the defence examined none. The learned trial court after analyzing the evidence of the prosecution witnesses convicted the appellant under section 302 I.P.C., sentenced him to undergo R.I. for life and fine of Rs.50,000/-, in default to undergo R.I. for one year.

**SUBMISSIONS:**

6. Learned counsel for the appellant submitted that there are discrepancies in the evidence of the eye witnesses to prove overt act of the appellant, in regard to the weapons of offence used. According to him, the prosecution has not proved the statement of the appellant recorded under section 27 of the Evidence Act and leading to discovery legally, because P.W.10 was examined by the court to prove the disclosure statement and leading to discovery of the weapon of offence.

7. Learned counsel for the appellant further submitted that the blood group as available from the blood stain on the seized cloth of appellant does not match to the blood group of the deceased. He further submitted that there are discrepancies about the statement of the appellant made towards recovery of the weapon of offence and leading to discovery of the same, because

P.W.18 who is the I.O. stated about statement of the appellant, but outside witness does not corroborate the same. It is the further argument on behalf of the appellant that the prosecution has not proved the intention and motive of the appellant to cause death of the deceased. Since there is sudden overt act by the appellant, the intention is far away from the commission of offence. Hence he submitted to acquit the appellant of the charge.

**8.** Mr. J. Katkia, learned Additional Government Advocate submitted that there is clinching material about the overt act of the appellant, because the eye witnesses have consistently stated about the assault by the appellant by utilizing the sharp cutting weapon. He further submitted that since there is direct evidence, motive is immaterial. The intention is very clear from the overt act of the appellant because the appellant has continuously assaulted the deceased by the weapon of offence till the gathering was made. However, he submitted that in addition to the direct evidence, circumstantial evidence is also clinching one to prove the guilt of the appellant. Hence, he supported the impugned judgment of conviction and sentence.

**9.** As an appellate Court evidence on record has to be appreciated to find out whether the conclusion arrived at by the trial court is correct or not. It is trite in law that the evidence is to be weighed, but not to be counted. The Court should separate the grain from the chaff. It is reported in **A.I.R. 2003 SC 854; Lallu Manjhi and another v. State of Jharkhand**, where Their Lordships at paragraph-10 observed as follows:-

“The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness. (See **Vadivelu Thevar etc. v. State of Madras, AIR 1957 SC 614**.)”

**10.** With due respect to the said decision, it is clear that the evidence of witnesses while being appreciated, the same should be wholly reliable or wholly unreliable or same be partly reliable and partly unreliable. Bearing in mind this principle, let us discuss the evidence on record. It is revealed from the evidence of P.W.28 that he held the inquest over the dead body of the deceased vide Ext.1/1. P.Ws.10 and 15 corroborate the statement of P.W.28 about the inquest over the dead body of the deceased. The inquest report also

shows that the deceased was having multiple injuries on his person. The evidence of P.W.21 shows that on 9.12.2006 he conducted the post-mortem examination over the dead body of the deceased and found the following injuries:-

- “1. One incised wound on the right side of neck 5 cm x 1 cm ante mortem in nature.
2. One incised wound over chin 2” x ½”.
3. One incised wound below left eye 4” x 1/2”.
4. Multiple injury over back region.
5. Bruise over left temporal region.
6. Cutting wound over forehead left side 5” x 1”.
7. Cutting wound over scalp at frontal region left side.
8. Large hematoma over left side of temporal region frontal skull.
9. Swelling of eye lids with black eye.”

**11.** P.W.21 proved the report vide Ext.6 and his signature vide Ext.6/1. According to him, the cause of death is due to severe bleeding out of multiple injuries on face, skull and hematoma over skull. The post-mortem examination report vide Ext.6 shows that the death was homicidal one. Therefore, the prosecution has proved the cause of death of the deceased as homicidal.

**12.** The evidence of P.W.1 shows that she is the daughter of the deceased. Although she is 13 years old and related to the deceased, her evidence is clear enough to repose confidence. According to her, she was present while her father was assaulted. According to her, while her father had gone to the house of Manu Singh to call him for work, near the house of Ayodhya Singh, the appellant-accused being armed with a spade and Kata dealt blow by such weapon on the head and face of her father. While the witnesses arrived, he fled away, but it is clear from her evidence that the appellant was threatening the witnesses not to go near the deceased. Denying the suggestion of the defence she stated to have narrated the incident before the police in her earlier statement, but the witness confronted to such statement of the I.O. So, the evidence of P.W.1 cannot be stated to have been exorbitant or contrary to her earlier statement. It is trite in law that a witness being relation cannot be relied upon to prove charge provided his/her evidence is convincing and unimpeachable. So, after scrutiny her evidence is found to be cogent and clinching for which, she being the eye witness has proved the overt act of the appellant. Similarly P.W.2 corroborating the evidence of P.W.1 stated that she had seen the assault by the present appellant on the person of the deceased by means of the handle of a spade and Kata. She has been cross-

examined in detail and admitted that she saw the occurrence although at a distance and categorically stated that two to three blows were given on the face of the deceased. So, her evidence cannot be discarded. P.W.3 who is the wife of the deceased stated that by the time she arrived at the spot the assault was over, but the appellant was standing there with the handle of Kodal in his hand.

**13.** Similarly, the evidence of P.W.5 revealed that he had witnessed the assault by the present appellant by means of Kata on the deceased. The witness apprehended the appellant, he arranged a rickshaw and shifted the deceased to the hospital. In cross-examination, denying the suggestion of the defence he stated to have witnessed the occurrence. At the same time such statement was not confronted to the I.O. In absence of confronting such statement to the I.O., it cannot be stated that P.W.5 has contradicted his earlier statement. On the other hand, he has sufficiently corroborated P.W.1 about the assault by the appellant on the person of the deceased. P.W.8 also stated that he saw the appellant assualting the deceased by the handle of a Kodal and Kata. He has also restrained the appellant from assaulting. In cross-examination he stated that he was alone when the incident took place. Here, learned counsel for the defence submitted that if he was alone when the incident took place, it cannot be said that P.W.1 was also there witnessing the occurrence. Unless during cross-examination the closeness of P.W.8 to the place of occurrence is ascertained and possibility of other persons is evident, such statement of P.W.8 is not at all conducive to the case of the prosecution. On the other hand, P.W.8 has also proved the overt act of the appellant.

**14.** P.W.19 revealed that hearing hullah he came out from the house and found that the present appellant was assaulting the deceased holding the handle of a Kodal in left hand and dealing blows by Kata on the face and head of the deceased. While he protested, the appellant also threatened him to kill. In cross-examination he admitted to have not stated before the police that he saw the overt act of the appellant. Thus, for the first time he disclosed the occurrence before the court. However, his evidence with regard to his presence at the spot cannot be denied because the threatening by the accused to him could not be washed out from his evidence during cross-examination. P.W.20 stated to have witnessed the assault by the present appellant on the person of the deceased by means of the handle of the Kodal. He being threatened by the appellant, went away, but later on came to the spot again and found multiple injuries on the person of the deceased. There is no fruitful cross-examination to this witness. So, he has proved the assault by the

appellant on the person of the deceased. There are minor discrepancies between the eye witnesses in regard to use of weapon of offence because some witnesses stated to have seen the use of handle of Kodal.

**15.** The aforesaid evidence of eye witnesses are consistent, clear, cogent and above reproach to prove that the appellant had assaulted the deceased by means of the handle of a Kodal and Kata causing multiple injuries on his face and head. The aforesaid evidence of the doctor enjoined with the evidence of the eye witnesses amply proves the overt act of the appellant.

**16.** There are also evidence of the above P.Ws. and other P.Ws. to show that the appellant did not allow the witnesses to intervene and went on assaulting, which clearly shows an important circumstance against him to prove his intention to cause death of the deceased. Bereft of this evidence, there is also evidence of the I.O. P.W.28 to the effect that on 9.12.2006 at about 11.30 a.m. during the custody the appellant made statement about the blows by the handle of Kodal and Kata on the person of the deceased and he had concealed the Kata by wrapping same by means of a napkin in the Bari of Dhusa Singh and accordingly led the police and gave recovery of the same Kata and napkin. P.W.28 proved the seizure list vide Ext.2. Of course he has not proved the statement of the witnesses recorded separately, but the same has been recorded in the circumstances of the seizure. Although the statement was not separately recorded, but the circumstance to seizure in the seizure list is clear to show recording of statement of the appellant as to concealment of the property in the Bari of Dhusa Singh. At the same time the same document shows that the appellant gave recovery of the Kata, weapon of offence with a napkin which was kept wrapped. It is reported in **Pulukuri Kuttaya and others v. Emperor, A.I.R. 1947 P.C. 67** where Their Lordships observed on the following manner in paragraph-10 :-

“10. [Section 27](#), which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.....”

**17.** The aforesaid decision has been reported in the case of **Geejaganda Somaiah v. State of Karnataka; A.I.R. 2007 SC 1355**, wherein Their Lordships at paragraph-21 have held as follows:-

“21. Section 25 of Evidence Act mandates that no confession made to a police officer shall be proved as against a person accused of an offence. Similarly Section 26 of the Evidence Act provides that confession by the accused person while in custody of police cannot be proved against him. However, to the aforesaid rule of Sections 25 to 26 of the Evidence Act, there is an exception carved out by Section 27 the Evidence Act providing that when any fact is discovered to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 27 is a proviso to Sections 25 and 26. Such statements are generally termed as disclosure statements leading to the discovery of facts which are presumably in the exclusive knowledge of the maker. Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence.”

**18.** With due regard to the aforesaid decisions, it is clear that the relevant fact discovered in consequence of information disclosed is really assurance to the truth of such information. On the other hand if the material is recovered without any statement, that cannot be taken as compliance of Section 27 of the Evidence Act. Apart from this, leading to discovery by the appellant is a conduct relevant under Section 8 of the Evidence Act showing incriminating circumstance against the appellant.

**19.** The evidence of P.W.18 shows that in his presence the appellant during police custody produced the Kata with blood stain and napkin from inside the earth. This witness even if did not disclose about the statement of the appellant, but showed recovery of the Material Object at the instance of the appellant which also corroborates with the statement of the I.O. (P.W.18) about discovery of the weapon of offence by the appellant.

**20.** Thus, the evidence of leading to discovery being proved with consistent evidence is a great circumstance against the appellant. From the aforesaid analysis, we are of the view that the prosecution has proved the occurrence and the complicity of the appellant with the commission of offence by consistent, clear, direct and circumstantial evidence. The appellant has simply pleaded innocence without adducing any evidence to prove the same. It is only submitted by learned counsel for the appellant that no motive in this case has been proved. It is reported in **Molu and others v. State of**

**Haryana, A.I.R. 1976 S.C. 2499**, where Their Lordships observed at paragraph-11 as follows:-

“.....It is well settled that where the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes the motive is clear and can be proved and sometimes, however, the motive is shrouded in mystery and it is very difficult to locate the same. If, however, the evidence of the eye witnesses is credit-worthy and is believed by the Court which has placed implicit reliance on them, the question whether there is any motive or not becomes wholly irrelevant.....”

**21.** With due respect to the aforesaid decision, it is clear that motive would take a back seat if the direct unimpeachable evidence is available to prove the complicity of the accused with the commission of offence. Since in the instant case there is ample direct evidence of the eye witnesses of unquestionable character, the absence of evidence of motive cannot be said to be material to reject the case of the prosecution, which is otherwise proved.

**22.** In the result we find that the learned trial court has correctly appreciated the evidence on record and recorded the order of conviction and sentence. We affirm the finding of learned trial court. Before parting with the judgment, we make it clear that the prosecution should play active role while the witnesses are produced by the police because in the instant case some witnesses have been put the questions on the fact as per their knowledge directly because the prosecution appears to have not taken active role when witnesses were produced by the police. Role of prosecution is to assist the Court but not to discourage the witnesses from their attendance and prosecution should play all cards before the Court to show its transparency.

**23.** In the result, the judgment of conviction and sentence is upheld, and the appeal being devoid of merit stands dismissed. A copy of this judgment be sent to the Principal Secretary to the Government in Home Department for circulation to the Public Prosecutors/ Additional Public Prosecutors with regard to discharge of their duties to be performed. The L.C.R. be returned back immediately.

Appeal dismissed.

**2018 (I) ILR – CUT-507**

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

JCRLA NO. 83 OF 2009

**HADI SISA**

.....Appellant

.Vrs.

**STATE OF ORISSA**

.....Respondent

**INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction – Appellant killed the deceased by shooting arrow from his bow – P.Ws. do not say anything about previous enmity between the parties – Material shows, the assault, an outcome of sudden overt act – Doctor’s evidence – The deceased had only one single blow by arrow and could have been saved had he been given treatment at the right time – Held, the appellant had no intention to kill but to cause serious injuries – Conviction modified to one under 304-I, IPC.**

(Paras 20, 21 & 23)

**Case Laws Relied on and Referred to :-**

1. AIR 1999 SC 2416 : Mohd. Zahid -V- State of Tamil Nadu
2. AIR 2004 SC 2174 : State of Madhya Pradesh -V- Sanjay Rai

For Appellant : Mrs. C.Kasturi & B.K.Pani

For Respondent : Addl. Govt. Adv.

---

Date of hearing:06.01.2018 Date of judgment:21.02.2018

**JUDGMENT**

***DR.D.P.CHOUDHURY, J.***

This Jail Criminal Appeal is filed by the appellant from Jail assailing the judgment of conviction passed under Section 302 of the Indian Penal Code (hereinafter called as “I.P.C.”) by the learned Ad hoc Additional Sessions Judge (FTC), Malkangiri in Criminal Trial No.42/2008 sentencing him to undergo imprisonment for life for the offence under Section 302 IPC and to pay a fine of Rs.5,000/- in default to undergo R.I. for six months for the said offence.

2. The factual matrix leading to the case of the prosecution is that on 30.04.2008, the appellant assaulted the deceased by shooting arrow from the bow and thus, said arrow pierced to the chest of the deceased. Then, the deceased was carried to CHC, Khariput where the doctor, having found the deceased with injury, lodged the FIR before the police. During investigation, police examined the witnesses and while treatment was going on, the injured succumbed to injuries. So, the post-mortem examination of the injured was also conducted after performing the inquest over the dead body. Police also seized the weapon of offence, wearing apparels of the victim, nail clippings of the appellant, bow and bed head ticket. After completion of the investigation, charge sheet has been submitted.

3. The plea of the appellant, as revealed from his statement recorded under Section 313 Cr.P.C. and the cross-examination made to the prosecution

witnesses that he is innocent and had no intention to kill the deceased and a false case has been filed against him.

4. The prosecution, in order to bring home the charge against appellant, has examined nine witnesses and the defence examined none. Learned trial Court, after analyzing the evidence of the PWs, found the appellant guilty under Section 302 IPC and sentenced him to undergo imprisonment for life and to pay a fine of Rs.5,000/- in default to undergo R.I. for six months for the said offence.

5. Mrs.Kasturi, learned counsel for the appellant submitted that the motive of the appellant has not been proved by the prosecution. No intention or knowledge of the appellant is proved to cause the death of the deceased. According to him, P.W.2 being arrayed as sole eye witness, cannot be trusted because of his peculiar evidence led. Similarly, the evidence of P.W.8 is not clear, cogent and creditworthy.

6. Mrs.Kasturi, learned counsel for the appellant further submitted that the material available on record would only indicate that the occurrence took place all of a sudden and the mens rea of the appellant is not proved to cause the death of the deceased. So, he submitted to allow the Jail Criminal Appeal by acquitting the present appellant from the charge.

7. Learned Additional Government Advocate for the State submitted that there is dying declaration of the deceased to the effect that the appellant had intentionally shot the arrow from the bow to cause the death of the deceased. Moreover, since there is direct evidence available against the appellant, the motive for commission of the crime is not required to be proved being academic. As there are lot of evidence proved against the appellant, the judgment of conviction and sentence should be affirmed.

#### 8. **DISCUSSIONS**

The FIR vide Ext.1 shows that the Medical Officer of CHC, Khariput is the informant in this case. According to him, when the deceased arrived, the arrow was present piercing the hypochondrium (left side) with omentum protruding out. On being asked, the injured informed that the present appellant assaulted him by bow and arrow on his stomach. Then, he referred the injured to the District Headquarters Hospital, Koraput. He proved his report vide Ext.1. Thus, P.W.1 is not the occurrence witness but an informant to the case. There is no fruitful cross-examination to this witness. Of course, the statement of the deceased is not available to lend corroboration as the prosecution submitted that during course of treatment, he died.

9. P.W.7 is also another doctor, who has treated the injured preliminarily proved the OPD entry vide Ext.4. Of course, he has referred injured to P.W.1. There is no explanation from P.W.7 as to why he has not lodged the FIR. It is made clear that the doctor, who treated the injured at first instance, is duty bound to lodge FIR if no FIR is lodged prior to visit the doctor.

10. However, P.W.8 is another doctor who was working as Surgery Specialist at D.H.H. Koraput, corroborating the statement of P.Ws.1 and 7, admitted that he had attended the deceased referred to by PWs.1 and 7. According to him, the deceased was having penetrating arrow shot with arrow in place and he was in condition of shock and in a confuse state. The arrow entry was at the hypocondrium with prolapsed omentum. He found the injured had fical peritonitis with the arrow head found lodged in vartibra piercing through peritoneum plurals cavity with two perforating wounds over transverse column and injury to pancreas. The wounds were repaired transverse colostomy done and chest tube given to left chest cavity. The deceased has profuse bleeding from left side chest. He had prepared the bed head ticket vide Ext.7 and proved his signature vide Ext.7/1 but on 01.05.2008 at 9.00 pm, the deceased expired.

11. P.W.8 further testified that Dr.Manoj Kumar Das, who is his colleague, had performed the post-mortem examination over the dead body of the deceased. He has got acquaintance with his handwriting and signature having worked with him together. He proved the post-mortem report vide Ext.10 and signature of Dr.M.K.Das vide Ext.10/1. Dr. Das has not been examined in this case because P.W.8 has further clarified that Dr.Das had gone to SCB Medical College and Hospital, Cuttack for higher studies. No doubt, P.W.8 is competent to prove the post-mortem report because he being the colleague of Dr.Das, has got acquaintance with his handwriting and signature. The acceptance of post-mortem report, as a document, can be admissible in evidence under Section 68 of the Evidence Act. But his evidence cannot be considered as evidence relevant under Section 45 of the Evidence Act because the doctor who performs the post-mortem examination has to testify. It is reported in *Mohd. Zahid –V- State of Tamil Nadu; AIR 1999 SC 2416* where the Hon'ble Supreme Court, at paragraph-24, has observed in the following manner:

*“24.....sufficient weightage should be given to the evidence of the doctor, who has conducted the post-mortem, as compared to the statements found in the textbooks, but giving weightage does not ipso facto mean that each and every statement made by a medical witness should be accepted on its face value when it is self-contradictory.....”*

**12.** It is also reported in *State of Madhya Pradesh –V- Sanjay Rai; AIR 2004 SC 2174* where the Hon'ble Supreme Court have observed that opinion expressed in textbooks may have persuasive value but cannot be considered to be conclusive. It cannot have higher value than the opinion of the expert examined in Court.

**13.** With due regard to the aforesaid decisions, it appears that the doctor who has performed the autopsy must be examined to prove the post-mortem report as an expert whose evidence is very vital and relevant under Section 45 of the Evidence Act. There are exceptions to such view because at times, doctor being dead is not available or doctor is missing being not available. However, in the instant case, Dr.M.K.Das being at SCB Medical College and Hospital for his higher study, was not available to the trial Court. So, the evidence of P.W.8 cannot be taken as relevant to prove the cause of the death as an expert. But, at the same time, the autopsy report of the deceased is accepted being a document duly proved by P.W.8 for the reasons, as discussed above.

**14.** On perusal of the post-mortem report, it is clear to show that the cause of the death was due to hemorrhagic shock as a result of bleeding from various internal wounds and accumulation of blood in multiple body cavity as well as injury to various organs.

**15.** Even if the doctor conducting autopsy has not examined but taking the evidence of P.Ws.7 and 8 read with the post-mortem report culminatingly go to show that the deceased had died due to arrow shot. So, from the material, it is inferred that the death of the deceased was homicidal.

**16.** P.W.2, who is the eye witness to the occurrence, categorically stated that on the date of occurrence, while he and deceased were sitting on their verandah and talking with each other, at that time, the appellant being armed with bow and arrow, shot an arrow aiming at the deceased and the said arrow pierced through the chest of the deceased for which he fell down on the ground. Then, the appellant fled away from the spot. From the evidence of P.W.2, it reveals that the deceased Sania Sisa was shifted to CHC, Khairput and then at the advice of the doctor, the deceased was shifted to District Headquarters Hospital and on the next date, he died. There is nothing revealed from his cross-examination to shake his testimony.

**17.** From the evidence of P.W.6, who is the son-in-law of the deceased, it reveals that he was present in his courtyard when the occurrence took place.

Hearing the cry of his father-in-law, he rushed to the spot and found the appellant was running away from the spot with his bow. There is nothing revealed from his evidence to discredit his testimony even if he is related to the deceased. On the other hand, his evidence also corroborates the evidence of P.W.2 about the complicity of the appellant to cause death of the deceased.

**18.** P.W.3 is not an occurrence witness but he had only been to the spot after coming to know about the death of the deceased.

**19.** From the evidence of the IO (P.W.9), it appears that he has seized the bow from the house of the appellant. From the evidence of P.W.8 (doctor), it reveals that police has seized the arrow from him at district headquarter hospital vide Ext.8. It also reveals from the evidence of P.W.9 that the seized bow and arrow had been sent for doctor's opinion. Of course, inquiry report prepared by Dr.Manoj Das is proved vide Ext.11 by P.W.8, who has got acquaintance with the signature and handwriting of Dr.Das. In cross-examination, P.W.8 denied about possibility of such injury by accidental fall on a pointed object. It reveals from Ext.11 that the injuries, as found by P.W.8 and Dr.Das, are possible by the said arrow. Of course that arrow is not produced in Court. Even if the same is not produced in Court, non-controverted evidence of P.W.9 read with the evidence of P.Ws.1, 7 and 8 do not beleaguer the case of the prosecution. So, the prosecution has well proved that the injury could be possible by arrow and bow.

**20.** It is revealed from the evidence of PWs that the IO (P.W.9) has seized the wearing apparels of the deceased and appellant. Not only this but also the IO has seized the nail clippings of the appellant. P.W.13 stated to have sent these items for chemical examination but the report of the chemical examiner has not been proved by the prosecution. In the absence of report of the chemical examiner, no adverse view can be taken against the case of the prosecution as other materials, as discussed above, clearly proved the sudden overt act by the appellant upon the deceased by shooting arrow. The evidence of the P.Ws do not disclose about the previous enmity between the parties. Of course, the motive is not criteria as there lies direct evidence available to prove the complicity of the appellant with the commission of offence.

**21.** It is only available from the evidence of PWs.1 and 7 that if appropriate medical facilities were available at the CHC, Khairput, then the life of the deceased could have been saved. So, the doctor's opinion is clear to show that in the event of proper medical intervention at right time, they could have saved the life of the deceased. When there is single blow by arrow

and opinion of the doctor that the deceased could have been saved had there been proper medical facility at CHC, Khairput, the Court is of the view that the appellant has no intention to kill but to cause serious injuries on the person of the deceased.

**22.** It is submitted by the learned counsel for the appellant that in view of the facts and circumstances of the present case, the offence under Section 302 IPC is yet to be proved because the mensrea to cause the death of the deceased is not proved by the prosecution. Moreover, there is no motive proved by the prosecution and it appears that the appellant has no knowledge that the injury in ordinary course will cause death of the deceased. Repelling such argument, learned State Counsel submitted that when there is sudden attack by the appellant by shooting arrow, he had intention and knowledge that the injury would cause the death of the deceased in ordinary course of its nature.

**23.** From the discussions made hereinabove, we are of the view that the death of the deceased was culpable homicidal one but the single shot by arrow without there being evidence of intention to cause death. The judgment of conviction under Section 302 IPC passed against the appellant, while being not agreed with, the prosecution case for the offence under Section 304-I of IPC against the appellant is well made out. Therefore, we modify the judgment of conviction passed against the appellant under Section 302 of IPC by the learned Ad hoc Additional Sessions Judge (FTC), Balkangiri to Section 304-I IPC.

**24.** So far as the sentence of the present appellant is concerned, we are of the view that the appellant is a member of Scheduled Tribe, mens rea of appellant being proved and the appellant is in custody since 2008, in the facts and circumstances, we award sentence for R.I. for ten years and to pay a fine of Rs.5000/- (Rupees Five Thousand) in default to undergo R.I. for six months for the offence under Section 304-I of IPC. The period already undergone may be set off against the imprisonment awarded. With the above modification of conviction and sentence, the JCRLA is allowed in part.

JCRLA allowed in part.

## 2018 (I) ILR - CUT- 514

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

W.P. (C) NO. 22713 OF 2014

ARATI MOHAPATRA

..... Petitioner

.Vrs.

DEPUTY REGISTRAR, STATE  
ADMINISTRATIVE TRIBUNAL & ORS.

..... Opp. Parties

**SERVICE – Petitioner selected by a duly constituted selection committee in 1997, appointed – Challenging such selection, OA filed by other unsuccessful candidates without making the petitioner a party – In consequence of the Tribunal’s order petitioner’s service was terminated – OA filed by petitioner challenging such termination on various grounds – OA dismissed following wrong appreciation of facts and law – Prayer for review also dismissed on technical grounds – order cryptic and non-speaking – Set aside – High Court directives.**

*“All these aspects were not at all considered by the learned Tribunal. Although this fact was brought to the notice of learned Tribunal at the time of adjudication of the Review Petition, learned Tribunal refused to answer on the ground that the same was beyond the scope of review. These vital aspects were required to be considered and answered by learned Tribunal. But learned Tribunal has not at all delved into these material aspects. The impugned order under Annexure-7 is otherwise cryptic and non-speaking. Further learned Tribunal adhered to hyper technicalities in dealing with the Review Petition. In our opinion these aspects can be well looked into by the Commissioner-cum-Secretary, School and Mass Education Department-opposite party No.2, with reference to the relevant records. Order accordingly.”*

(Para -10)

For Petitioner : M/s. Sanjib Swain &amp; Mr.Ashok Mishra

For Opp. Parties : Mr. M.S.Sahu, Addl. Government Advocate

Date of judgment: 20.03.2018

**JUDGMENT****K.R. MOHAPATRA, J.**

This writ petition is directed against the order dated 03.06.2014 (Annexure-7) passed by the State Administrative Tribunal, Cuttack Bench, Cuttack (for short, ‘learned Tribunal’) in O.A. No.2699 (C) of 2006 thereby dismissing the Original Application.

2. Facts in nut shell relevant for proper adjudication of the case are that the petitioner herein was appointed as an Assistant Teacher under the then District Inspector of Schools, Jagatsinghpur Education District (opposite party No.5) and was posted at Singiri U.P. School at Singiri in the district of Jagatsinghpur. While continuing as such, she had to face termination vide

order dated 30.11.2006 (Annexure-1). The order of termination under Annexure-1 was passed pursuant to the direction of learned Tribunal dated 24.01.2001, 16.09.2004, 02.12.2004 in O.A. No.2792(C) of 1999, C.P. No.382(C) of 2001 and similar other Original Applications and Contempt Petitions. The said order of termination was challenged before learned Tribunal by the petitioner and similar other Assistant Teachers of Jagatsinghpur and Tirtol Education districts in different Original Applications. The facts and law involved in all the Original Applications being similar, the same were taken up together and were dismissed vide common order dated 03.06.2014, which is under challenge in this writ petition.

3. The case of the petitioner before learned Tribunal was that he being selected by a duly constituted Selection Committee was appointed as an Assistant Teacher in the year 1997 and joined as such in Singiri U.P. School. While continuing as such, some unsuccessful candidates approached learned Tribunal in O.A. No.2792(C) of 1999 and a batch of similar Original Applications alleging foul play in the selection process. Learned Tribunal heard those Original Applications analogously and disposed of the same vide order dated 24.01.2001 with a direction to prepare category wise select list in accordance with the instruction prevalent then. Alleging non-compliance of the order passed in O.A. No. 2792(C) of 1999, C.P. No. 382(C) of 2001 was filed before learned Tribunal. The Contempt Proceeding was dropped vide order dated 02.12.2004 with an observation that the State Government has to prepare fresh select list within a period of four months from the date of the order taking into consideration the defects pointed out by the applicants in their respective Original Applications. Accordingly, a fresh select list was prepared on 15.12.2004 and appointment orders were issued. Subsequently, the said orders were withdrawn on the ground that the appointments were not made in consonance with order dated 02.12.2004 passed in C.P. No.382(C) of 2001. Assailing such withdrawal of the appointment orders O.A. No.305 of 2005 was filed by one Smt. Sailasutta Dei. The said O.A. was disposed of with a direction that the State Government (respondent No.1) therein should call for the verified list from the Director of Elementary Education, approve the final select list after due scrutiny and to issue appointment orders accordingly. In the garb of implementation of the said direction, termination orders were issued against the petitioner and similarly situated Assistant Teachers terminating their services. The petitioner and other similarly placed Assistant Teachers were not made parties to the aforesaid Original Application. It has been contended that while terminating their services,

neither any proceeding as envisaged under Rule 15 of the O.C.S. (CC&A) Rules, 1962 (for short, 'Rules, 1962') was initiated against the applicants nor any notice to show cause was issued, which was the minimum requirement to dispense with the services of a Government servant as they are protected under Article 311 (2) of the Constitution of India. As such, the termination orders are *per se* illegal and being violative of natural justice.

4. Case of the State-opposite parties before learned Tribunal was that pursuant to the order of learned Tribunal, the Director of Elementary Education, vide letter No.5351 dated 03.05.2006 submitted the verified select list of Jagatsinghpur and Tirtol Education districts. Thereafter, the Government constituted a Committee under the Chairmanship of Additional Secretary, School and Mass Education Department to scrutinize the same. After scrutinisation of the verified select list submitted by the Director of School and Mass Education Department, the Committee took a decision vide letter dated 17.11.2006 taking into consideration the claims involved in O.A. No.2792(C) of 1999 and batch of cases as well as O.A. No.305 of 2006. As per order of the Committee dated 17.11.2006, the petitioner along with other similarly situated Assistant Teachers were to face termination from service as their names did not find place in the final/verified select list. As such there was no illegality in terminating services of the petitioner. It was further contended that while implementing the order of learned Tribunal passed in O.A. No.2792 (C) of 1999, the Committee could not verify and assess the marks of the applicants in O.A. No.668(C) of 2007, O.A. No.669(C) of 2007 and O.A. No.670(C) of 2007 since their testimonials and application forms etc. were seized by the Vigilance Department in connection with Vigilance P.S. Case No.18 dated 21.05.1998. Hence, it was contended that no illegality was committed by authorities of the State in terminating the petitioner as well as other similarly situated Assistant Teachers, which was done pursuant to the direction of the learned Tribunal. As such, they prayed for dismissal of the writ petition.

5. Learned Tribunal, accepting the contention of the State respondent, dismissed the Original Applications holding that there is no illegality or irregularity in the order dated 30.11.2006 in terminating the services of the petitioner and other similarly situated Assistant Teachers. The petitioner had also filed Review Petition in MP No.729(C) of 2014 contending *inter alia* that there was no vigilance case pending against the petitioner. Hence, learned Tribunal committed wrong in including her Original Application, i.e., O.A. No.2699(C) of 2006 in the list of cases against whom Vigilance cases

were pending. She had secured 114.80 marks in the selection test, but her name was not placed in the verified select list prepared in accordance with the direction of learned Tribunal showing that she has secured only 109.88 marks. Learned Standing Counsel for the School and Mass Education Department although admitted the allegation that the applicant had not committed fraud and no vigilance proceeding was pending against her, but submitted that since the petitioner secured only 109.88 marks in the selection test, she had to face termination. Learned Tribunal allowed the Review Petition vide his order dated 21.10.2014 (Annexure-9) to the extent of deleting O.A. No.2699 (C) of 2006 from the last paragraph of the order dated 03.06.2014 (Annexure-7) as no vigilance case was pending against her. However, learned Tribunal refused to consider other contentions raised by the petitioner on the ground that the same does not come within the scope of the review. Accordingly, the Review Petition was disposed of vide order dated 21.10.2014 (Annexure-9). Assailing both the orders, this writ petition has been filed.

6. Mr. Swain, learned counsel for the petitioner reiterating the contentions raised in the Original Application as well as this Writ Petition contended that no vigilance proceeding is pending against the petitioner and there is no allegation of fraud committed by her. The petitioner was also not made party in the Original Application in which direction was made to prepare the select list afresh taking into consideration the instructions issued by the Government at the relevant time. Her services could not have been dispensed with without following due procedure of law. Neither any proceeding under Rule 15 of the Rules, 1962 was initiated against her nor any notice to show cause was issued contemplating termination of her services. As such, the cryptic order of termination dispensing with the services of the petitioner is neither legal nor justified, as it does not stand to the scrutiny of law. Learned Tribunal also committed error in misconstruing the facts. The grounds raised by her before the learned Tribunal were not considered. Mr. Swain reiterating the grounds taken in the Review Petition filed before learned Tribunal submitted that in the selection test held in the year 1997, the petitioner had secured 114.80 marks, but her marks has been reduced to 109.88 in the select list prepared pursuant to the earlier direction of learned Tribunal in O.A. Such reduction of marks has no basis and persons securing less than 114.80 marks have been retained in service, whereas the petitioner had to face termination. In support of her case, the petitioner has filed the proceedings of the Selection Committee dated 31.01.1997 (Annexure-4), wherein the name of the petitioner appears at serial No.301 (page-100 of the

writ petition). Column No.4 of the said list disclosed that the petitioner has secured 114.80 marks.

7. The District Inspector of Schools, Jagatsinghpur (opposite party No.3) filed an affidavit enclosing the select list of candidates under Jagatsinghpur Education District prepared in the proceedings of meeting dated 27.08.2014 (Annexure-A/3), pursuant to the direction of learned Tribunal in OA No.1390(C) of 2010 by one Sri Abhaya Kumar Das and CP No.82(C) of 2009 arising out of OA No.2015(C) of 2008 filed by one Sri Ramakrishna Das. In the said list, the name of the petitioner does not appear. Hence, the State-Opposite Party took a stand that she could not have been retained in service as she had secured only 109.88 marks in toto, which is far less than the cutoff mark, i.e., 135.65 for the UR category and 122.61 for the UR (women category). As such, it was imperative to terminate the services of the petitioner.

8. The petitioner filed reply to the counter affidavit and additional affidavit filed by the opposite party No.3 stating inter alia that the marks secured by the petitioner in the recruitment test she has secured 114.80 mark. However, in the revised select list prepared pursuant to the direction of the learned Tribunal, the mark secured by the petitioner was arbitrarily reduced to 109.88, which is without any basis. Further, candidates securing less mark than that of the petitioner were retained in service, whereas the service of the petitioner was dispensed with. One Aurobinda Senapati (UR) (serial No.308) in the select list of 1997 had secured 114.10 marks in the selection test. However, he has been placed at serial No. 62 in the revised select list and he has been awarded 106.02 marks. Similarly, one Smt. Sudhansubala Behera UR (women) who was at serial No.337 in the select list of 1997 was awarded 109.13 marks. She has been placed at serial No.163 in the revised select list having secured 103.10 marks. Both of them although secured less mark than that of the petitioner, they were retained in service, whereas the petitioner was terminated. Further contention of the petitioner was that the last candidate under UR (women) category was Sahada Khatun, who has secured 111.53 marks in the revised select list. As such, the allegation that the cutoff marks for UR (women) category was 122.61 marks is not correct. Hence, the petitioner contended that her termination is an outcome of arbitrary and whimsical action of the authorities. Hence, Mr. Swain, learned counsel for the petitioner, contended that the petitioner should be reinstated in service forthwith with all service benefits.

9. We have heard learned counsel for the parties at length and perused the record meticulously. The petitioner has filed the merit list prepared pursuant to the minutes dated 31.01.1997, in which her name appeared at serial No.301 and she was awarded 114.80 marks. The minutes of the proceeding was obtained by the petitioner under the provisions of the RTI Act. Opposite party No.3 in its counter affidavit does not dispute the correctness of the said select list dated 31.01.1997. However, it is contended by the opposite party No.3 that pursuant to the direction of the Tribunal, a Committee was constituted to prepare the category wise selection list. Due to non-availability of the original viva-voce register and career mark register in respect of the recruitment of Primary School Assistant Teachers of Jagatsinghpur Education district with the opposite party No.3, the Dealing Assistant of the concerned Inspector of Schools was suspended by the Director of Elementary Education, Odisha. In order to work out the viva-voce marks, the Committee prepared a base record and taking into consideration the marks secured in H.S.E. and C.T., the petitioner was awarded with 14.14 marks in the viva-voce. It is fairly conceded by learned Standing Counsel for the School and Mass Education Department that there was no allegation with regard to awarding of marks in the vivo-voce test. Moreover, no material was also placed before us to come to a conclusion that marks awarded in the vivo-voce test in the merit list prepared on 31.01.1997 was not proper. As such, there was no reason to reduce the marks awarded in favour of the petitioner in the vivo-voce test from 19.34 to 14.14 out of 25 marks. Annexure-A/3 filed by the opposite party No.3 along with its affidavit has no relevance for the purpose of this case, as the petitioner was terminated pursuant to the decision taken on 17.11.2006.

10. Be that as it may, it is contended by the petitioner both before learned Tribunal as well as before this Court that Sri Aurobinda Senapati (UR) and Smt. Sudhansubala Behera UR (women) securing less marks both in the merit list dated 31.01.1997 as well as the revised select list, have been retained in service, whereas the petitioner was terminated. All these aspects were not at all considered by the learned Tribunal. Although this fact was brought to the notice of learned Tribunal at the time of adjudication of the Review Petition, learned Tribunal refused to answer on the ground that the same was beyond the scope of review. These vital aspects were required to be considered and answered by learned Tribunal. But learned Tribunal has not at all delved into these material aspects. The impugned order under Annexure-7 is otherwise cryptic and non-speaking. Further learned Tribunal adhered to hyper technicalities in dealing with the Review Petition. In our opinion these

aspects can be well looked into by the Commissioner-cum-Secretary, School and Mass Education Department-opposite party No.2, with reference to the relevant records.

11. In that view of the matter, we are constrained to hold that both the impugned orders under Annexure-7 as well as Annexure-9 are not sustainable in the eyes of law and accordingly the same are set aside. The Commissioner-cum-Secretary, Schools and Mass Education Department, Government of Odisha (opposite party No.2) is directed to consider the case of the petitioner in the light of the discussion made above treating the petitioner to have secured 114.80 marks in the selection test and communicate a reasoned order within a period of three months.

12. The Writ Petition is allowed to the extent stated above. No cost.

Writ Petition allowed.

**2018 (I) ILR - CUT- 520**

**S.C. PARIJA, J.**

MACA NO. 1264 OF 2015

**NATIONAL INSURANCE COMPANY LTD.**

.....Appellant

. Vrs.

**AHALYA SWAIN & ORS.**

.....Respondents

**MOTOR VEHICLES ACT, 1988 – Section 173 – Appeal by Insurance Company – Award of compensation - Head on collision of two vehicles due to rash and negligence driving – Prayer for apportionment of the compensation amount between the insurers of both the vehicles – Evidence of eye witness confirms rash and negligence driving of both the vehicle drivers – Direction of apportionment of the compensation amount at the ratio of 70:30 between both insurer.**

**Case Laws Relied on and Referred to :-**

1. (2006) 3 SCC 242 : Bijoy Ku. Dugar -V- Bidya Dhar Dutta & Ors.
2. 1994 ACJ 1303 : Mataji Bewa & Ors. -V- Hemanta Ku. Jena & Anr.
3. 2007 AIR SCW 3591 : Oriental Insurance Co. Ltd. -V- Premlata Shukla & Ors.
4. 2009 (3) TAC 1003 (SC) : Vijay Ku. Kulhar -V- Rajasthan State Road Tpt Corpn.

For Appellant : M/s. Gautam Mishra

For Respondent : M/s. P.P. Mishra

---

Date of Order : 09.03.2018

**ORDER**

**S.C. PARIJA, J.**

Heard learned counsel for the parties.

This appeal by the appellant-Insurance Company is directed against the judgment/award dated 16.3.2015, passed by the 1<sup>st</sup> Motor Accident Claims Tribunal, Cuttack, in MAC Case No.426 of 2011, awarding an amount of Rs.28,59,184/- as compensation along with interest @ 7.5% per annum from the date of filing of the claim application i.e. 08.7.2011 and directing the appellant-Insurance Company to pay the same.

Learned counsel for the appellant-Insurance Company submits that as there was sufficient materials available on record to show that both the vehicles involved in the accident were rash and negligent in causing the accident, learned Tribunal erred in ignoring the same and saddling the entire liability on the present appellant, as the insurer of the Maruti Alto car no.OR-14-V/6703. It is submitted that as the claimants had impleaded the owner and insurer of both the vehicles involved in the accident as parties to the claim application and had specifically claimed that the drivers of both the vehicles were rash and negligent in causing the accident and had adduced oral evidence in support of the same, learned Tribunal was not justified in ignoring the same and proceeding to hold only the driver of the offending Maruti car to be rash and negligent, solely relying on the basis of the police papers and M.V.I. report. It is submitted that the claimants had examined the eye-witness to the accident as P.W.2, who in his evidence had categorically stated that both the Maruti car and the Truck bearing no.OR-09-K/3616 were being driven in a very high speed and in a rash and negligent manner, which resulted in a head-on collision, which fact has been overlooked by the learned Tribunal, while passing the impugned award. It is further submitted that as the accident was due to head-on collision between the Maruti car and the Truck, the contributory negligence of both the vehicles is to be implied, as has been observed by the Apex Court in *Bijoy Kumar Dugar v. Bidya Dhar Dutta and others*, (2006) 3 SCC 242.

Learned counsel for the appellant-Insurance Company further submits that as the impugned award has been passed solely on the basis of the police papers, such as F.I.R.(Ext.2), Final Form (Ext.3) and the M.V.I. report (Ext.B), ignoring the oral evidence of the eye-witness (P.W.2), the same cannot be sustained. In this regard, he has relied upon a decision of this Court in *Mataji Bewa and others v. Hemanta Kumar Jena and another*, 1994 ACJ 1303.

It is submitted that when there was clear, cogent and credible oral evidence of the eye witness was available on record to show that both the vehicles involved in the accident were being driven in a rash and negligent manner and the drivers of both the vehicles were responsible for the same, which resulted in a head-on collision, the findings of the learned Tribunal that only the driver of Maruti car was rash and negligent in causing the accident cannot be sustained. It is submitted that as the owner-insurer of the other vehicle i.e. Truck no.OR-09-K/3616 had been made parties to the claim application, it was incumbent on the part of the learned Tribunal to apportion the liability between the insurers of both the vehicles, proportionate to the extent of their respective negligence.

Learned counsel for the claimants does not dispute the factual position that the claimants had impleaded the owners and insurers of both the vehicles involved in the accident as parties to the claim application and it was the specific case of the claimants that the accident took place due to rash and negligent driving by the drivers of both the vehicles. It is submitted that the eye-witness (P.W.2), examined on behalf of the claimants had categorically stated that both the vehicles were being driven in a rash and negligent manner, which resulted in a head-on collision. Accordingly, it is submitted that the insurers of both the vehicles be directed to pay the compensation amount proportionately.

Learned counsel appearing for the Insurance Company (respondent no.6), who is the insurer of the Truck no.OR-09-K/3616 submits that as the F.I.R. (Ext.2) and the Final Form (Ext.3), clearly established that the driver of the offending Maruti car was rash and negligent in causing the accident and the M.V.I. report (Ext.B) supported such findings, the impugned award cannot be faulted. It is submitted that the eye-witness (P.W.2), in his cross-examination had admitted that the Maruti car was being driven in a high speed and went under the Truck after the head-on collision and therefore, learned Tribunal was fully justified in holding the driver of the offending Maruti car to be rash and negligent in causing the accident. It is further submitted that the F.I.R. and the Final Form having been filed by the claimants and admitted in evidence and marked as exhibits, the contents of the same cannot be disputed or considered in part. In this regard, he has relied upon two decisions of the Apex Court in *Oriental Insurance Co. Ltd. v. Premlata Shukla & Ors.*, 2007 AIR SCW 3591 and *Vijay Kumar Kulhar v. Rajasthan State Road Transport Corporation*, 2009 (3) T.A.C. 1003 (S.C.). Accordingly, it is submitted that the impugned award having been

passed on the basis of the documentary evidence available on record, no interference is warranted.

On a perusal of the impugned award, it is seen that the learned Tribunal has taken into consideration the police papers, such as F.I.R. (Ext.2), Final Form (Ext.3) and the M.V.I. report (Ext.B), in coming to hold that the driver of the offending Maruti car was rash and negligent in causing the accident. Though the learned Tribunal has considered the evidence of the eye-witness (P.W.2) examined on behalf of the claimants, it appears that learned Tribunal has been swayed by the statement of the said witness made in the cross-examination that the Maruti car was running at a high speed and went under the Truck after the mishap and has accordingly come to the conclusion that the driver of the Maruti car was rash and negligent in causing the accident.

There is no dispute that the claimants in their claim application had specifically averred that the drivers of both the Maruti car and the Truck were rash and negligent in causing the accident, which resulted in the death of Nagen Kumar Swain. The evidence in-chief of the eye-witness (P.W.2), examined on behalf of the claimants clearly goes to show that both the vehicles were driven in a high speed and also in a rash and negligent manner and dashed head-on. In the cross-examination, the said witness has reiterated that both the vehicles were being driven in a rash and negligent manner and that the Maruti car went under the Truck after the mishap.

This statement of P.W.2, made in his cross-examination, itself cannot be the basis to conclude that the driver of the Maruti car was alone responsible for the accident. As the accident took place due to head-on collision and the Maruti car is admittedly a very small vehicle, it is but natural that the momentum and impact had taken the car under the front portion of the Truck. Being head-on collision, the negligent of both the vehicles involved in the accident can be implied in such a case unless, one of the vehicles had dashed on the side or rear of the other vehicle. There being cogent and credible evidence of the eye-witness (P.W.2), which clearly goes to show that the drivers of both the vehicles were rash and negligent in causing the accident, learned Tribunal was not justified in ignoring the same and relying upon the police papers, such as F.I.R. (Ext.2), Final Form (Ext.3) and the M.V.I. report (Ext.B), in holding that the driver of the Maruti car alone was responsible for the accident. Such police papers cannot be the sole basis for determining the extent of contributory negligence of the two drivers

involved in the accident. The factum of accident and the involvement of the vehicles may be established by such police papers but not the extent of contributory negligence of the drivers with regard to their rash and negligent driving, which can only be determined by cogent and credible oral evidence, especially of the eye-witnesses to the occurrence.

So far as the M.V.I. report (Ext.B) is concerned, the same being a report drawn on inspection of the vehicle much after the accident, which merely gives an opinion as to whether the accident is due to mechanical failure of the vehicle or due to the negligence or lapses on the part of the drivers, the same cannot be the basis for determining the extent of contributory negligence of the drivers of the two vehicles involved in the accident, especially in a case of head-on collision.

For the reasons as aforesaid, I am of the considered view that it is a case of contributory negligence. However, keeping in view the evidence of the eye-witness (P.W.2), it would be just and proper to hold that the drivers of the Maruti Alto car and Truck contributed to the accident in the ratio of 70:30 respectively. Accordingly, the liability to pay the compensation amount to the claimants is apportioned in the said ratio of 70:30 between the appellant and respondent no.6. The impugned award is modified to the said extent.

The appellant and respondent no.6 are directed to deposit their respective share of the compensation amount in the ratio of 70:30 along with the awarded interest with the learned Tribunal within six weeks hence. On deposit of the amount, the same shall be disbursed to the claimants proportionately, as per the direction of the learned Tribunal given in the impugned award.

The statutory amount deposited in the Registry of this Court along with the accrued interest thereon shall be refunded to the appellant-Insurance Company, on production of receipt showing deposit of its share of the compensation amount and interest with the Tribunal. MACA is accordingly disposed of. Issue urgent certified copy as per rules.

MACA disposed of.

2018 (I) ILR - CUT- 525

**S. K. MISHRA, J.**

CRLMC NO. 1507 OF 2017

**SMT. JANAKI PATHAK**

..... Petitioner

. Vrs.

**STATE OF ODISHA & ORS.**

..... Opp. Parties

**CODE OF CRIMINAL PROCEDURE, 1973 – Section – 205 – Application under – Rejected by the Magistrate on the ground that accused petitioner involved in an offence under section 409 of IPC – Petitioner a Bank employee – Held, a good ground for allowing her to appear through a lawyer – Discretion exercised.**

**Case Laws Relied on and Referred to :-**

1. (1988) I OCR 136 : Raghunath Das & Ors –Vrs- Hari Mohan Pani.
2. (1995) 9 OCR 110 : Basudev Purohit –Vrs- Republic of India anr.
3. (1988) I OCR 108 : Rudrapanki Dhurjati Devara alias Dhurjati Devara – Vrs- Rma Chandra Subudhi.

For petitioner : Satya Ranjan Pati

For opp. Parties: Govt. Counsel

Date of Order : 29.03.2018

**ORDER****S.K.MISHRA, J.**

Heard learned counsel for the petitioner and learned Additional Government Advocate.

In this case, petitioner assails the order dated 31.03.2017 passed by the learned S.D.J.M.(S). Cuttack in 1.C.C. No. 97 of 2008 rejecting the application filed by the petitioner, who is the accused no. 1 in 1.C.C. case to dispense with her appearance under Section 205 of Cr. P.C. on the ground that she is a lady and an employee of the Bank, at present, working as Asst. General Manager in Head office of the Urban Cooperative Bank Limited, Cuttack. It is not possible on her part to attend the court on each date of posting. However, her application has been rejected by the learned S.D.J.M.(S), Cuttack on the ground that the offence alleged against the petitioner is grievous and serious in nature. The offence under Section 409 of the IPC is punishable with imprisonment for life. Also, the application under Section 205 of the Cr. P.C. has been rejected so far as other accused persons are concerned, the same was allowed. The 1<sup>st</sup> matter is taken up without issuing notice to the opposite party no.2 i.e. complainant before the lower court in view of the ratio decided by this Court in the

reported case of *Raghunath Das and others vs. Hari Mohan Pani*. (1988) I OCR 136. wherein at paragraph-3, this Court has held follows.

“Representation is a mode of appearance of an accused. It is a matter between the Court and the accused. In prosecutions initiated on police report, the Public Prosecutor has a right to be heard on the question of bail. So far as a prosecution initiated on complainant, the Magistrate while issuing summons has also power to direct the appearance of an accused through Lawyer without personally appearing. Thus, complainant has no right to be heard. He can, however, bring to the notice of the court at any stage the facts of an accused misusing the benefit of representation for appropriate order.”

So, it is not necessary to issue notice to the opposite party no. 2.

This Court in the matter of *Basudev Purohit vs. republic of India and another*, (1995) 9 OCR 110 has given the guidelines to exercise discretion. It is appropriate to quote the same, appearing at paragraph-8.

“Discretion” means use of private and independent thought. When anything is left to be done according to one’s discretion the law intends it to be done with sound discretion and according to law. Discretion is discerning between right and wrong, and one has power to act at discretion is bound by rule of reason. Discretion must not be arbitrary. The very term itself stands unsupported by circumstances, imports the exercise of judgment, wisdom and skill as contradistinguished from unthinking folly, heady violence or rash injustice.

When applied to a Court of Justice, it means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful but, legal and regular. Discretion must be exercised honestly and in the spirit of the statute. It is the power given by a statute to make choice among competing considerations. It implies power to choose between alternative courses of action It is not unconfined and vagrant. It is canalized within banks that keep it from overflowing.

In the case of *Rudrapanki Dhurjati Devara alias Dhurjati Devara Vs. Rma Chandra Subudhi*, (1988) I OCR 108, this Court has held that he Section 205 of the Cr. P.C. confers wide discretion on the Magistrate to dispense with the personal attendance of the accused and permit him to appear through his pleader, but discretion must be exercised judiciously and not arbitrarily. This Court further held that the accused was working as a Manager of Bank and for him to remain absent from the Bank of each date of posting must be held to be a good ground for allowing him to appear through a pleader and to dispense with his personal attendance until the Magistrate requires his personal attendance in the court interest of the case.

In this case, the petitioner is working as a Head of a Branch of the Bank, who has some heavy and onerous responsibilities. So, it is not possibility for her part to appear in court on each date of posting. So, this Court is of the opinion that in view

of the discussions made above, the learned Magistrate should have allowed her application.

Accordingly, CRLMC is allowed. The order date 31.03.2017 passed by the learned S.D.J.M.(S), Cuttack in I.C.C. No. 97 of 2008 so far as it relates to rejection of the application filed by the petitioner under section 205 of the Cr.P.C. concerned, is hereby quashed. Her personal appearance be dispensed with and she be allowed to be represented through a counsel till her appearance is necessary by the court for the purpose of trial or in the interest of justice.

Application allowed.

**2018 (I) ILR - CUT-527**

**A.K.RATH, J.**

S. A. NO. 48 OF 2000

**SRI ASHOK KUMAR DASH**

..... Appellant

. Vrs.

**CHINTAMANI MOHANTY AND ORS.**

..... Respondents

**(A) LEGAL MAXIM – There is well recognized maxim of equity, namely, *actus urine neminem gravabit* which means an act of the court shall prejudice no man – A party cannot be made to suffer on account of an act of the court – This maxim is founded upon Justice and good sense which serves a safe and certain guide for the administration of law.**

(Para- 9)

**(B) CODE OF CIVIL PROCEDURE, 1908 – Section 96 – First appeal – Question arose as to whether the appeal filed by the non-party to the suit against any observation made by the trial court against him is maintainable? – Held, no – The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law.**

(Para- 10)

**(C) CODE OF CIVIL PROCEDURE – Order-7 – Suit by plaintiff/appellant for realization of money – Decreed – Some observations were made against a person who was not a party to the suit – Such person filed first appeal – Held, the observation by the Trial Court was wholly unwarranted and there is no provision in the code for appeal by a person who is not a party to the suit – Respondent No. I in second appeal not being a party to the suit filed first appeal – First appellate court without considering the petition for condonation of delay in granting leave to appeal heard the appeal on merit – Held, not justified.**

**Case Laws Relied on and Referred to :-**

1. Smt. Ganga Bai vs. Vijay Kumar and others, AIR 1974 SC 1126
2. AIR 1977 SC 965 : Justice Krishna Iyer in Chairman, Board of Mining Examination & another v. Ramjee.

For Appellant : Mr. P.V. Balakrishna Rao, Advocate  
For Respondents : None

---

Date of Hearing :07.03.2018      Date of Judgment:07.03.2018

**JUDGMENT**

***DR. A.K. RATH, J.***

This is a plaintiff's appeal against reversing judgment.

2. The plaintiff instituted the suit for realization of Rs.32,888.27 paise from the defendants. The case of the plaintiff was that he was an 'A' class Government contractor. The defendant no.1 invited quotation vide memo dated 4.2.88 for construction of I.T.I. (D.R.D.A.) Hostel building at Barbil. He submitted his quotation on 19.2.88. The same was duly approved by the defendant no.2 on 23.2.88. Work order was issued to him on 27/29.2.88 for supply of materials. On 8.3.1988, the defendant no.1 had issued the letter of approval to him. Thereafter an agreement was entered into between him and defendant no.1 on 20.3.88. Pursuant to the work order, he carried out the work. After completion of the work, he submitted the final bill along with vouchers. But then, the final bill had not been paid. The further case of the plaintiff was that the work was being supervised from time to time by the official of the defendants as per letter dated 8.3.88. Extra items beyond agreement were used as per verbal discussion. As per the discussion with the official in charge of supervision of the work, binding wires, centering materials, bricks, chips, sands were purchased by him from the local market. He had hired mixture machine from the P.W.D., Barbil. He had also incurred expenses towards clearing of jungle and removing debris from the work site. As the payment was not made, he instituted the suit seeking the reliefs mentioned supra after issuing notices under Sec.80 C.P.C. to the defendants.

3. Defendant no.1 filed written statement pleading inter alia that the final bill amount had been paid to the plaintiff on 23.5.90. The security deposit had also been released and no further payment was permissible to the plaintiff under the terms of contract. There was no entry in the stock book of his office with regard to extra materials said to have been used by the plaintiff in the construction work. No money was payable to the plaintiff.

4. Stemming on the pleadings of the parties, learned trial court struck five issues. Parties led evidence, oral and documentary, to substantiate their

cases. On an analysis of the evidence on record and pleadings, learned trial court came to hold that the plaintiff is entitled to Rs.17,272.00. Learned trial court observed that the plaintiff suffered due to the negligence of the then principal Chintamani Mohanty. It granted liberty to the defendants to realize the entire decretal amount from the salary or personal property of Chintamani Mohanty. It also granted liberty to the plaintiff to realize an amount of Rs.5,000/- from the then principal Chintamani Mohanty. Held so, it decreed the suit. The contesting defendant did not file any appeal. Chintamani Mohanty filed Money Appeal No.4 of 1995 before the learned District Judge, Keonjhar along with applications; seeking leave of the court to file appeal and condonation of delay. On 11.9.95, learned appellate court observed that the appellant files a petition praying to grant leave to the appellant to prefer appeal and adjourned the matter to another date for consideration of the said petition. The application for condonation of delay having been rejected, the plaintiff filed Civil Revision No.255 of 1996 before this Court. A Bench of this Court set aside the order passed by the learned appellate court. After disposal of civil revision, learned appellate court heard the appeal on merit and allowed the same. Hence this second appeal.

**5.** The second appeal was admitted on the substantial questions of law enumerated in ground nos.(i), (ii) and (iii) of the appeal memo. The same are:

“(i) Whether an appeal by a person who is not a party to the suit can prefer an appeal without leave of the Court. The law is well settled that a person who is not a party has to obtain leave and in the absence of such leave, the appeal is incompetent.

(ii) Whether the lower appellate court can vacate the entire decree when the defendants have not preferred an appeal. It is submitted that the discretionary provision of Order 41, Rule 33 C.P.C. cannot be called in aid to wipe out the entire decree of the trial court. The decree against defendant nos.2 and 3 should stand.

(iii) Whether the beneficent provisions of Section 70 of the Contract Act are attracted. The law is well settled that where a Builder having contracted to construct a premises and having done substantial work which was not intended to be gratuitous, is entitled to compensation on the doctrine of quantum meruit.”

**6.** Heard Mr. P.V. Balakrishna Rao, learned counsel for the appellant. None appears the respondents.

7. Mr. Balakrishna Rao, learned counsel for the appellant, submits that the contesting defendant no.1 had chosen not to file appeal. Respondent no.1, who was not a party to the suit, filed appeal before the learned District Judge, Keonjhar against the observation made by the learned trial court along with an application seeking leave of the court to file appeal. The same was not allowed. Learned appellate court proceeded to decide the appeal on merit and as such the judgment is vitiated.

8. Respondent no.1 was not a party to the suit. Against the observation made by the learned trial court supra, he filed Money Appeal No.4 of 1995 before the learned District Judge, Keonjhar along with two applications; one seeking leave of the court to file appeal and another for condonation of delay. Once the delay is condoned, a duty is cast upon to the learned appellate court either to grant or refuse the leave. But the learned appellate court proceeded to decide the appeal on merit.

9. A party cannot be made to suffer on account of an act of the Court. There is well-recognized maxim of equity, namely, *actus curiae neminem gravabit* which means an act of the court shall prejudice no man. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law.

10. The next question crops up as to whether the appeal filed by the non-party to the suit against any observation made by the trial court is maintainable? The answer is emphatically no. In *Smt. Ganga Bai vs. Vijay Kumar and others*, AIR 1974 SC 1126, the apex Court held that a suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute. Under Sec.96(1) of the Code of Civil Procedure, save where otherwise expressly provided by the Code or by any other law for the time being in force, an appeal lies from every decree passed by any Court exercising original jurisdiction, to the Court authorised to hear appeals from the decisions of such Court. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal.

11. Chintamani Mohanty, respondent no.1, was not a party to the suit. Thus any observation made by the learned trial court against him is wholly unwarranted. Further the observation made by the learned trial court is infraction of principle of natural justice.

**12.** In his inimitable style, Justice Krishna Iyer in *Chairman, Board of Mining Examination & another v. Ramjee*, AIR 1977 SC 965 proclaimed that “natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt--that is the conscience of the matter”. In view of the same, the observation made by the learned trial court with regard to recovery of money from the respondent no.1 is expunged. The substantial questions of law are answered accordingly.

**13.** In the wake of aforesaid, the impugned judgment is set aside. The appeal is allowed. Consequently the suit is decreed.

Appeal allowed.

**2018 (I) ILR - CUT- 531**

**A.K.RATH, J.**

S. A. NO. 201 OF 2093

**GOLAKH CHANDRA DAS**

..... Appellant

. Vrs.

**BRAJA KAMINI DAS & ORS.**

..... Respondents

**CODE OF CIVIL PROCEDURE, 1908 – Section 96 – First Appeal, a valuable right of the parties – How it is to be dealt with – Discussed – 2010 (13) SCC 530, B.V. Nagesh & another .V. H.V. Sreenivasa Murthy, relied on.**

**Case Laws Relied on and Referred to :-**

1. B.V.Nagesh and another v. H.V. Sreenivasa Murthy, 2010 (13) SCC 530

For Appellant : Mr. Ramakanta Mohanty, Sr. Adv.  
& Dipankar Bharadwaj.

For Respondent : None

Date of hearing: 16.03.2018

Date of judgment: 16.03.2018

**JUDGMENT**

**DR. A.K.RATH, J**

This is a defendants’ appeal against confirming judgment.

2. Since the appeal is to be disposed of on a short point, the facts need not be recounted in detail. Suffice it to say that the plaintiffs-respondents instituted a suit for specific performance of agreement to sell. Defendant entered contest and filed a written statement denying the assertions made in the plaint. The suit was decreed. Unsuccessful defendant filed Title Appeal No.27/26 of 1990, which was eventually dismissed.

3. The appeal was admitted on the following substantial questions of law;

“1. Whether in the absence of any pleading and proof that the plaintiffs have performed their part of the contract and were always ready and willing to perform the same, a decree for specific performance can at all be passed, and

2. Whether in the facts and circumstances of the present case the impugned decree directing specific performance of the contract is a proper exercise of jurisdiction u/s. 20 of the Specific Relief Act and whether court can exercise its power u/s 1 of the said Act.

4. Heard Mr. R.K. Mohanty, learned Senior Advocate along with Mr. Dipankar Bhardwaj, learned counsel for the appellant. None appears for the respondents.

5. Mr. Mohanty, learned Senior Advocate for the appellant submits that the judgment of the appellate court consists of ten pages. Learned appellate court stated the facts and contentions of the parties in ten pages. It abruptly came to the conclusion that the learned trial court has not committed any error in decreeing the suit. He submits that the first appeal is a valuable right of the parties. A duty is cast upon the first appellate court to scan the evidence and pleadings and answer all issues.

6. This Court finds ample force in the submission of Mr. Mohanty. After survey of the earlier decisions, the apex Court in the case of B.V.Nagesh and another v. H.V. Sreenivasa Murthy, 2010 (13) SCC 530 held:

“3. How regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate Court shall state:

a) the points for determination;

b) the decision thereon;

c) the reasons for the decision; and

d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate Court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law,

the whole case therein is open for rehearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put-forth, and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari vs. Purushottam Tiwari, (2001) 3 SCC 179 = JT (2001) 2 SC 407 and Madhukar and others vs. Sangram and others, (2001) 4 SCC 756)

5) In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate Court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the Court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law.”

**7.** The judgment of the appellate court reveals that the appellate court stated the facts of the case and contentions of the parties in ten pages and abruptly came to the conclusion that the learned trial court has not committed any error in decreeing the suit. No reason has been assigned. The judgment is a laconic one.

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

“Even in respect of administrative orders Lord Denning, M. P. in *Breen Vrs. Amalgamated Engg. Union* reported in (1971) 1 All ER 1148 observed : (All ER p. 1154h). "The giving of reasons is one of the fundamentals of good administration." In *Alexander Machinery (Dudley) Ltd. v. Crabtree* reported in 1974 ICR 120 (NIRC) it was observed:

“Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at.”

Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx," it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system.

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

9. Resultantly, the judgment of the learned appellate court is set aside. The matter is remitted back to the learned appellate court. The learned appellate court shall dispose of the appeal keeping in view the law laid down by the apex Court in the case of B.V. Nagesh (supra).

Appeal disposed of.

2018 (I) ILR - CUT- 534

A.K.RATH, J.

RSA. NO. 467 OF 2003

**BHIMSEN TANTY @ GANDA**

..... Appellant

. Vrs.

**GHASSIA ORAM & ANR.**

..... Respondents

**CODE OF CIVIL PROCEDURE, 1908 – Order 8 Rule 5 – Provisions under – Passing of decree on the basis of plaint averments – Applicability of the provision – Discussed.**

*"Both the provisions were the subject-matter of interpretation in Modula India (supra). The apex Court held that these rules are permissive in nature. They enable the court in an appropriate case to pronounce a decree straightway on the basis of the plaint and the averments contained therein. Though the language of Rule 10 says that the court shall pronounce judgment against him, it is obvious from the language of the rule that there is still an option with the court either to pronounce judgment on the basis of the plaint against the defendant or to make such other appropriate order as the court may think fit. Therefore, there is nothing in the rules, which makes it mandatory for the court to pass a decree in favour of the plaintiff straightway because a written statement has not been filed. Sub-rule (1) of Rule 5 has application only in a case where a pleading is filed, but does not contain a specific or implicit denial of the averments contained in the plaint or other document to which it is a reply. Rule 5(1) cannot be made use of to sustain the contention that where there is no written statement the court is bound to accept the statement contained in the plaint and pass a decree straightway. Even in such cases it is a matter for the court to exercise discretion as to the manner in which the further proceedings should take place.(Emphasis laid)" (Para-9)*

**Case Laws Relied on and Referred to :-**

1. AIR 1993 SC 398 : Shri Bhagwan Sharma v. Smt. Bani Ghosh.
2. AIR 2003 SC 1905 : Bondar Singh and others v. Nihal Singh and others.

3. AIR 1978 MP 39 : Mathew Elenjical and another v. The Nagpur Roman Catholic Diocesan Corpn. (P) Ltd.  
 4. AIR 1989 SC 162 : Modula India v. Kamakshya Singh Deo.

For Appellant : Mr. Umesh Chandra Patnaik, Adv.  
 Mr. Somnath Patnaik

For Respondents : Mr. Ramakanta Mohanty, Sr. Adv.  
 M/s.Sumitra Mohanty

---

Date of hearing: 09.03.2018 Date of judgment: 19.03.2018

### **JUDGMENT**

***DR. A.K.RATH, J.***

This is a plaintiff's appeal against confirming judgment. The suit was for declaration of right, title and interest, declaration that the sale deed no.1678 of 1980 as void, confirmation of possession and certain other ancillary reliefs.

2. Case of the plaintiff was that one Sriram Gardia was the owner of the suit land. He sold the suit property to the plaintiff by means of an unregistered sale deed dated 5.12.1997 for a consideration of Rs.1000/. Possession was delivered to him. Thereafter, he sold the suit land and other lands to the plaintiff by means of a registered sale deed dated 20.4.1990 for a valid consideration. Plaintiff made an application before the Addl. Tahasildar to mutate the land. The Addl. Tahasildar rejected the application on the ground that the suit land had been mutated in favour of defendant no.1. Plaintiff came to know that Sriram Gardia had executed a sale deed in respect of the suit land in favour of defendant no.1. Though notice was issued to the defendants, but then they chose not to contest the case and as such, were set ex parte. To substantiate the case, the plaintiff had examined one witness and on his behalf, six documents had been exhibited. Learned trial court came to hold that prior to execution of the sale deed vide Ext.3, the vendor had already executed a sale deed in favour of defendant no.1 on 9.12.1980. The plaintiff was not in possession of the suit land. Held so, it dismissed the suit. Unsuccessful plaintiff challenged the judgment and decree before the learned District Judge, Sundargarh in Title Appeal No.24 of 1998, which was eventually dismissed.

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

“Whether the courts below have acted contrary to law in not decreeing the suit under Order 8 Rule 5 of the CPC as the defendant did not contest the suit and the oral and documentary evidence adduced by the plaintiff remained unchallenged.”

4. Heard Mr. Umesh Chandra Patnaik along with Mr. Somnath Patnaik, learned counsel for the appellant and Mr. Ramakanta Mohanty, learned Senior Advocate along with Ms. Sumitra Mohanty, learned counsel for the respondent.

5. Mr. Patnaik, learned counsel for the appellant submitted that the defendants were set ex parte. In such a contingency, the courts below ought to have decreed the suit under Order 8 Rule 5 CPC applying the doctrine of non-traverse. He further contended that the evidence on record reveals that Sriram Gardia, vendor of the plaintiff, had executed an unregistered sale deed on 5.12.1997 and delivered possession of the suit land to the plaintiff. Thereafter, he executed the registered sale deed in favour of the plaintiff. During pendency of the appeal, defendant no.1 sold a part of the suit plot to one Rajiv Naik in the year 2012 and Dase Oram in the year 2011 respectively. The plaintiff filed Civil Suit No.51 of 2013 in the court of the learned Civil Judge (Senior Division), Sundargarh praying for declaration of title and permanent injunction. Learned trial court came to hold that the plaintiff is in possession of the suit plot. He further contended that the plaintiff is in possession of the suit land peacefully, continuously and to the hostile animus of the defendant no.1 for more than the statutory period and as such, perfected title by way of adverse possession. Learned courts below did not delve deep into the matter. On untenable and unsupportable grounds learned appellate court negatived the claim of the plaintiff. He placed reliance on the decisions in the case of Shri Bhagwan Sharma v. Smt. Bani Ghosh, AIR 1993 SC 398, Bondar Singh and others v. Nihal Singh and others, AIR 2003 SC 1905 and Mathew Elenjical and another v. The Nagpur Roman Catholic Diocesan Corpn. (P) Ltd., AIR 1978 MP 39.

6. Per contra Mr. Mohanty, learned Senior Advocate for the respondent submitted that Sriram Gardia sold the suit land to the defendant no.1 by means of a registered sale deed dated 9.12.1980 and delivered possession to him. Much thereafter, he sold the self-same property to the plaintiff on 5.12.1997. The vendor had no title to the property, when he sold the suit land to the plaintiff. Referring to the provisions contained in Rules 1, 5 and 10 of Order 8 CPC, he contended that there is still an option with the court either to pronounce judgment on the basis of the plaint against the defendant or to make such other appropriate order as the court may think fit. Where there is no written statement, the court is not bound to accept the statements contained in the plaint and pass a decree straightway. He relied on the decision of the apex Court in the case of Modula India v. Kamakshya Singh Deo, AIR 1989 SC 162.

**7.** Order 8 Rule 5(2) CPC provides that where the defendant has not filed a pleading it shall be lawful for the court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the court may, in its discretion, require any such fact to be proved.

**8.** Order 8 Rule 10 CPC provides that where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

**9.** Both the provisions were the subject-matter of interpretation in *Modula India* (supra). The apex Court held that these rules are permissive in nature. They enable the court in an appropriate case to pronounce a decree straightway on the basis of the plaint and the averments contained therein. Though the language of Rule 10 says that the court shall pronounce judgment against him, it is obvious from the language of the rule that there is still an option with the court either to pronounce judgment on the basis of the plaint against the defendant or to make such other appropriate order as the court may think fit. Therefore, there is nothing in the rules, which makes it mandatory for the court to pass a decree in favour of the plaintiff straightway because a written statement has not been filed. Sub-rule (1) of Rule 5 has application only in a case where a pleading is filed, but does not contain a specific or implicit denial of the averments contained in the plaint or other document to which it is a reply. Rule 5(1) cannot be made use of to sustain the contention that where there is no written statement the court is bound to accept the statement contained in the plaint and pass a decree straightway. Even in such cases it is a matter for the court to exercise discretion as to the manner in which the further proceedings should take place. (Emphasis laid)

**10.** In *Balraj Taneja and another v. Sunil Madan and another*, AIR 1999 SC 3381, the apex Court held that the Court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor the Court should proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a written statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in

the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8.

**11.** In *Ramesh Chand Ardawatiya v. Anil Panjwani* AIR 2003 SC 2508 the apex Court held that in a case which has proceeded ex parte the court is not bound to frame issues under Order 14 and deliver the judgment on every issue as required by Order 20 Rule 5. Yet the trial court would scrutinize the available pleadings and documents, consider the evidence adduced and would do well to frame the 'point for determination' and proceed to construct the ex-parte judgment dealing with the points at issue one by one. Merely because the defendant is absent the Court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence.

**12.** In *Mathew Elenjical* (supra), the Madhya Pradesh High Court held that on failure of the defendant to file the written statement required under Rule 1 the Court's power under sub-rule (2) of Rule 5 is attracted which gives a discretion to the Court to either pronounce a judgment in plaintiff's favour for mere non-filing of the written statement or not to do so, depending on the facts of a particular case.

**13.** Reverting to the facts of the case at hand and keeping in view the aforesaid principles, this Court finds that Sriram Gardia sold the suit land to defendant no.1 on 9.12.1980 and delivered possession to him. He again executed a sale deed in respect of the suit land in favour of the plaintiff by means of a registered sale deed on 5.12.1997. By the time the execution of the registered sale deed in favour of the plaintiff he had no title over the same. Thus no title passes to the plaintiff.

**14.** The claim of title to the property and adverse possession are in terms contradictory.

**15.** The apex Court in the case of L.N. Aswathama and another v. P. Prakash (2009) 13 SCC 229 held :

“To establish a claim of title by prescription, that is, adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. It is also well settled that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence.” (Emphasis laid)

**16.** In Shri Bhagwan Sharma (supra), the apex Court had an occasion to deal with the power of the High Court under Sec. 100 CPC. Scope of Sec. 100 CPC is well known.

**17.** In Bondar Singh (supra), the apex Court held that even though the sale deed not admissible in evidence can be looked into for collateral purposes. There is no quarrel over the proposition of law.

**18.** On an anatomy of the pleadings and the evidence on record both the courts negated the claim of the plaintiff over the suit property. There is no perversity or illegality in the said findings. The substantial question of law is answered accordingly.

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

Appeal dismissed.

**2018 (I) ILR - CUT- 539**

**A.K.RATH, J.**

SA. NO. 254 OF 1991

**NAYAN MAJHI AND ORS.**

..... Appellant

.Vrs.

**CHHITA MAJHIANI & ANR.**

.....Respondents

**TRANSFER OF PROPERTY ACT, 1882 – Section 123 – Provisions under – Unregistered gift deed – Reliance on such document – Held, not acceptable.**

*“On a conspectus of Sec.123 of the Transfer of Property Act, 1882, it is evident that for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. In the instant case, the gift deed is an unregistered one. Thus, reliance placed on Ext.A is totally misplaced.”* (Para 8)

**Case Laws Relied on and Referred to :-**

1. (1995) 2 SCC 543 : In Annasaheb Bapusaheb Patil and others vs. Balwant alias Balasaheb Babusaheb Patil (dead) by Lrs. and heirs and ors.
2. (2009) 13 SCC 229 : L.N. Aswathama and another v. P. Prakash.

For Appellants : Mr. S.D. Das, Senior Advocate  
Mr. H.K. Behera

For Respondents : None

---

Date of hearing: 26.03.2018 Date of judgment: 26.03.2018

**JUDGMENT**

***DR. A.K. RATH, J.***

This is a defendants' appeal against confirming judgment.

02. Plaintiffs-respondents instituted the suit for declaration of right, title and interest over 'A' schedule land and recovery of possession. The case of the plaintiffs was that Arjun Majhi, father of plaintiff no.1, was the original owner of the suit land. He executed a registered gift deed dated 31.8.50 of all lands including the suit schedule land in favour of plaintiff no.1 and her elder sister Dulgu Majhiani. The gift deed was acted upon. Dulgu Majhiani was a spinster. She died 25 years back. Thus, plaintiff no.1 became the owner of the suit land. Plaintiff no.2 is her elder son. It was further pleaded that defendant no.1 initiated Crl. Misc. No.100/81 before the Executive Magistrate on 26.5.81. The said case was disposed of on 15.2.83 in his favour. The order passed by the Executive Magistrate is illegal. Defendant no.1 made a false assertion in the petition. Basi, wife of Arjun Majhi, had not executed any gift deed in favour of any person. Dasa had not performed the obsequies of Arjun and Basi. A cloud of suspicion is raised over their title. With this factual scenario, they instituted the suit seeking the reliefs mentioned supra.

03. The defendants entered contest and filed a written statement. The specific case of the defendants was that they denied about the transaction that Arjun had not executed any gift deed in favour of plaintiff no.1 and her sister Dulgu in the year 21.8.1950. Arjun died in the year 1951 without a male issue. As per Santal custom, the female member cannot perform the obsequies and a male person from out of the existing near relations has to

perform the obsequies. After the death of Arjun, a Panchayat was convened. Dasa Majhi, father of the defendants, was asked to perform the obsequies of Arjun. Dasa in obedience to the said decision performed the obsequies and in lieu thereof he got the suit lands from the plaintiff no.1 and her mother Basi on the strength of an unregistered gift deed dated 31.12.1951 executed by them. Since then, he is in possession of the said land. They are in possession of the land openly, peacefully and continuously since the year 1951 and as such perfected title by way of adverse possession.

04. Stemming on the pleadings of the parties, learned trial court struck eight issues. Parties led evidence, oral and documentary, to substantiate their respective cases. Learned trial court came to hold that the plain paper unregistered gift deed, Ext.A, has not been proved by the defendants and doubted the genuineness. It negated the plea of the defendants that they have perfected title by way of adverse possession. Held so, it decreed the suit. The unsuccessful defendants filed T.A. No.33 of 1987 before the learned District Judge, Mayurbhanj, Baripada, which was eventually dismissed. It is apt to mention here that during pendency of the second appeal, the defendant nos.2 and 3-appellant nos.2 and 3 died. The legal heirs have been substituted.

05. The second appeal was admitted on the substantial questions of law enumerated in ground nos.1 and 2 of the memorandum of appeal. The same are:

“1. Whether the learned District Judge is correct in law in holding that the defendants failed to aver and prove the assertion of hostile though they are in possession of the suit land by virtue of invalid gift deed (Ext-A) dated 31.12.1951 in order to acquire title by adverse possession because the evidence as well as the pleadings do not spell the word “hostile” ?

2. For that the learned District Judge did not record any clear finding on the question of possession and thereby he failed to exercise his jurisdiction as final court on finding of facts. Absence of any finding on the question of possession vitiates the judgment of the learned District Judge and the judgment and decree passed by the learned District Judge is erroneous and is liable to be set aside.”

06. Heard Mr. S.D. Das, learned Senior Advocate along with Mr. H.K. Behera, learned counsel for the appellants. None appears for the respondents.

07. Mr. Das, learned Senior Advocate for the appellants, argues with vehemence that Arjun had executed unregistered gift deed on 31.12.1951, Ext.A, in favour of defendant no.1. The gift deed had been acted upon. Otherwise also, the defendants are in possession of the suit land peacefully,

continuously and with the hostile animus to the true owner for more than the statutory period and as such perfected title by way of adverse possession.

08. Ext.A is an unregistered gift deed dated 31.12.1951. Sec.123 of Transfer of Property Act, 1882 provides that for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrumental signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift deed of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered. On a conspectus of Sec.123 of the Transfer of Property Act, 1882, it is evident that for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrumental signed by or on behalf of the donor, and attested by at least two witnesses. In the instant case, the gift deed is an unregistered one. Thus, reliance placed on Ext.A is totally misplaced.

09. The matter can be examined from another angle. The claim of title to the property and adverse possession are in terms contradictory. In *Annasaheb Bapusaheb Patil and others vs. Balwant alias Balasaheb Babusaheb Patil (dead) by Lrs. and heirs and others*, (1995) 2 SCC 543, the apex Court made an in-depth analysis of claim of title and claim to adverse possession over the property. The apex Court in paragraph-15 of the report held:

“Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all.”

10. The apex Court in the case of *L.N. Aswathama and another v. P. Prakash*, (2009) 13 SCC 229 held :

“To establish a claim of title by prescription, that is, adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. It is also well settled that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to

possess the property hostile to the title of the true owner, the period for prescription will not commence.” (Emphasis laid) The substantial questions of law are answered accordingly.

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

Appeal dismissed.

**2018 (I) ILR - CUT- 543**

**A.K.RATH, J.**

S. A. NO. 106 OF 2000

**GANESH PRASAD DUBEY (DEAD) THROUGH  
HIS L.RS. AND ORS.**

..... Appellant

. Vrs.

**PREMLATA DEI @ PANI & ORS.**

..... Respondents

**CODE OF CIVIL PROCEDURE, 1908 – Order 41 Rule 27 – Provisions under – Prayer for adducing additional evidence in appeal – Dealy– Reasons – Attributing misconduct on the part of the counsel – Held, such ground cannot be accepted for admitting additional evidence – Four years after filing of appeal an application for additional evidence was filed – Effect of – Held, the provisions under order 41 Rule 27 are not intended to patch up lacuna.** (Para-12)

**Case Laws Relied on and Referred to :-**

1. (2001) 7 SCC 503 N.Kamalam (Dead) and another v. Ayyasamy & Anr.
2. AIR 1963 SC 1526 : In K.Venkataramiah v. A.Seetharma Reddy & Ors.

For Appellants : Mr.Sanjeev Udgata , Mr.Satyabrata Udgata

For Respondents : Mr.J.R.Dash,

---

Date of Hearing :21.3.2018      Date of Judgment:30.3.2018

**JUDGMENT**

***DR.A.K.RATH, J.***

This is a defendants’ appeal against confirming judgment.

2. Plaintiffs-respondents 1 and 2 instituted the suit for declaration of title, confirmation of possession or in the alternative recovery of possession, in the event they are dispossessed during pendency of the suit and permanent injunction. The case of the plaintiffs was that one Chaina Jena wife of

Chintamani Jena was the absolute owner of the suit land. She died leaving behind her daughters, Chandri and Dukhi. After death of the parents, the daughters succeeded to the suit property. Chandri and Dukhi were in possession of the suit property. Chandri died issueless in the year 1982. Thereafter, Dukhi became the absolute owner. Dukhi died in the year 1989. After her death, her sons and daughter, plaintiffs 1 and 2 and defendants 4 and 5 succeeded to the property. On 6.3.1991 defendants 1 to 3 claimed that Chandri had gifted Schedule-B property to them. Chandri became feeble and weak because of her old age. Before her death, she was in coma. Chandri had not executed any gift deed at any point of time. The alleged gift deeds are inoperative and void. The suit property had not been partitioned between Chandri and Dukhi. With this factual scenario, they instituted the suit seeking the reliefs mentioned supra.

3. Defendants 1 to 3 filed written statement denying the assertions made in the plaint. According to them, plaintiffs 1 and 2 and proforma defendants 4 and 5 are not the daughters of Dukhi. It was pleaded that the suit property described in Lot no.1 of Schedule- A was the self-acquired property of Chandri. Lot nos.2 & 3 were selfacquired properties of Chintamani. After death of Chintamani, both Chandri and Dukhi became owners of Lot nos.2 & 3 of Schedule-A property. After death of Dukhi, Chandri became the owner of the properties. On 5.8.1982, Chandri executed a registered gift deed in respect of Lot nos.1 & 2 of Schedule-A property in favour of defendant no.1. She had also executed a gift deed of plot no.1548 in favour of defendant no.2 and delivered possession. It was further pleaded that plaintiff no.1 was the maid servant of Chandri and Dukhi. She was residing in their house. The plaintiffs as well as proforma defendants had no semblance of right, title and interest over the suit property.

4. Stemming on the pleadings of the parties, learned trial court framed five issues. Parties led evidence, oral and documentary, to substantiate their case. Learned trial court came to hold that the gift deed nos. 443/82 and 444/82 are inoperative and void. The plaintiffs and proforma defendants 4 and 5 have right, title, interest and possession over the suit land. The defendants 1 to 3 have no right, title, interest and possession over the suit property. Defendants 1 to 3 are trespassers over Schedule-B property. Held so, it decreed the suit. The unsuccessful defendants appealed before the learned District Judge, Sambalpur, which was subsequently transferred to the court of the learned Additional District Judge, Samablpur and renumbered as Title Appeal No.46/2 of 93-97. During pendency of the appeal, an application

under Order 41 Rule 27 CPC was filed to admit the certified copy of the gift deed no.444 of 1982 as evidence. It was stated that an advocate was engaged by the defendants. During trial, he was gained over by the plaintiffs. He had not filed any application to declare D.W.3 hostile and cross-examine him. The said advocate acted against the interest of the defendants. He had not advised the defendants to examine the attesting witness and scribe of the gift deeds. The same amounts to professional misconduct. The learned appellate court came to hold that appeal was filed in the year 1993. The application for additional evidence was filed four years after filing of the appeal. The Court is not competent to decide the question of misconduct of the counsel. There was no justifiable ground to admit the document as additional evidence. The application had been filed to patch up lacuna. Thereafter, it scanned the evidence on record, pleadings, concurred with the findings of the learned trial court and dismissed the appeal. It is apt to state here that during pendency of this appeal, appellants 1 & 3 died, whereafter their legal heirs have been substituted.

5. The Second Appeal was admitted on the following substantial questions of law :

“i) Whether the appellate court can allow additional evidence to pronounce judgment or for any other substantial cause ?

ii) Whether the appellate court is correct in rejecting the application under Order 41 Rule 27 of the Code of Civil Procedure Code without any reason while the appellants have suffered due to the laches on the part of their counsel ?”

6. Heard Mr.Sanjeev Udgata, learned Advocate along with Mr.Satyabrata Udgata, learned Advocate for the appellants and Mr.J.R.Dash, learned Advocate for the respondents.

7. Mr.Udgata, learned Advocate for the appellants submitted that the advocate of defendants had not conducted the suit properly. D.W.3 was hostile, but then he had not filed the application to declare the witness hostile. The registered gift deed is a relevant document and can be admitted as additional evidence. The appellate court is within its jurisdiction to entertain the material documents sought to be taken as additional evidence. The appellate court can allow the evidence to pronounce the judgment or any other substantial cause. For the laches of the lawyer, the party should not suffer. He placed reliance on the decisions of the apex Court in Union of India v. K.V.Lakshman and others, AIR 2016 SC 3139 and this Court in Sankar Pradhan v. Premananda Pradhan (dead) and others, 2016(I) ILR-CUT-1151.

8. Per contra, Mr. Dash, learned Advocate for the respondents submitted that the defendants have made unnecessary allegations against their counsel. No petition was filed in the trial court to disengage him. Rather the counsel conducted the case on their behalf. Three numbers of witnesses including the attesting witness had been examined by defendants 1 and 2. D.W.3 did not support the case of defendants 1 and 2. Further eleven documents including gift deed no.443/82 had been exhibited. After lapse of four years in filing of the appeal, application for additional evidence was filed to patch up lacuna. Provisions of Order 41, Rule 27 C.P.C. are not designed to help parties to patch up weak points. He relied on a decision of the apex Court in the case of N.Kamalam (Dead) and another v. Ayyasamy and another, (2001) 7 SCC 503.

9. In *K.Venkataramiah v. A.Seetharma Reddy and others*, AIR 1963 SC 1526, Order 41, Rule 27 C.P.C. was the subject-matter of interpretation before the apex Court. The Constitution Bench of the apex Court held that section 107 of the Code of Civil Procedure empowers the appellate court "to take additional evidence or to require such evidence to be taken," "subject to such conditions and limitations as may be prescribed." Rule 27 of Or. 41 of the Code of Civil Procedure prescribe the conditions and limitations in the matter. The rule first lays down that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. It then proceeds to lay down two classes of cases where the appellate court may allow additional evidence to be produced. One class is where the Court appealed from has refused to admit evidence which ought to have been admitted. The other class is where the appellate court requires such additional evidence for itself-either to enable it to pronounce judgment or for any other substantial cause. The second class of the rule requires that when additional evidence is allowed to be produced by an appellate court the court shall record the reason for its admission. It was further held that the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause." There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence "to enable it to pronounce judgment," it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence "for any other substantial cause" under R.27 (1) (b) of the Code.

10. Another Constitution Bench of the apex Court in the case of *Municipal Corporation of Greater Bombay v. Lala Pancham and others*, AIR 1965 SC 1008 held that under Rule 27, the High Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. The provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. The power under clause (b) of sub-rule (1) of Rule 27 cannot be exercised for adding to the evidence already on record except upon one of the ground specified in the provision. If the documents on record are relevant on the issue, the court could well proceed to consider them and decide the issue. It further held that the appellate cannot order a fresh trial. Such a course is not permissible under Order 41, Rule 27 C.P.C., when it has not proceeded under Order 41 Rule 25 or remanded the case under Order 41 Rule 23.

11. In *N.Kamalam (dead) (supra)*, the apex Court held that the provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal-it does not authorize any lacunae or gaps in evidence to be filled up.

12. Reverting to the facts of the case and keeping in view the enunciation of law laid down by the apex Court in the decisions cited supra, this Court finds that three witnesses had been examined on behalf of defendants 1 and 2. The gift deed no.443 of 1982 was not proved. There is no material on record that gift deed no.444 of 1982 was handed over to the counsel for the defendants. Attributing misconduct on the part of the counsel per se is not a ground to admit the additional evidence. Four years after filing of the appeal, an application for additional evidence was filed. The provisions contained in Order 41 Rule 27 C.P.C. are not intended to patch up lacuna. The substantial questions of law are accordingly.

13. *K.V.Lakshman (supra)* and *Sankar Pradhan (supra)* are distinguishable on facts. In *K.V.Lakshman (supra)*, an application for additional evidence was filed. The same was not opposed by the respondents. Since the application contained necessary averment as to why additional evidence was necessary to decide real controversy involved in appeal, the

apex Court allowed the same. In Sankar Pradhan (supra), this Court placed reliance on the oft quoted decision of the Privy Council in the case of Persotim Thakur v. Lal Mohar Thakur and others, AIR 1931 P.C.143 and held that the legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but “when on examining the evidence as it stands some inherent lacuna or defect becomes apparent”.

14. A priori, the appeal fails and is dismissed. No costs.

Appeal dismissed.

**2018 (I) ILR - CUT-548**

**B. RATH, J.**

CMP NO. 1943 OF 2016

**JAGABANDHU PARIDA**

..... Petitioner

.Vrs.

**SUKUTI PARIDA AND ANR.**

..... Opp. Parties

**CODE OF CIVIL PROCEDURE, 1908 – Order 23 Rule 1 – Withdrawal of suit allowed by Trial Court after death of defendant No.1 – Legal heir of D-1 challenges the order permitting withdrawal of the suit to be illegal on the ground that after death of D-1, the suit abated – Pleadings in the plaint confirms there is claim of relief against D-2 who is alive – Held, suit has not been abated, order permitting withdrawal cannot be interfered with.** (Para-5)

**Case Laws Relied on and Referred to :-**

1. 56(1983)C.L.T.503 : Sri Sri Shyam Ray alias Shyamsundar jew Thakur  
-V- Haramani Dei (dead) & after her, Jinet Samal & Ors.
2. 2017 (II) OLR : Tirtha Bararty and 9 Ors. -V- Dingar Kanda and 7 Ors.

For Petitioner : M/s. S.S. Das, S.R. Sahoo

For Opp. Party : M/s. A.K. Rout, B.K. Nanda

---

Date of hearing : 7.02.2018      Date of Judgment : 7.02.2018

**JUDGMENT**

***BISWANATH RATH, J.***

This civil miscellaneous petition involves a challenge to the order vide Annexure-3 passed by the learned Civil Judge (Senior Division), Bhadrak in Civil Suit No.146/2014-I thereby allowing withdrawal of the suit at the instance of the plaintiff.

2. Short background involved in this case is that the petitioner claiming to be one of the legal heir of the defendant no.1 in the court below submitted that the defendant no.1 died on 27.6.2014 and during pendency of the application for substitution in respect of the defendant no.1 at the instance of the plaintiff, the application under Order 23 Rule 1 of C.P.C. was finalized. As the suit has already been abated, there was no scope for the trial court to entertain the application under Order 23 Rule 1 of C.P.C.

3. Referring to the pleadings in the plaint and the claim involved therein, Shri Dash, learned counsel for the petitioner submitted that the legal heirs of the defendant no.1 since are necessary and proper party, the suit should not have been permitted to be withdrawn in absence of substitution.

Also referring to a decision of this Court, in the case of *Sri Sri Shyam Ray alias Shyamsundar jew Thakur versus Haramani Dei (dead) and after her, Jinet Samal & others* as reported in **56(1983)C.L.T.503** learned counsel for the petitioner contended that for the ratio decided therein, the decision has direct application to the case of the petitioner. Similarly, referring to another decision in the case of *Tirtha Bararty and 9 others versus Dingar Kanda and 7 others* as reported in **2017 (II) OLR-242** further submitted that in absence of substitution of the defendant no.1 in the case at hand following the principle laid down in the above reported case, the suit had already got abated leaving any scope for considering the application under Order 23 Rule 1 of C.P.C. It is under these premises, learned counsel for the petitioner submitted that the impugned order becomes bad and needs to be interfered with and set aside.

4. Shri Rout, learned counsel for the contesting opposite party nos.1 to 2 taking this Court to the pleadings involving the plaint and the prayers made therein submitted that the suit being directed for a decree only as against the defendant no.2, death of defendant no.1 becomes immaterial and therefore, learned counsel for the opposite parties contended that there is no infirmity in passing the impugned order as the suit was very much existing on the date of disposal of the application under Order 23 Rule 1 of C.P.C. Further answering to the claim of the learned counsel for the petitioner based on two judgments, it is contended that none of the decision has any application to the case at hand.

5. Considering the rival contentions of the parties and on perusal of the copy of the plaint involving C.S. No.146I of 2014 this Court finds, not only the pleadings involved therein relates to a claim only involving the defendant

no.2 but there is also specific prayer in the suit seeking a declaration to the effect that the registered sale deed no.10271300208 dated 22.1.2013 in the name of defendant no.2 as void and illegal. It is for the specific pleading and for the specific prayer in the suit, this Court declines to entertain the claim of the petitioner that the suit got abated for the non-substitution of the defendant no.1.

6. Now coming to scan the decision relied on by the learned counsel for the petitioner. Scan of the decision reported vide 56(1983)C.L.T.503 this Court finds, the fact involved therein involving death of a necessary party. Under the observation that the relief claimed in the suit since has a bearing involving the defendant no.2 and without substitution of defendant no.1 the suit got abated, this Court considering the fact involved in the case at hand, finds, there was no relief sought for as against the defendant no.1 and the suit was involving the claim pertaining to the defendant no.2 only. As a consequence, this Court observes, this decision rather helps the case of the opposite parties.

Similarly, considering the other decision vide 2017(II)OLR-242, for the observation of this Court made hereinabove that the suit was surviving for the relief involved therein on the date of consideration of the application under Order 23 Rule 1 of C.P.C., this decision has no application to the case of the petitioner.

7. Perused the impugned order. For the recordings and the observations of this Court made hereinabove as well as for the support of the decision as reported in 56(1983) C.L.T.503 to the case of the opposite parties, this Court finds, there is no infirmity in the impugned order. Accordingly, the Civil Miscellaneous Petition stands dismissed. No cost.

CMP dismissed.

**2018 (I) ILR - CUT-550**

**B. RATH, J.**

CMP NO. 188 OF 2018

**BHAGYADHAR DASH** ..... Petitioner

.Vrs.

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

**CODE OF CIVIL PROCEDURE, 1908 – Section 149 – Payment of deficit Court fee – Application by petitioner to permit him to pay the court fee**

**in installment – Rejected by Trial Court – Considering the provision High Court directed payment of 50% within seven days & balance before settlement of issues.**  
(Para – 6 & 7)

For petitioners : M/s. Nilakantha Jujharsingh

For Opposite Parties :

---

Date of Order : 12.02.2018

**ORDER**

***BISWANATH RATH, J.***

Heard Shri Nilakantha Jujharsingh, learned counsel appearing for the petitioner and Shri K.K. Mishra, learned counsel appearing for the opposite parties-State.

2. This matter involves rejection of an application under Section 149 of the Code of Civil Procedure, thereby rejecting the request of the plaintiff-petitioner to allow him some installments in making payment of the Court fees for the plaint purpose.

3. There is no dispute by the plaintiff-petitioner in the matter of payment of Court fees, but for the heavy amount involved therein, the plaintiff-petitioner seeks relief of installments in the matter of payment of Court-fees.

4. Under the above circumstance and taking this Court to the observations made by the trial Court, Shri Jujharsingh, learned counsel appearing for the petitioner making reference to the power of the Court under Section 149 of C.P.C., contended that the Court has ample power to grant installments and/or directs the parties to have a part payment in the proceeding of the suit.

5. Shri K.K. Mishra, learned counsel appearing for the opposite parties-State referring to the provisions under Section 149 of C.P.C., submitted that unless the half of the Court fees is paid, the suit may not be allowed to proceed or at least the Court fees should be cleared by the time of settling the Issues.

6. Considering the rival contentions of the parties, this Court finds, the provision at Section 149 of C.P.C. reads as follows :-

“149. **Power to make up deficiency of Court-fees.**- Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to Court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such Court-fee; and upon such payment the document, in

respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.”

7. Reading of the above provision abundantly makes it clear that a suit can even be filed with payment of part Court-fees and further for the clear provision empowering the Court taking up suit proceedings to have the power of direction to the plaintiff to make part payment of the Court-fees, this Court finds, there is no proper consideration of the issue involved by the trial Court. This Court recording the submission of Shri Jujharsingh, learned counsel appearing for the petitioner that the plaintiff-petitioner is ready to clear the entire Court-fees before settlement of the Issues and further the provisions contained in Section 149 of C.P.C., holds the impugned order since passed in non-consideration of the provisions contained in Section 149 of C.P.C. As a consequence, interfering with the impugned order at Annexure-3 and while allowing the application under Section 149 of C.P.C. at the instance of the plaintiff-petitioner, this Court permits the plaintiff-petitioner to pay 50(fifty) percent of the Court-fees within a period of one week hence and the balance Court-fees will be paid before the settlement of Issues.

8. The Civil Miscellaneous Petition stands disposed with the aforesaid observation and direction.

CMP disposed.

**2018 (I) ILR - CUT-552**

**B. RATH, J.**

W.P. (C) NO. 9003 OF 2006

**MANTU KUMAR MAHANTA**

..... Petitioner

. Vrs.

**DIRECTOR, GENERAL, C.R.P.F.,  
O.G.O. COMPLEX, LODHI ROAD & ORS.**

..... Opp. Parties

**CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging order of dismissal from service – Petitioner a CRPF constable serving in border area – Leave for 15 days – Over stayed for about four months – In spite of submission of Medical Certificates from Govt. Medical that he was suffering from jaundice, authority dismissed him from service – Held, the authority could not have disbelieved the Medical certificates issued by a Govt. medical unless proved by contrary evidence – Order of dismissal shockingly disproportionate to the gravity of offence involved and does not commensurate with the gravity of charge – Order set aside – Matter remanded for imposing lesser penalty.**

(Para- 8 & 9)

**Case Laws Relied on and Referred to :-**

1. (2002) 7 Supreme Court Cases 168 : Regional Manager & Disciplinary Authority, State Bank of India, Hyderabad and another v. S. Mohammed Gaffar.
2. 1994 (2) SCC 537 : State Bank of India and Ors. v. Samarendra Kishore Endow and Anr,

For petitioner : Miss Arundhoti Sahoo

For Opp.parties : Miss Vijay Laxmi Tripathy

---

Date of hearing : 07.02.2018

Date of Judgment : 20.02.2018

**JUDGMENT*****BISWANATH RATH, J.***

This is a writ petition wherein the petitioner challenges the orders vide Annexure-1 involving a Memorandum of Charge, the Annexure-2, an order dismissing the petitioner from service by the Disciplinary Authority in disposal of a Departmental Enquiry and further seeking consequential directions contained therein.

2. Short background involved in this case is that the petitioner while serving as Constable in the border area, Manipur, availed leave for fifteen days on account of illness of his mother. Following the leave order the petitioner was to rejoin his duty on 30.08.1997. The petitioner states that unfortunately he suffered from Jaundice and viral fever, for which he was bedridden for a long period and it is only after his recovery from illness he reported back to opposite party no.3 on 11.12.1997. It is on the premises of petitioner availing unauthorized leave thereby committing breach of service conditions, a Charge memorandum was served on the petitioner along with the communication of the imputation involving the petitioner vide Annexure-1. Consequent upon the dissatisfaction on the show-cause involving the petitioner, a Disciplinary Proceeding was initiated. It is contended in the Disciplinary Proceeding that in course of enquiry the petitioner filed medical certificates issued by the Government Hospital to show that he was suffering from jaundice and viral fever and was advised by the treating doctor to take bed rest for a particular period. Prosecution examined two witnesses to prove the charges. In spite of petitioner's filing medical documents to satisfy the absence and evidence of P.W.1 that during the entire service career petitioner was not only sincere but also had never overstayed and P.W.2 stating that the petitioner was sincere in his duties, the Enquiry Officer being not satisfied with the case of the petitioner submitted report to the Disciplinary Authority suggesting that the petitioner remained absent from duty deliberately and

without any authority. It is alleged, based on the submission of the Enquiry report the Disciplinary Authority mechanically accepted the report of the Enquiry Officer, holding that the charges levelled against the petitioner have been proved, imposed punishment of dismissal of the petitioner from service as appearing in Annexure-2.

**3.** Assailing the impugned order, Miss Arundhoti Sahoo, learned counsel appearing for the petitioner submitted that finding of the Enquiry Officer and the Disciplinary Authority that the petitioner has managed to obtain medical certificates is contrary to the disclosures in the medical certificate and for the medical certificates being issued by the competent persons of a Hospital none else than the District Headquarters Hospital, there was no question of discarding such materials by the Enquiry Officer or the Disciplinary Authority. Further, on the allegation against the petitioner for violation of the Rules and procedures meant for an employee of such establishment, Miss Sahoo, learned counsel appearing for the petitioner submitted that the unauthorized absence of the petitioner being bonafide and on account of serious illness of the petitioner and for his confining to bed for his suffering from “viral hepatitis” making the petitioner impossible to send any intimation to the Disciplinary Authority has not been properly visualized by the Disciplinary Authority. It is under the pretext that the petitioner has reported back to the Appointing Authority immediately after recovery from his illness, Miss Sahoo, learned counsel appearing for the petitioner claimed that the absence ought to have been treated as bonafide and not intentional. Further, taking this Court to the quantum of punishment imposed involving the petitioner on the ground of unauthorized absence, Miss Sahoo, learned counsel for the petitioner contended that the punishment of dismissal imposed against the petitioner also remained disproportionate looking to the gravity of offence. It is under the circumstance, Miss Sahoo, learned counsel appearing for the petitioner requested this Court for interfering in the impugned order and setting aside the same and further passing appropriate direction in the matter of reinstatement of the petitioner.

**4.** In her opposition, Miss Vijay Laxmi Tripathy, learned counsel appearing for the CRPF establishment, the contesting opposite parties while admitting that the petitioner proceeded on fifteen days Casual Leave with effect from 08.08.1997 to 29.08.1997, contended that looking to the period of leave granted in favour of the petitioner the petitioner was supposed to join his duty on 30.08.1997. It is also alleged that in spite of communication of the Officer Commandant-B/26 BN CRPF on 12.09.1997 in the home address

directing the petitioner to rejoin the duty forthwith to avoid a Disciplinary Proceeding, neither the petitioner sent any information nor the petitioner reported for duty. It is under the compelling situation, a complaint was lodged by the Officer commanding in the Court of the Chief Judicial Magistrate-cum-Commandant-26<sup>th</sup> BN CRPF, ultimately the petitioner reported at his place of posting on 11.12.1997. The Chief Judicial Magistrate released the petitioner on bail for the petitioner's involving in unauthorized absence. The petitioner was dealt departmentally following the procedures involving the conditions of service. Departmental proceeding ended with a dissatisfactory note for the petitioner's unable to satisfy his case and for the reasons borne therein, Miss Tripathy, learned counsel appearing for the contesting opposite parties submitted that there is no infirmity in the impugned order. Further, on the medical certificate produced by the petitioner, Miss Tripathy, learned counsel referring to the materials available on record, submitted that on examination of medical certificates, the Department found the medical certificates remained silent about the admission of the petitioner in the Hospital or the petitioner undertaking treatment as an OPD patient. Further, even though the petitioner claimed that he was suffering from jaundice (viral Hepatitis), but the medical certificate establishes that the petitioner was suffering from viral fever. Besides, there has been two medical certificates twice declaring the fitness of the petitioner to join his duty. Miss Tripathy, learned counsel, therefore, contended that though the petitioner became fit to resume duty on 29.10.1997 and for reasons best known, the petitioner arranged another medical certificate showing himself to be fit to join duty after 06.12.1997. It is under the above circumstance, Miss Tripathy, learned counsel appearing for the contesting opposite parties submitted that there is absolutely no infirmity either in the enquiry or in the Disciplinary proceeding requiring interference in the same by this Court.

5. Considering the rival contentions of the parties, this Court finds, admittedly, the petitioner was granted fifteen days C.L. with effect from 08.08.1997 on the ground of his mother's illness. There is also no dispute that the petitioner had availed unauthorized absence and the petitioner to substantiate his case, filed two medical certificates attempting to establish his case that his absence is a bonafide one. In the absence of any allegation of infirmity in the Disciplinary proceeding, this Court at this stage is required to only assess as to if the petitioner had a bonafide reason for unauthorized absence ? and whether the imposition of penalty of dismissal from service is justified for the gravity of offence involved ? Looking to the allegation of

unauthorized absence involving the petitioner, the petitioner had faced the following charges :-

“That No.913141924 CT Montu Kumar Mahanta of B/26<sup>th</sup> BN CRPF while functioning as CT/GD has committed misconduct and disobedience of orders in his capacity as a member of the Force punishable under Section 11(1) of the CRPF Act, 1949 read with Rule 27 of the CRPF Rules, 1955 in that he was sanctioned 15 days Casual leave w.e.f. 8.8.97 to 29.8.97 with permission to avail prefix / suffix / interfix etc. He has due to report for duty on 30.8.97 (FN) but did not report on due date and also failed to send any communication seeking extension of leave. He remained OSL without any authority of sanction. He has also been directed by the officer Commanding 8/26<sup>th</sup> Bn CRPF to report for duty immediately vide letter No.L.II-1/97-8/26 dt. 12.9.97 but despite clear direction he neither reported for duty nor sent any communication for extension of leave. He reported at his own on 9.12.97 (FN) at T.C. Jammu after 101 days OSL which does not appear genuine and justified. The act of individual is prejudicial to good order of the force.”

Attending the charges framed against the petitioner, it appears, the petitioner produced two medical certificates in his support establishing a case that for his suffering from jaundice and viral fever in the first spell from 20.08.1997 to 20.10.1997 and in the second spell from 30.10.1997 to 06.12.1997 being granted by the District Medical Hospital, Baripada. Finding that there is no communication by the petitioner to the employer regarding his illness this Court now proceed to decide whether the medical certificates produced by the petitioner comes to the rescue of the petitioner ?

**6.** Perusal of one of the medical certificates filed as Annexure-4, this Court reading of the same finds, the medical certificate was issued by a person none else than a doctor in the General Medicine stream of the District Headquarters Hospital, Baripada giving a fitness certificate in favour of the petitioner on 29.10.1997 certifying that petitioner – Sri Montu Kumar Mahanta, Constable CRPF was suffering from “viral hepatitis” and was under his treatment with advice of complete rest from 20.08.1997 till 28.10.1997. Looking to the competency of the Officer granting a fitness certificate and from the nature of suffering of the petitioner indicated therein, this Court finds, there was no doubt in believing any such medical certificate. If the Department was of any other view then the Department should have brought material to prove the contrary. For the issuance of a fitness certificate by a doctor of a Government Hospital and for the suffering of the petitioner from “viral hepatitis”, this Court finds, the second spell of illness of the petitioner could be a possibility. Here also, this Court finds from the discussion in the impugned order at Annexure-2 as well as in the counter affidavit, there is no denial that the subsequent certificate was also issued by a doctor of the

Government hospital. This Court, therefore, observes, once the petitioner had filed the medical certificate obtained from a Government Hospital, for the position of the doctor the disease involved therein and the Government Hospital involved therein, it becomes necessary for the Department to establish this case by proving material to establish the contrary. For there being no material to establish the contrary, this Court finds, there is no reason in disbelieving the medical certificate and thus answer the Issue No.(ii) framed herein in favour of the petitioner and hold that the petitioner had sufficient materials to establish that he had a reason for unauthorized absence as the absence was bonafide and under compelling reason.

7. Now, coming to decide on the other issue indicated herein, this Court finds, as an employee in a discipline service, it was incumbent on the part of the petitioner to at least have a communication to the establishment for his absence. Admittedly, there is no communication from the side of the petitioner on his illness to his employer till he reported back before the employer on 11.12.1997. Be that as it may and taking into account that there is admitted unauthorized absence by the petitioner, but taking into account the reason of unauthorized absence being a medical ground and considering that the petitioner was suffering from “viral hepatitis” being not a simple disease, there is every possibility that a person was not in a position to move such a distance to join his duty before getting completely cured. Further, from the medical certificates, this Court also finds, the petitioner on both the occasions has been directed to take bed rest. Considering from the humanitarian point of view and as this Court finds, the petitioner did not involve in any offence involving moral turpitude or a serious offence for merely committing an offence of unauthorized absence, this Court finds, the punishment of dismissal awarded involving the petitioner becomes disproportionate to the gravity of offence involved herein.

8. In the case of *Regional Manager & Disciplinary Authority, State Bank of India, Hyderabad and another v. S. Mohammed Gaffar*, (2002) 7 Supreme Court Cases 168, their Lordships of Hon’ble Apex Court mandated that the only scope for interfering in the punishment arises only when the penalty is either impermissible or shocking to the conscience of the High Court, in such event also the High Court has to direct the disciplinary authority to impose punishment of its choice instead of itself imposing or substituting the punishment. Similarly, in the case of *State Bank of India and Ors. v. Samarendra Kishore Endow and Anr*, 1994 (2) SCC 537, their Lordships of the Hon’ble Apex Court held that in the circumstances wherein

the punishment of removal imposed upon the delinquent employee is harsh but it is then for the consideration of the disciplinary authority and not by the High Court or the Tribunals. In another case, in the case of *State of U.P. & Others v. Ashok Kumar Singh & Anr.*, 1996 AIR 736 involving removal of a police constable after entering into a disciplinary proceeding, the Hon'ble Apex Court also interfered in the impugned order of punishment disproportionate with the quantum of offence. In the case of *Union of India & Others v. Ghulam Mohd.Bhat* (2005) 13 SCC 228, the Hon'ble Apex Court held the order of removal from service passed against the respondent, who was a constable in CRPF on ground that he had overstayed his leave by 315 days was confirmed, but then the Hon'ble Supreme Court held that the misconduct alleged called for a minor punishment and not a punishment of removal from service.

9. Now considering the case at hand, the only charge against the petitioner involved herein is long absence from service after the expiry of leave period, further not involving any charge of misconduct of grave nature inviting extreme penalty of dismissal, this Court observes the punishment imposed herein is shockingly disproportionate to the gravity of offence involved herein and does not commensurate with the gravity of charge, further taking into consideration that the petitioner has taken the plea of illness and for filing of medical certificates to support such claim, the writ petition deserves to succeed on this point. But, for this Court having no power to convert or modify the order of punishment while setting aside the impugned order at Annexure-2 so far it relates to imposition of punishment, directs the disciplinary authority to impose any minor punishment against the petitioner. Back wages involving the petitioner shall remain dependent on the imposition of lesser punishment by the disciplinary authority.

10. The writ petition succeeds to the extent indicated hereinabove. No cost.

Petition allowed.

**2018 (I) ILR - CUT- 558**

**BISWANATH RATH, J.**

C.M.P. 88 OF 2018

**M/S. KONARK INFRA SOLUTION PVT. LTD.**

.....Petitioner

*Vrs.*

**SANJUKTA DAS & ORS.**

.....Opp. Parties

**CONSTITUTION OF INDIA, 1950 – Articles – 227– Writ petition/C.M.P. arising out of Civil Proceeding – Suit for declaration – IA filed for injunction under Order 39, Rule 1 & 2 – Disposed of by Trial Court – Appeal against the order passed in IA of suit – IA filed before the appellate Court – IA disposed of with direction to maintain status quo – CMP challenging the order disposing the IA filed in appeal, whether maintainable – Held, yes.** (Para 15)

**Case Laws Relied on and Referred to :-**

1. AIR 1975 Madras 3 : C. Kalahasti, Appellant -V- P.C. Munuswami Chetti.
2. AIR 1976 Madras 63: Ramaswamy Reddiar and others, Appellants versus Chinna Sithammal and others.
3. AIR 1978 GOA, Daman & Diu 31: Domlu Guno Gaudo and others, Appellants -V- Smt. Yeshadabai Ganesh Naik and another, Respondents.
4. AIR 1982 Andhra Pradesh 284 : K. Gangulappa Naidu and others, Petitioners -V- K. Gangi Naidu.
5. 2014 (I) OLR 921 : Madhusudan Hota –V- Ratnakar Hota
6. AIR 1975 Madras 3 : C. kalahasti, Appellant versus P.C. Munuswami Chetti.
7. AIR 1976 Madras 63 : Ramaswamy Reddiar and others, Appellants -V- Chinna Sithammal and others
8. AIR 1978 GOA, Daman & Diu 31: Domlu Guno Gaudo and others, -V- Smt. Yeshadabai Ganesh Naik & another

For Petitioner : M/s. M.K. Pati, A.R. Dash,  
R. Mohapatra

For Opp. Parties : M/s. B.S. Panigrahi, D.K. Rout

Date of hearing :9.2.2018

Date of Judgment : 21.02.2018

**JUDGMENT**

***BISWANATH RATH, J.***

This civil miscellaneous petition involves a challenge to the order passed by the learned District Judge in I.A. No.1 of 2017 arising out of F.A.O. No.18 of 2017 involving allowing an application under Order 39 Rule(s) 1 & 2 read with Section 151 of C.P.C. arising out of the F.A.O. No.18 of 2017.

2. For the nature of the order involved herein, looking to the fact scenario involved herein and even though there is no stamp reporting but while hearing the matter on admission a doubt is raised on the maintainability of the Civil Miscellaneous Petition. For which, this Court first takes up the maintainability of the present proceeding hearing the counsels appearing for the respective sides. It be taken note here that there is already appearance of the opposite parties by way of caveat.

3. Admitted fact involved in the civil miscellaneous petition is that the opposite party no.1 herein as the plaintiff, instituted a suit in the court of the Civil Judge (Sr. Divn.), Bhubaneswar registered as C.S. No.2128 of 2016 impleading the present petitioner as defendant no.4 and the rest of the opposite parties as defendants. The suit was for declaration as well as permanent injunction along with other consequential reliefs.

Leaving apart the factual background, as the same is unnecessary for deciding the question of maintainability, this Court takes into consideration the relevant factual aspect, which is necessary for consideration of the issue that “for the order involving the application under Order 39 Rule(s) 1 & 2 of C.P.C. in the pending appeal before the learned District Judge, Khurda, is the Civil Miscellaneous Petition involving such order under Article 227 of the Constitution of India maintainable or not?”

4. For the above, this Court proceeds as hereunder:

In the suit at the instance of the opposite party no.1-the plaintiff therein, an application under Order 39 Rule(s) 1 & 2 of the C.P.C. was filed seeking a direction for injunction against the opposite parties involved therein from changing the nature and character of the suit land and further, not alienating the suit land till disposal of the suit. This application was registered as I.A. No.1/2016 and got disposed of with participation of all contesting parties. By order dated 23.11.2016 the trial court finally directed the defendant no.1 i.e. the present petitioner, for not claiming any equity over the suit land in the event, the plaintiff succeeds in the suit. Being aggrieved by the order involving I.A. No.1/2016, the plaintiff i.e. the opposite party no.1 filed the F.A.O. No.18 of 2017 before the learned District Judge, Khurda. In addition to the appeal, the plaintiff opposite party no.1 also filed an application under Order 39 Rule(s) 1 & 2 of the C.P.C. seeking interim injunction till disposal of the appeal, being registered as I.A. No.1/2017. Learned District Judge hearing the application under Order 39 Rule (s) 1 & 2 involving both the contestants disposed of the I.A. No.1/2017 directing both the parties to maintain status quo till disposal of the appeal, thereby also fixing the date of hearing of the appeal to 20.11.2017.

This Civil Miscellaneous Petition is directed against the order passed by the learned District Judge in I.A. No.1/2017 involving an application under Order 39 Rule(s) 1 & 2 of the C.P.C. arising out of the F.A.O. No.18 of 2017.

5. Answering to the doubt raised by this Court on the maintainability of the Civil Miscellaneous Petition under the peculiar circumstance, Shri A.R. Dash, learned counsel for the petitioner taking this Court to the provisions contained in Order 43 Rule 1-R as well as Section 104 of the C.P.C. and further, taking the plea that the impugned order arises out of an appeal proceeding pending before the learned District Judge and following the restrictions in the Section 104 read with Order 43 Rule 1 (r), submitted that no further appeal is permissible in the eye of law, therefore, the civil miscellaneous petition under Article 227 of the Constitution of India is maintainable. Shri A.R. Das, learned counsel for the petitioner to justify his claim that the civil miscellaneous petition is maintainable, referring to the citations in the case of *C. Kalahasti, Appellant versus P.C. Munuswami Chetti, Respondent* as reported in AIR 1975 Madras 3, in the case of *Ramaswamy Reddiar and others, Appellants versus Chinna Sithammal and others, Respondents* as reported in AIR 1976 Madras 63, in the case of *Domlu Guno Gaudo and others, Appellants versus Smt. Yeshadabai Ganesh Naik and another, Respondents* as reported in AIR 1978 GOA, Daman & Diu 31, in the case of *K. Gangulappa Naidu and others, Petitioners versus K. Gangi Naidu, Respondent* as reported in AIR 1982 Andhra Pradesh 284, in the case of *Madhusudan Hota versus Ratnakar Hota* as reported in 2014 (I) OLR 921 and taking this Court to the ratio decided in the above cases contended that his contentions regarding maintainability of the civil miscellaneous petition get support from all the above decisions.

6. In his opposition, learned counsel for the opposite party while objecting the submission made by Shri A.R. Dash, taking this Court to the factual aspect involving the matter and the detail development taken place in the meantime, contended that for the interim application U/o 39 Rules 1 & 2 of C.P.C. taken up in the appeal, requiring an independent consideration in the original side of the Appellate authority, the order passed therein is appealable and this Civil Miscellaneous Petition is not maintainable.

7. Considering the submission of the learned counsel for the petitioner and on assessment of the provisions contained in the Code of Civil Procedure particularly at Section 104 as well as Order 43 of the Code of Civil Procedure, this Court finds, Section 104 provides the provision for appeals from the order.

Section 104 of the C.P.C. reads as follows:

“**Orders from which appeal lies-**(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force from no other orders:

[*Clause (a) to (f) omitted*]

[(ff) an order under section 35-A;]

[(ff-a) an order under section 91 or Section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92, as the case may be;]

(g) an order under Section 95;]

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules:

[Provided that no appeal shall lie against any order specified in Clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.]

(2) No appeal shall lie from any order passed in appeal under this section.”

**8.** Reading of the provision at Sub-section 2 of Section 104, this Court finds, there is a clear restriction that no appeal shall lie from any order passed in appeal under this section, which leaves no doubt that the proceeding disposed of or involved in the subsequent proceeding must be appealed under Section 104 and the order involved in the subsequent proceeding must be arising out of an appeal. Taking into consideration the factual background involving the case at hand that the appeal before the District Judge is an appeal under Section 104 of the C.P.C. read with Order 43 of the C.P.C. but the proceeding disposed of involves disposal of an application under Order 39 Rule (s) 1 & 2 of C.P.C., this Court here observes, the District Judge has exercised his appellate jurisdiction so far as the pending appeal is concerned i.e. the F.A.O. No.18 of 2017, whereas the order impugned herein is disposal of an application under Order 39 Rule(s) 1 & 2 of the C.P.C. involving I.A. No.1 of 2017 also comes under the Appellate Jurisdiction of the District Judge, pending disposal of the appeal in exercise of the appellate power of the same court. It is at this stage taking into consideration the citations cited by the learned counsel for the petitioner vide **AIR 1975 Madras 3** in the case of *C. kalahasti, Appellant versus P.C. Munuswami Chetti, Respondent* this Court finds, the fact involved therein was that the plaintiff therein filed a suit against the defendant for relief of injunction, simultaneously also filed a petition under Order 39 Rule 1& 2 of C.P.C. to restrain the defendant with specific relief claimed therein. The City Civil Court dismissed the I.A.

Against dismissal of the I.A. under Order 39 Rules 1 & 2, the plaintiff preferred C.M.A. No.36/73 where the petitioner again filed an application for interim order of temporary injunction till disposal of the appeal. The Sessions Additional City Civil Judge allowed the C.M.P. No.49 of 1973. Aggrieved by the order passed in C.M.P. defendants preferred C.M.A. before the Madras High Court. Taking into consideration the provisions contained in Section 104 read with Section 107 of the C.P.C., the Madras High Court in paragraph nos.8 to 12 of the said judgment observed as follows:

“8. I am however unable to agree with the contention of Mr. V. Shanmugham. Section 107(2), Civil P.C. certainly does not lend support to the interpretation given to it by the learned counsel. All that Section 107(2), Civil P.C. provides for is that subject to the several modes of disposal of an appeal, enumerated in sub-section (1), the appellate court shall have the same powers and shall perform, as nearly as may be, the same duties as are conferred and imposed by the Code on courts of original jurisdiction in respect of suits instituted therein. This provision will not alter the nature and character of an order passed by an appellate court under Order XXXIX, Rule 1, Civil P.C. or any other order of a like nature, into an order passed by a court of original jurisdiction from an order passed by a court of appellate jurisdiction. As a matter of fact, Section 107(2) does not have the effect of rendering an appellate court a court of original jurisdiction when exercising its powers to pass incidental orders. All that sub-s.(2) of S.107 states is that subject to the limitations contained in the Code, the powers of the appellate court shall be co-extensive with the powers and obligations conferred and imposed upon the courts of original jurisdiction in respect of suits filed before them. Apart from Section 107(2) not lending support to the interpretation given by Mr. V. Shanmugham, the other provisions in the Code, viz., Sections 104 and 105 and Order XLIII, Rule 1 also go to show that an interim order passed by an appellate court cannot be deemed to be an order passed by the said court in exercise of its original jurisdiction.

9. Before proceeding to consider the provisions of Section 104 and Order XLIII, Rule 1, Civil P.C., it is apposite to remember that, while under Section 96 of the Code, every decree is appealable save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, every order is not necessarily appealable and, as a matter of fact, no other order except those specified in Section 104(1) or exempted thereunder is appealable. Section 104, which is the relevant provision in the Code which makes provision for appeals from orders, provides inter alia that any order made under rules, from which an appeal is expressly allowed by rules, is appealable. Order XLIII, Rule 1, Civil P.C. which enumerates the orders from which an appeal can be preferred is referable to this provision in Section 104 and consequently, Order XLIII, Rule 1, Civil P.C. cannot confer greater rights than what is conferred by Section 104. As a matter of fact, Order XLIII, Rule 1, Civil P.C. itself reads as follows-“An appeal shall lie from the following orders under the provisions of Section 104.”(underlining mine). Inasmuch as reference is made to Section 104 in Order XLIII, Rule 1, Civil P.C. it

necessarily follows that Section 104 has to be considered in its entire conspectus to decide the question whether an order referred to in Order XLIII, Rule 1 is an appealable order when it has been passed by an appellate court. As Section 104(2) clearly lays down that no appeal would lie from any order passed in appeal, it necessarily follows that the right of appeal given against the orders enumerated in Order XLIII, Rule 1 will be subject to the stipulation contained in Section 104(2), Civil P.C. Moreover, Section 105 also makes it clear that unless otherwise expressly provided, no appeal shall lie from an order made by a Court in the exercise of its original or appellate jurisdiction. The use of the words 'original or appellate jurisdiction' in Section 105 makes it abundantly clear that the court can only exercise either original or appellate jurisdiction, but cannot exercise both at one and the same time. Therefore, the contention of Mr. Shanmugham that even though the order in C.M.P. 49 of 1973 was passed by an appellate court, the order must nevertheless be construed to be one passed by the said court in the exercise of its original jurisdiction, cannot be countenanced, and it is clearly an untenable contention. It is only by virtue of the powers vested in it as an appellate court that the Additional City Civil Court passed the order in C.M.P. 49 of 1973 and consequently, the order will squarely fall within that class of orders which are contemplated in Section 104(2), Civil P.C. and which are expressly prohibited from being canvassed in further appeal. The fact that the order was passed in an interlocutory application will not make the order any the less an order passed in appeal. (Underlining is of this Court)

**10.** Mr. O. Radhakrishnan, learned counsel for the respondent, brought to my notice a decision of the Kerala High Court in *Chellappan v. Varughese*, ILR (1963) Ker 432 = (AIR 1964 Ker 23), where an indetical question as the one raised in this appeal had arisen for consideration. The learned Judge of the Kerala High Court, who decided the case, has come to the same conclusion as the one reached by me and has held that the power given to an appellate court under Section 107 is only part of its appellate jurisdiction, that it cannot be characterized as an original jurisdiction in an appellate court, that incidental orders passed by an appellate court in interlocutory applications moved in an appeal before it are 'orders passed in an appeal' within the scope of Section 104(2), Civil P.C. and cannot, therefore, be appealed against. I am in respectful agreement with the view expressed therein.

**11.** From another angle also, the argument advanced by Mr. Shanmugham is not worthy of acceptance. Section 100, Civil P.C. sets out the grounds on which, a second appeal can be filed and Sec. 101, Civil P.C. lays down in unambiguous terms that no second appeal shall lie except on the grounds mentioned in Section 100 of the Code. It is thus seen that a litigant is not entitled to file a second appeal as of right or as a matter of course and he is granted the right of a second appeal only if he satisfies the conditions adumbrated in Section 100, Civil P.C. If Mr. Shanmugham's contention is to be accepted, it would then mean that orders passed by an appellate court in interlocutory applications are to be placed on a better footing than appellate decrees themselves, because an order passed by an appellate court will automatically attract a second appeal solely on the ground that the order appealed against was passed by the appellate court in exercise of its original jurisdiction. Surely, the Legislature would not have intended to confer the

advantage of a second appeal in respect of orders passed under the Code when even appeals from appellate decrees are required to satisfy the conditions laid down in Section 100, Civil P.C. The anomalous consequences that would ensue by the acceptance of the argument of the learned counsel for the appellant is yet another factor to be taken note of in deciding the question whether an order passed under Order XXXIX, Rule 1, Civil P.C. by an appellate court is entitled to be appealed against.

12. In view of the reasons given above, I am clearly of the opinion that the appeal is not maintainable and is clearly barred by Section 104(2), Civil P.C. The appeal should therefore fail on this technical ground as well.

9. Similarly in deciding a similar nature of issue in the case of **Ramaswamy Reddiar and others, Appellants versus Chinna Sithammal and others** as reported in **AIR 1976 Madras 63**, the Hon'ble Madras High Court in paragraph nos.3 & 4 observed as follows:

“3. Section 104(2) says that no appeal shall lie from any order passed in appeal under the said section. In order to attract sub-section (2), The appeal should be one falling under Section 104. If the appeal is one under Section 96, and not under Section 104, sub-section (2) of the latter section is not applicable. If Section 104(2) is construed otherwise, that is as applying to appeals coming under Section 96, also the position would be anomalous. Sub-clauses (t) and (u) of Rule 1 of Order XLIII provide for appeals against orders passed under one provision or other of Order XLI, which governs appeals coming under Section 96. The said two sub-clauses cannot possibly refer to any order by a trial court. While clause (t) relates to an order refusing to re-admit (or to re-hear) an appeal (as in the present case), Clause (u) relates to an order of remand made by an appellate court under Rule 23 of Order XLI. These two provisions would become meaningless if sub-section (2) of Section 104 is made to apply to appeals under Section 96. No one can suggest that no appeal lies against an order of remand made under Order XLI, Rule 23.

4. In the present case, the order of the court below is one under Order XLI, Rule 19 of the Code, made in appeals under Section 96. That order is certainly an appealable one, as per Order XLIII, Rule 1(t) of the Code, I am quite clear that sub-section (2) of Section 104 has no application to an order made in an appeal coming under Section 96.”

10. In this case, the Madras High Court considering a challenge to the appeal involving an order under Order 41 Rule 19 of the Code of Civil Procedure made in an appeal under Section 96 observed that the restriction under sub-section 2 of Section 104 has no application to an order made involving an application in an appeal under Section 96 of the Act. This decision has however, no application to the case at hand.

11. Coming to have a look to the citation vide **AIR 1978 GOA, Daman & Diu 31** in the case of **Domlu Guno Gaudo and others, Appellants versus**

*Smt. Yeshadabai Ganesh Naik and another, Respondents* this Court finds, the fact involved herein is in the suit for permanent injunction, an application for temporary injunction was filed. The interim application being rejected by the trial court the plaintiff went up in appeal to the District Court. In the pending appeal the plaintiff filed an application for temporary injunction. Temporary injunction being granted by the lower appellate court, a miscellaneous appeal was moved to the High Court. The High Court of Goa in deciding the question of maintainability of the appeal observed that order passed by an appellate court in interlocutory applications moved in pending appeal, are the orders passed in appeal within the scope of Section 104(2) of C.P.C.

12. Now coming to scan the judgment vide *AIR 1982 Andhra Pradesh 284* in the case of *K. Gangulappa Naidu and others, Petitioners versus K. Gangi Naidu, Respondent* this Court finds, the factual background involved therein was that in a suit for permanent injunction a petition for temporary injunction under Order 39 Rule(s) 1 & 2 of C.P.C. was filed. Interim injunction was granted after hearing both the parties. Appeal preferred by the defendants to the District Court was dismissed. Subsequently, the suit came up for trial was ultimately dismissed. The plaintiff carried a regular appeal to the District Court and in the regular appeal an application under Order 39 Rule (s) 1 & 2 of the C.P.C. for grant of injunction was again moved. The First appellate court granted the injunction. In deciding the question involved therein that whether an appeal lies against such order a revision is maintainable or not? the Andhra Pradesh High Court in paragraph nos.11 to 14 held as follows:

“11. In the instant case pending the appeal preferred against the disposal of the suit, an application under O.39, Rr.1 and 2 is filed and that application is disposed of for the first time by the appellate Court. This is not a case where against the orders under O. 39, Rr. 1 and 2 made by the trial Court an appeal is preferred to the District Court and as against the orders of the District Court the matter is carried to this Court. So this does not come under the mischief of S. 104(2), C.P.C., but squarely falls under O.43, R.1(r). Accordingly, an appeal shall lie under O.43, R. 1(r) r/w S. 104(1), C.P.C. The authorities cited, as already noted, are distinguishable since the interlocutory proceedings there started from trial Court, then to the appellate Court and thereafter to the High Court attracting S. 104(2), C.P.C. Those High Courts are right in holding that no such appeal in those circumstances could be maintained. The case on hand is altogether different in nature and does not attract S. 104(2). Therefore, an appeal does lie and is maintainable in the instant case.

**12.** In a subsequent case in *Ramaswamy v. Chinna Sithammal* (AIR 1976 Mad 63) Ramaswamy, J., had to consider a similar point. The facts of the case were :Two appeals were filed in the High Court against orders in two applications, which were filed to restore two appeals, which were dismissed for default. A preliminary objection was raised by the respondents that the appeals were not maintainable and in support of their case they relief upon the decision of their case they relied upon the decision of Natarajan, J., in *C. Kalahasti v. P.C.M. Chetti* (AIR 1975 Mad 3). The learned Judge, Ramaswamy, J., dealing with that point held the view that (at p. 64):-

“Section 104(2) says that no appeal shall lie from any order passed in appeal under the said section. In order to attract sub-sec. (2) the appeal should be one falling u/s. 104. If the appeal is one u/s. 96, and no u/s. 104, sub-sec.(2) of the latter section is not applicable. If S. 104(2) is construed otherwise, that is, as applying to appeals coming u/s. 96, also the position would be anomalous. He further observed that sub-cl. (t) and (u) of R. 1 of O. XLIII provide for appeals against orders passed under one provision or other of O. XLI, which governs appeals coming u/s. 96. The said two sub-clauses cannot possibly refer to any order by a trial court. While cl.(t) relates to an order refusing to re-admit (or to rehear) an appeal (as in the present case) cl. (u) relates to an order of remand made by an appellate court under Rule 23 of O. XLI. These two provisions would become meaningless if sub-sec. (2) of S. 104 is made to apply to appeals u/s. 96. No one can suggest that no appeal lies against an order of remand made under O.XLI, R.23.

In the present case, the order of the court below is one under O. XLI, R. 19 of the Code, made in appeals u/s. 96. That order is certainly an appealable one as per O. XLIII, R. 1(t) of the Code. I am quite clear that sub-sec. (2) of S. 104 has no application to an order made in an appeal coming under Section 96.”

**13.** The learned Judge distinguished the decision in *C. Kalahasti v. P.C. M. Chetti* (AIR 1975 Mad 3.), on the facts of the case, by observing:

“If I may say so with respect, the decision of Nagarajan, J., is unexceptionable. As seen above the order which was appealed against, though made under O. XXXIX, R. 1, had been passed in an appeal which itself was one against an appealable order. The appeal before the Court which passed the order questioned before Nagarajan, J. was really one coming u/s. 104 that is, an appeal against an appealable order. But, the observations of the learned Judge are sought to be construed as laying down the law that no appeal lies against an order passed in any appeal even though the order is an appealable one, under one or other of the clauses of O. XLIII, R. 1, C.P.C. The learned Judge could not have possibly meant it so. If the learned Judge has really stated that an order passed even in a regular appeal coming u/s. 96 of the Code is not appealable, it would be purely obiter, for, in the matter before the learned Judge, the order had been passed not in an appeal coming U/s.96, but in appeal coming u/s.104.”

For the difference in the fact situation involved therein, this Court finds, this decision has no application to the case at hand.

13. Coming to scan the decision vide **2014 (I) OLR 921** in the case of *Madhusudan Hota versus Ratnakar Hota* this Court finds, the fact involved in the above case is that the respondent in the appeal decided therein as plaintiff filed T.S. No.452 of 2000 on the file of learned Civil Judge (Jr. Divn.), Balasore. Plaintiff accompanied therein an application under Order 39 Rule 1 & 2 of C.P.C. appearing as Misc. Case No.287 of 2000. Prayer for interim injunction being rejected, the plaintiff preferred Miscellaneous Appeal No.123 of 2001 wherein a direction was given to the parties to maintain status quo in respect of the plots involved therein. After disposal of the miscellaneous appeal an application under Order 39 Rule 2(A) of C.P.C. was filed alleging that the appellant and his sons disturb the status quo order. Order 39 Rule 2(a) application ended with an observation that the appellant involved therein violated the status quo order with an order of attachment of a property for a period of one year and appeal was preferred to the High Court under Order 43 Rule 1 of C.P.C. read with Section 104 of C.P.C. which was registered as F.A.O. No.151 of 2009. In disposal of the F.A.O No.151 of 2009 this High Court in paragraph no.6 of the said judgment held as follows:

“6. The appeal in hand is one against an order passed by the learned District Judge on application filed before him for the first time under Order 39, Rule 2-A C.P.C. alleging violation of order of status quo which was passed by the learned District Judge in the Misc. Appeal. It is argued by the learned counsel for the appellant that sine the learned District Judge had passed the order of status quo, any application alleging violation of that order was required to be filed before the same Court and, accordingly, R-1 filed the petition under Order 31, Rule 2-A C.P.C. Therefore, it is submitted that the petition under Order 39, Rule 2-A C.P.C. is an independent proceeding initiated for the first time before the learned District Judge and the impugned order passed on that petition cannot be said to be an order passed in an appeal under Section 104 C.P.C.

In the present case the impugned order has been passed on an application under Order 39, Rule 2A C.P.C. which is appealable under Order 43 Rule 1(r) C.P.C. In **Choorakadum v. Antony**, AIR 1991 Kerala 44 it is held that the proceeding under Order 43, Rule 2-A for breach of injunction is separate and independent. In **Ratnakar Swain v. Orissa Forest Corporation Ltd.**, 75(1993) CLT 476 it is observed by this Court that an order passed by a Single Judge under Order 39, Rule 2-A for violating order of injunction passed by him partakes the nature of an original order even though passed in a proceeding arising out of an appeal.”

From reading of the ratio decided therein, this High Court in the aforesaid citation, taking into account another decision of this Court observed that disposal of the miscellaneous application since involve an application U/o-39 Rule 2(A) of C.P.C., is in the nature of an original order, even though

passed in a proceeding arising out of an appeal and thus, held that the appeal involved is maintainable.

**14.** Looking to the decision vide **75(1993) CLT 476** rendered by a Division Bench of this Court, this Court finds, the factual aspect involved therein was that the plaintiff brought a suit for title and injunction in the suit. The Subordinate Judge granted *ex parte* order of injunction, which got finally vacated on 17.3.1989 on disposal of the Miscellaneous application, resulting the plaintiff carried the matter in appeal in Misc. Appeal. Learned Single Judge in disposal of the Miscellaneous Appeal prohibited the defendant – respondents from interfering in the suit land. Miscellaneous appeal was allowed. It is at a subsequent stage, the plaintiff-respondent filed Misc. Case No.730 of 1990 in Order 39 Rule 2(A) of the Code of Civil Procedure alleging violation of the injunction order of this Court. By order dated 26.4.1994 a direction was given for conducting an enquiry in the matter of violation. Subsequently, the application under Order 39 Rule 2(A) was allowed with imposition of punishment. Party aggrieved filed letters patent appeal involving the order of conviction. The question of maintainability of the appeal involving an order under Order 39 Rule 2(A) was disposed of in an appeal by a Single Judge. This Court in paragraph no.14 observes, an order passed by the Single Judge under Order 39 Rule 2(A) for violation of Order of injunction passed by him partakes the nature of an original order, even though passed in a proceeding arising out of an appeal, falls in the trapping of its finality.

**15.** Reading of both the decisions vide 2014(I) OLR 921 as well as in 75(1993) CLT 476 both rendered by this High Court, this Court finds, both the decisions involved disposal of petition U/o-39 Rule 2(A) of the C.P.C. and it is under the circumstance, this Court is of the view that for the nature of petition involved particularly U/o-39 Rule2(A) of the C.P.C., the disposal of the application even though involves an appeal pending with the appellate authority cannot fall in the trap of an independent proceeding so as to invite the appeal remedy. Decisions vide AIR 1975 Madras 3 as well as in AIR 1982 Andhra Pradesh 284 and AIR 1978 GOA, Daman & Diu 31 supports the stand taken by Shri Dash, learned counsel for the petitioner. Decision vide 2014(I) OLR 921 as well as in 75(1993) CLT 476 rendered by this Court since stand on different footing has no application to the case at hand. This Court answering on the question of maintainability holds, the present Civil Miscellaneous Petition is maintainable.

**16.** Now coming to decide on merit involving the impugned order, this Court finds, in considering the application under Order 39 Rules 1 & 2, the appellate Court as an interim measure considering the allegation by the appellant that she being a coparcener and protection of property was paramount consideration till the appeal against the refusal of injunction by the trial court is disposed, the lower appellate court is justified in passing the impugned order. As a result, this Court finds no scope to interfere in the same but however, taking into consideration the direction of the appellate court for early disposal of the appeal pending with him, this Court while disposing the Civil Miscellaneous Application directs the lower Appellate Court to dispose the appeal vide F.A.O. No.1/2017 within one month from the next date of posting. Parties are directed to appear in the lower court on the next date fixed with copy of the order of this Court.

**17.** This Court appreciates the effort of Shri Amiya Kumar Mishra, learned Additional Government Advocate and Miss. Samapika Mishra, learned Additional Standing Counsel in rendering their assistance during hearing of this case.

**18.** The civil miscellaneous petition stands disposed of with above direction. However, in the circumstance, there is no order as to cost.

CMP disposed of.

**2018 (I) ILR - CUT- 570**

**B. RATH, J.**

CMP NO. 345 OF 2018

**PRANAKRUSHNA DASH & ANR.** .....Petitioners

.Vrs.

**DINAKRUSHNA DASH & ORS.** .....Opp. Parties

**CODE OF CIVIL PROCEDURE, 1908 – Order 18 Rule 1 – Application under – Rejected by Trial Court considering the proceeding is a suit for partition only – Other contingencies – Not looked into – Matter remitted with observations.**

*“Considering the pleadings involved in the gift deed, particularly, dealing with the prayer involving prayer No. viii, the objection of the defendant nos.1 and 27 specifically in paragraph-10, taking into consideration of the provision requiring contingency invoking Order 18, Rule 1 of the Code of Civil Procedure, this Court is of the opinion that dealing with the matters, the court taking such application is required to find the issue involving such prayer is there or not and then in the event any such issue is there, to proceed to have a*

*finding as to the relevancy in the asking of the plaintiff or the defendant to begin first, further keeping in view that unless such evidence will in the first instance determine all the issues involving the suit or not, failure of which there is no possibility of getting out of the suit and there is definite chance of going to evidence on all other issues to conclude the suit finally. Perusal of the facts and relief involved herein, this Court finds the suit not only involves several issues but the evidence also is of multi dimensional.*

For petitioner : M/s. Pranab Kumar Ghosh

For Opp.parties :

---

Date of Order : 26.03.2018

**ORDER**

***BISWANATH RATH, J.***

Sri S.S.Das, learned senior counsel appears on behalf of the petitioners by filing memorandum in Court today. The same be kept on record.

Heard Sri S.S.Das, learned senior counsel appearing for the petitioners involving the impugned order.

This Civil Miscellaneous Petition involves a challenge to the order dated 27.1.2018 passed by the learned Civil Judge, Senior Division, Athgarh in Civil Suit No.117 of 2016 involving Annexure-6 thereby allowing an application under Order 18, Rule 1 of the Code of Civil Procedure at the instance of the plaintiff praying the trial court to ask the defendant nos.1 and 27 to adduce their evidence first. Considering the pleadings involved in the gift deed, particularly, dealing with the prayer involving prayer No.viii, the objection of the defendant nos.1 and 27 specifically in paragraph-10, taking into consideration of the provision requiring contingency invoking Order 18, Rule 1 of the Code of Civil Procedure, this Court is of the opinion that dealing with the matters, the court taking such application is required to find the issue involving such prayer is there or not and then in the event any such issue is there, to proceed to have a finding as to the relevancy in the asking of the plaintiff or the defendant to begin first, further keeping in view that unless such evidence will in the first instance determine all the issues involving the suit or not, failure of which there is no possibility of getting out of the suit and there is definite chance of going to evidence on all other issues to conclude the suit finally. Perusal of the facts and relief involved herein, this Court finds the suit not only involves several issues but the evidence also is of multi dimensional.

Perused the impugned order and on perusal of the same, this Court finds the trial court has absolutely not taken into account any of the above contingencies before issuing the impugned direction and as appears has totally directed itself considering the proceeding is a suit for partition alone, therefore, observed that there is no difference between the parties. It is for this serious lapse involving the impugned order, this Court while declining to issue notice to the contesting opposite party-plaintiff, interfering in the impugned order, remits the matter back to the trial court for re-hearing the application under Order 18, Rule 1 of the Code of Civil Procedure but however giving opportunity of further objection and hearing to the plaintiff as well as defendant nos.1 and 27. The hearing of the matter, as directed hereinabove, be concluded by passing a reasoned order within a period of four weeks from the date of communication of this order by the petitioners.

Writ petition disposed of.

**2018 (I) ILR - CUT-572**

**B. RATH, J.**

OJC NO. 16009 OF 2001

**LADI CHANDRASEKHAR RAO & ANR.** .....Petitioners

.Vrs.

**KONDAGIRI SUKADEV AND ORS.** .....Opp. Parties

**ORISSA SCHEDULE AREA TRANSFER OF IMMOVABLE PROPERTY BY (ST) REGULATIONS, 1956 – Section (3-a) (i) – Review proceeding initiated after five years – Consequential order – Provision permits review within five years from the date of order – Review filed after five years – Order set aside.**

For petitioners : Mr. Sidhartha Mishra.

For Opp.party : Mr. Gopal Krushna Mohanty  
Mr.K.K. Mishra, A.G.A.

---

Date of Hearing: 29.03.2018

Date of Judgment : 29.03.2018

**JUDGMENT**

***BISWANATH RATH, J.***

Heard Shri S.K. Mishra, learned counsel appearing for the petitioners and Shri K.K. Mishra, learned Addl. Government Advocate appearing for the opposite party nos.3 and 4-State. In spite of appearance of a set of counsel for the private opposite party nos.1 and 2, nobody is present in course of hearing.

2. Assailing the notice at Annexure-4 series and the order at Annexure-5, a review proceeding initiated by the competent authority, Shri Mishra, learned counsel appearing for the petitioners taking this Court to the provisions contained in Regulation (3-a)(i) of the O.S.A. Transfer of Immovable Property (by ST) Regulations, 1956 (for short “the Regulations, 1956”), contended that for the permission under Annexure-1 having been granted on 19.04.1995 and the notice awaiting the review proceeding in exercise of power under Regulation (3-a)(i) of the Regulations, 1956 having been issued on 05.11.2001, undoubtedly beyond five years of the date of order. It is in the above circumstances, Shri Mishra, learned counsel appearing for the petitioner contended that the notice and consequential order passed thereof, both becomes illegal being contrary to the provisions contained in the aforesaid provision.

3. Shri K.K. Mishra, learned Addl. Government appearing for opposite party nos.3 and 4-State even though has no dispute with regard to the provisions contained in Regulation (3-a)(i) of the Regulations, 1956, particularly for initiation of the review proceeding within a period of five years from the date of order under review, but however taking this Court to the observations in the order at Annexure-5, submitted that for detail consideration of the case of a party and for the party in contest shall not adjudicate of the proceeding, such a contention after participating in the proceeding should not be accepted.

4. Considering the rival contentions of the parties and taking into consideration the provisions contained in Section (3-a)(i) of the Regulations, 1956), this Court finds, the provisions reads as hereunder :-

“(3-a)(i) Any order passed by the competent authority under Sub-sec. (1) or under Sub-sec.(2) may, within a period of five years from the date of such order, be revised, either on own motion or otherwise, by the Revenue Divisional Commissioner if the order was passed by the Collector and by the Collector if it was passed by any other competent authority, after giving the parties concerned a reasonable opportunity of being heard:

Provided that no order shall be revised under the sub-section if an appeal against such order has been entertained under Sub-sec.(3).”

It be taken note here that the provision as aforesaid was brought into force vide Orissa Gazettee Ext.No.391 dated 27.03.1997. Reading the provision, finding that the review proceeding should be initiated within a period of five years from the date of order and this Court finds the order involved (3-a) proceeding having been passed on 19.04.1995 and the notice

at Annexure-4 series involving the dispute in exercise of above power having been issued on 05.11.2001 goes beyond the time stipulation provided in the Regulations taken note hereinabove. In the circumstances, this Court finds, notice at Annexure-4 series becomes bad in law being contrary to the provisions at Regulation (3-a)(i) of the Regulations, 1956. As a consequence, the consequential order at Annexure-5 also becomes bad.

5. As a result, this Court interfering in the notice as well as the impugned order at Annexures-4 series and 5 respectively, sets aside the same.

6. The writ petition succeeds. No order as to costs.

Writ petition allowed.

**2018 (I) ILR - CUT-574**

**S.K.SHOO, J.**

CRLLP 155 OF 2015

**SUSAMA SETHI @ SUSAMA SETHY** .....Petitioner

.Vrs.

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

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 378 – Leave to appeal against the order of acquittal – Alleged offence is under section 306 of IPC – Petitioner, widow of the deceased who committed suicide – Allegations of harassment by the accused – Evidence available on record though permit for two views, yet, the appellate court should be slow in disturbing the finding of fact of the trial court – Principles – Indicated.**

*“If two views are possible, the appellate Court should not interfere with the conclusions arrived at by the trial Court unless the conclusions are not possible. If the finding reached by the trial Judge cannot be said to be unreasonable, the appellate Court should not disturb it even if it were possible to reach a different conclusion on the basis of the material on the record because the trial Judge has the advantage of seeing and hearing the witnesses and the initial presumption of innocence in favour of the accused is not weakened by his acquittal. The appellate Court, therefore, should be slow in disturbing the finding of fact of the trial Court and if two views are reasonably possible on the evidence on the record, it is not expected to interfere simply because it feels that it would have taken a different view if the case had been tried by it.”*

**Case Laws Relied on and Referred to :-**

1. A.I.R. 1983 Supreme Court 308 : Babu -Vrs.- State of Uttar Pradesh

For Petitioner : Mr. B.K. Parida-2

For State : Mr. Prem Kumar Patnaik Addl. Govt. Advocate

For Opp. party No.2: Mr. Smurtiranjana Mohapatra

---

Date of Hearing: 29.01.2018 Date of Judgment: 29.01.2018

### **JUDGMENT**

**S. K. SAHOO, J.**

Heard Mr. B.K. Parida-2, learned counsel for the petitioner, Mr. Prem Kumar Patnaik, learned Addl. Govt. Advocate for the State and Mr. Smurtiranjana Mohapatra, learned counsel for the opposite party no.2.

This leave petition under Section 378 of Cr.P.C. has been filed by the petitioner who is the widow of the deceased Prahallad Sethy for grant for leave to prefer an appeal against the impugned judgment and order dated 27.08.2015 of the learned Addl. Sessions Judge, Bhubaneswar passed in CrI. Tr. No.23/124 of 2014 in acquitting of the opposite party no.2 Saroj Kumar Pradhan of the charge under section 306 of the Indian Penal Code.

The prosecution case, in short, is that the deceased was serving as a Multi Task Service (MTS) in the office of Deputy Chief Labour Commissioner, Central, Bhubaneswar located at I.R.C. village, Nayapalli. He committed suicide by hanging himself in a ceiling fan in a room of his office after bolting the door from inside before the start of the office on 15.10.2012. When the staff of the office came, they detected the body hanging through the window glass of the room. The head of the office namely, Dr. P.K. Rath submitted a report regarding unnatural death of the deceased before Inspector in charge, Nayapalli police station and on basing on such report, Nayapalli P.S.U.D. Case No.60 dated 15.10.2012 was registered and enquiry was taken up by Asst. Sub-inspector of police. During course of inquiry, the dead body was brought down from its hanging position and inquest was held as per inquest report Ext.2. The inquiry officer found a suicidal note (Ext.1) from the shirt pocket of the deceased which was seized under seizure list Ext.4. The dead body was sent for post mortem examination. The suicidal note indicated that the opposite party no.2 was responsible for the suicide of the deceased and accordingly, the A.S.I. of police lodged the F.I.R. on the basis of such suicidal note and the Inspector in charge of Nayapalli police station registered Nayapalli P.S. Case No.289 dated 15.10.2012 under section 306 of the Indian Penal Code against the opposite party no.2. After completion of investigation, charge sheet was submitted on 23.02.2013 against the opposite party no.2 under section 306 of the Indian Penal Code.

The defence plea is that the deceased was over burdened under loan pressure for which he had lost his mental balance and was remaining in a drunken condition and he had a suicidal tendency and though he attempted to commit suicide on different occasion but due to timely treatment, he survived. It is the further defence plea that the suicidal note is a manufactured document which was created only to entangle the opposite party no.2 falsely in the case.

Out of the twelve witnesses examined by the prosecution during trial, P.W.1 is the wife, P.W.7 is the younger brother, P.W.5 is the cousin son-in-law and P.W.12 is the brother-in-law of the deceased respectively. P.Ws. 2, 3, 4 and 6 were the staffs of the office where the deceased was posted at the time of his death. P.W.8 and P.W.10 are the havildar and constable respectively at Nayapalli police station, P.W.9 is the informant -cum-inquiring officer and P.W.11 is the investigating officer.

Though the opposite party no.2 did not examine any witness in support of his defence plea but proved some documents which were marked as Exts.A, B and C, out of which Ext.A consisted of twenty four sheets relating to the outstanding loan dues of the opposite party no.2 from different banks.

Learned trial Court formulated the following points for consideration of the charge under section 306 of the Indian Penal Code:-

- (i) Whether the death of Prahallad Sethi in his office at I.R.C. village, Nayapalli on dtd. 15.10.2012 was a suicide through hanging?
- (ii) Whether the writings made in the alleged suicidal note vide Ext.1 is the own handwriting of the deceased Prahallad Sethi?
- (iii) Whether Prahallad Sethi had committed suicide after keeping that suicidal note vide Ext.1 in his shirt pocket?
- (iv) Whether the alleged suicidal note vide Ext.1 was seized from the shirt pocket of the deceased by the A.S.I. Bichitrananda Sethi on dtd. 15.10.2012 at the time of holding inquest over his dead body as per seizure list vide Ext.4?
- (v) Whether the implications/writings made against the accused in the alleged suicidal note vide Ext.1 are fulfilling the ingredients of section 107 of the I.P.C. as per law for making the accused liable U/s.306 of the I.P.C. i.e. abetment of suicide of the deceased Prahallad Sethi?"

Learned trial Court while discussing whether it is a case of suicide or not, arrived at a finding that the death of Prahallad Sethi in his office at I.R.C. village, Nayapalli on 15.10.2012 was a suicide through hanging.

So far as the second point is concerned, the learned trial Court has been pleased to hold that if the evidence of P.Ws.1, 5 and 12 will be read after exclusion of their contradictions with the evidence of P.W.9 and P.W.11 then it can easily be held that there is no sufficient material on record on behalf of the prosecution to establish that the writings made in the alleged suicidal note vide Ext.1 is the own hand writing of the deceased Prahallad Sethy.

Learned trial Court also discussed the third and fourth points and came to hold that the evidence of the P.Ws.1, 3, 4, 5 and 7 regarding the breaking open of the door of the room by the police i.e. A.S.I. B.N. Sethi (P.W.9) and holding inquest over the dead body there in that room after untying the ligature has been contradicted by P.W.9 himself and one of the brother-in-law of the deceased i.e. P.W.12. It is further held that there are ample contradictions in the evidence of P.Ws.1, 2, 3, 4, 5, 7, 9 and 12 and the contents of Exts.1, 2, 4 and 7 regarding the manner of entering into the spot room, finding out of the alleged suicidal note with date, time and place of seizure thereof, then at this juncture, it cannot at all safely be concluded that, Prahallad Sethi had committed suicide after keeping that suicidal note vide Ext.1 in his shirt pocket and that, the alleged suicidal note vide Ext.1 was seized from the shirt pocket of the deceased by the A.S.I. Bichitrananda Sethi (P.W.9) on dated 15.10.2012 at the time of holding inquest over his dead body through seizure list vide Ext.4.

The learned trial Court discussed the fifth point and came to hold that if the alleged harassment to the deceased by the accused indicated in the suicidal note will be taken in toto as it is, without delving into its cross-examination part, still then, the said amount of harassment to the deceased indicated in Ext.1 was not of such a degree leaving no other option to the deceased except to commit suicide. Merely because a person like the deceased had a grudge against his superior staff like the accused and committed suicide on account of that grudge, the same cannot be a proper allegation for abetment of suicide as per law. The learned trial Court further held that even if the prosecution case basing upon the suicidal note as stated vide Ext.1 will be taken in toto, still then the ingredients of section 107 of the Indian Penal Code i.e. the ingredients of abetment are not fulfilled/satisfied for the reasons in order to fasten criminal liability on the accused under section 306 of the Indian Penal Code. The learned trial Court has observed that it has come through the evidence of investigating officer that the deceased had taken huge amount of loan from different banks, to which, he

was not able to clear and for that reason, he was suffering from mental depression and he had attempted to commit suicide again and again prior to the incident and he was also admitted and treated at Capital Hospital.

The learned trial Court accepted the defence plea that the cause of commission of suicide by the deceased Prahallad Sethy was out of her own accord by losing his mental balance due to pressure of loan on him having suicidal tendency with him which finds support from the evidence of the prosecution witnesses. Learned trial Court further held that the prosecution has not been able to establish through legally admissible evidence that the alleged suicidal note vide Ext.1 was by the own handwriting of the deceased and that, the same was kept in the shirt pocket of the deceased prior to commission of suicide and that the same was found by the P.W.9 at the time of holding of inquest over his dead body and that it was seized by P.W.9 on 15.10.2012 at the spot room immediately after holding of inquest through seizure list vide Ext.4 and it was further held that the implications made in the alleged suicidal note vide Ext.1 itself are not making out the ingredients of abatement as envisaged under section 107 of the Indian Penal Code for making out the offence punishable under section 306 of the Indian Penal Code.

Learned counsel for the petitioner has failed to point out any illegality or infirmity in the impugned judgment. Learned counsel for the opposite party no.2 supported the impugned judgment and contended that the learned trial Court after formulating the points, discussed the evidence on record carefully and it is a well-reasoned judgment.

After going through the impugned judgment, it appears that not only the learned trial Court has formulated the points for establishing the charge under section 306 of the Indian Penal Code but has discussed the oral as well as the documentary evidence available on record carefully and came to a finding that the ingredients of offence under section 306 of the Indian Penal Code are not attracted and accordingly, acquitted the opposite party no.2.

Where the accused by his continued course of conduct creates circumstances under which the deceased was left with no other option except to commit suicide, the instigation or intentional aiding may be inferred. It is not enough if the acts of accused caused persuasion in the mind of the deceased to commit suicide. The clear mens rea to commit the offence must exist. In some cases, there may be several reasons for creating great disturbance to the psychological imbalance of the deceased which resulted in

the commission of suicide. One of such reason may be due to some overt act committed by the accused at some point of time but unless there is proximity and nexus between the conduct or behavior of the accused with that of suicide committed by the deceased, it would not be proper to convict an accused under section 306 of the Indian Penal Code.

Law is well settled as held in case of **Babu -Vrs.- State of Uttar Pradesh reported in A.I.R. 1983 Supreme Court 308** that in appeal against acquittal, if two views are possible, the appellate Court should not interfere with the conclusions arrived at by the trial Court unless the conclusions are not possible. If the finding reached by the trial Judge cannot be said to be unreasonable, the appellate Court should not disturb it even if it were possible to reach a different conclusion on the basis of the material on the record because the trial Judge has the advantage of seeing and hearing the witnesses and the initial presumption of innocence in favour of the accused is not weakened by his acquittal. The appellate Court, therefore, should be slow in disturbing the finding of fact of the trial Court and if two views are reasonably possible on the evidence on the record, it is not expected to interfere simply because it feels that it would have taken a different view if the case had been tried by it.

In view of the finding of the learned trial Court after a thorough analysis of the evidence and in absence of any illegality or infirmity in the impugned judgment, I am not inclined to grant leave to the petitioner to prefer an appeal against the order of acquittal. Accordingly the CRLLP petition stands dismissed.

CRLLP petition dismissed.

2018 (I) ILR - CUT-579

S.K.SHOO, J.

CRLREV 867 OF 2006

**NARAYAN PRASAD AGARWAL @**

**NARAYAN PRASAD BHAWANIA**

..... Petitioner

.Vrs.

**STATE OF ORISSA & ANR.**

..... Opp. Parties

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Petition under – Injured challenging the order not framing charge under section 307 of IPC – Evidence of witnesses coupled with**

**the nature of injuries sufficient to form an opinion that there was ground for presuming that the accused committed an offence U/s 307 of IPC – Held, the trial court was not justified in not framing the charge U/s 307 – Direction issued.**

**Case Laws Relied on and Referred to :-**

1. (2008) 2 SCC 561 : Onkar Nath Mishra -Vrs.- State

For Petitioner : Mr. B.S. Dasparida

For State : Mr. Prem Kumar Patnaik Addl. Govt. Advocate

For Opp. Party No.2 - Mr. Suraj Mohanty

---

Date of Hearing: 05.02.2018      Date of Judgment: 05.02.2018

**JUDGMENT**

***S. K. SAHOO, J.***

This is an application under section 482 of Cr.P.C. filed by the petitioner Narayan Prasad Agarwal @ Narayan Prasad Bhawania challenging the impugned order dated 20.03.2006 passed by the learned Addl. Sessions Judge, Jharsuguda in S.T. Case No.19/11 of 2006 in not framing charge under section 307 of the Indian Penal Code. The said case arises out of Jharsuguda P.S. Case No. 100 of 2004.

2. The factual scenario of the case as per the first information report submitted by one Sanjay Kumar Bhawania, brother of the petitioner before the Inspector in charge of Jharsuguda Police station is that out of enmity and previous grudge, the opp. party no.2 Raj Kishore Agarwal tried to kill the petitioner on 09.04.2004 by running over Maruti 800 Car as a result of which the petitioner sustained compound fracture of his leg and his face was dashed against the iron gate and he sustained bleeding injuries. It is further stated that on hearing the shout of the petitioner, the informant came out of the house and sided the petitioner quickly for which the opp. party no.2 could not run him down. It is further stated that earlier the opp. party no.2 had threatened to take away the life of the petitioner but the matter was not reported in the police station as it was amicably settled. It is further stated that the petitioner was shifted to the Government hospital.

On the basis of the first information report, Jharsuguda P.S. Case No. 100 of 2004 was registered under sections 307 and 325 of the Indian Penal Code. During course of investigation, the Investigating Officer visited the spot, examined the witnesses, verified the documents of the Maruti Car bearing registration No. OR-16-7211, obtained the injury report of the petitioner which showed that the injuries were grievous and simple in

nature. On completion of investigation, charge sheet was submitted on 27.07.2004 under sections 307 and 325 of the Indian Penal Code against the opp. party no.2 and accordingly, cognizance of such offences was taken.

3. After commitment of the case to the Court of Session, at the time of framing of charge, the learned Addl. Sessions Judge, Jharsuguda in S.T. Case No. 19/11 of 2006 came to hold that there are discrepancies in the statements of the witnesses about the occurrence and the entire allegation does not reveal that there was any preparation made by the opp. party no.2 with intention to commit an offence of murder and since the opp. party no.2 run down the petitioner on his leg only and not on any vital part of the body, therefore, a case under section 307 of the Indian Penal Code is not made out. The learned trial Court framed charges against the opposite party no.2 under sections 279/337/338 of the Indian Penal Code and read over and explained the charges to the opp. party no.2 to which he pleaded not guilty and claimed to be tried. The case was transferred to the Court of learned Chief Judicial Magistrate, Jharsuguda under section 228(1)(a) of Cr.P.C. for disposal in accordance with law.

4. Challenging the impugned order, Mr. B.S. Dasparida, learned counsel appearing for the petitioner contended that the learned trial Court has gone beyond the scope of framing of charge by deeply entering into the probative value of the materials on record. He was supposed to have taken the materials on its face value and to see whether the ingredients of the offences are made out or not. The learned counsel further submitted that since the F.I.R. was lodged under section 307 of the Indian Penal Code and on completion of investigation, charge sheet was also submitted under such offence and the learned Magistrate being prima facie satisfied about the commission of offence under section 307 of the Indian Penal Code took cognizance of such offence, there was no justification on the part of the learned trial Court to come to a different conclusion particularly at the stage of framing charge. Learned counsel for the petitioner relied upon the decision of the Hon'ble Supreme Court in case of *Onkar Nath Mishra -Vrs.- State reported in (2008) 2 Supreme Court Cases 561*.

Mr. Suraj Mohanty, learned counsel appearing for the opp. party no.2 while supporting the impugned order contended that there was civil dispute between the parties for which there was strained relationship and the factual scenario indicates that there was no intention to commit the crime and there was no preparation at all and it was a mere case of accident which has been given the colour of section 307 of the Indian Penal Code and therefore, the

learned trial Court has not committed any illegality in passing the impugned order.

Mr. Prem Kumar Patnaik, learned Addl. Government Advocate supported the contentions raised by the learned counsel for the petitioner.

5. Law is well settled as held in case of *Onkar Nath Mishra -Vrs.- State reported in (2008) 2 Supreme Court Cases 561* as follows:-

“11. It is trite that at the stage of framing of charge, the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the Court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.”

The statement of the injured-petitioner indicates that the opp. party no.2 is the brother of the petitioner but the opp. party no.2 had been adopted by late Srinivash Bhawania about forty years prior to the date of occurrence. It further appears that there is one Iron Gate at the entrance of the building which was used by the petitioner as well as the opp. party no.2 and the opposite party no.2 was also using that grill gate for passing of his Maruti 800 car and there was previous ill feeling between the parties. The petitioner has stated that on the date of occurrence at about 10.30 p.m. when he came to the house and found the gate open, he tried to close the gate and at that point of time, the opposite party no.2 came driving his Maruti 800 car bearing registration no. OR-16-7211 and dashed it against the petitioner as a result of which he sustained fracture of his right leg, injuries on his head and also on left foot. When he fell down on the ground, the opposite party no.2 ran over the car on the right leg for which the petitioner shouted and hearing his shout, his wife, younger brother Susil, Sanjay and others rushed to the spot and they backed the vehicle and rescued the petitioner. Thereafter, the opposite party no.2 backed the car and got it parked by the side of the road. The other statements available on record also corroborate the statement of the injured-petitioner. There is no dispute that immediately after the occurrence, the F.I.R. was lodged and the injured was sent to the hospital and some of the injuries sustained by the injured was found to be grievous in nature and some were simple in nature.

6. Section 307 of the Indian Penal Code deals with attempt to murder. For the purpose of constituting an attempt, the requirements of two ingredients are necessary. Firstly, the intention or the knowledge and secondly, the act done. If the injury inflicted has been with the avowed object or intention to cause death, the ritual nature, extent and character of the injury or whether the injury is sufficient to actually causing death are really factors which are wholly irrelevant for adjudicating the culpability under section 307 of the Indian Penal Code. It is duty of the Court to see whether the act, irrespective of its result, was done with intention or knowledge and under circumstances mentioned in that section. The only requirement of attempt to murder is intent coupled with some overt act in execution thereof. It is not necessary that the injury must be capable of causing death. The accused must do an act with such a guilty intention and knowledge and in such circumstances that but for some intervening fact, the act would have amounted to murder in the normal course of events.

7. In the case in hand, prima facie materials available on record indicate that there was previous ill feeling between the parties and on the date of occurrence, while the petitioner was closing the gate, at that point of time the opposite party no.2 came driving in his Maruti 800 car and dashed the car against the petitioner as a result of which the right leg of the petitioner got fractured and he sustained bleeding injuries on his head and left foot. After the petitioner fell down on the ground, the opposite party no.2 ran over the vehicle on the right leg of the petitioner. The petitioner shouted in pain for which his wife, younger brothers rushed to the spot and pushed the car back and rescued the petitioner and then the petitioner was shifted to the hospital. The previous enmity, the conduct of the opposite party no.2 at the spot, the surrounding circumstances, the manner in which the offence was committed and the nature of injuries sustained by the injured prima facie indicates the commission of offence under section 307 of the Indian Penal Code.

The learned trial Court in the impugned order has held that the entire allegation does not reveal that there was any preparation made by the opposite party no.2 with intention to commit an offence of murder and if such an intention was there, finding the petitioner alone, the opposite party no.2 could have run him down not on his leg but on the vital part of his body. Law is well settled that intention can be inferred from the attending circumstances of the case and the conduct of the parties and the intention may develop even during the course of an occurrence. Preparation to commit a crime is always done secretly and therefore, it is very difficult to find direct evidence in that

respect. The conduct of the accused at the spot prior to the occurrence, at the time of occurrence and after the occurrence is relevant for adjudicating whether he had intention to commit the crime or not.

In this case when the gate was found open, the petitioner was closing the same. At that point of time, the opposite party no.2 arrived there in his car. There is no material that he blew any horn of the car as it came closer to the gate to open the gate or that in spite of the blowing the horn, there was any attempt made by the petitioner to close the gate or there was any obstruction caused by the petitioner in allowing the opposite party no.2 to enter inside the premises with his vehicle. The conduct of the opposite party no.2 in dashing the vehicle against the petitioner and after he fell down, running down the vehicle on his left leg, non-attempt to come out of the car to save the petitioner and backing the car only after the intervention of the wife and younger brothers of the petitioner coupled with the nature of injuries sustained by the injured are sufficient to come to an opinion that there is ground for presuming that the opposite party no.2 has committed an offence under section 307 of the Indian Penal Code. The statement of the petitioner gets corroboration not only from the medical evidence but from the statements of other witnesses.

Therefore, I am of the view that the learned trial Court was not justified in not framing the charge under section 307 of the Indian Penal Code even though charge sheet has been submitted for such offence and cognizance has been taken. In view of the forgoing discussions, I am inclined to accept the prayer made by the petitioner and direct the learned Addl. Sessions Judge, Jharsuguda to frame additional charge under section 307 of the Indian Penal Code against the opposite party no.2 apart from the charges under sections 279/337/338 of the Indian Penal Code which have already been framed and proceed with the trial in accordance with law.

It is needless to say that any observation made in this order shall not prejudice the mind of the learned trial Court while adjudicating the guilt or otherwise of the opposite party no.2 and he has to decide the case on the basis of the evidence which would be adduced by both the sides at the stage of trial. In the result, the CRLMC application is allowed.

CRLMC application allowed.

2018 (I) ILR - CUT-585

**S.K.SHOO, J.**

CRLREV 635 OF 2008

**BAISHNAB CHARAN BARIK**

.....Petitioner

Vrs.

**STATE OF ORISSA**

.....Opp. Parties

**CODE OF CRIMINAL PROCEDURE, 1973 – Section 239 – Framing of charge – Duty of the Trial Court while framing the charge – Indicated.**

*Therefore, I am of the view that the Investigating Officer has failed to collect any clinching materials to proceed against the petitioners and acted in a mechanical manner. On the available materials on record, there is no prima facie case for commission of the offences alleged against the petitioners. There is no ground for presuming that the petitioners have committed the offences alleged. There is no strong suspicion against the petitioners. Submission of charge sheet is based totally on unfounded assumptions and it has resulted in causing miscarriage of justice. The learned trial Judge has mechanically dealt with the discharge petition filed by the petitioners and after quoting the prosecution allegation, he jumped to the conclusion that there are sufficient grounds for proceeding against the petitioners and rejected the petition. Therefore, without meticulous examination of the materials on record, I am of the humble view that the learned trial Court has committed palpable error in framing charges against the petitioners after rejecting the discharge petition and as such, in the interest of justice, the impugned order cannot be sustained in the eye of law.*

For Petitioner : Mr. Asok Mohanty (Senior Advocate)

For Opp. Party : Mr. Sangram Das Stand. Counsel (Vig.)

**Case Laws Relied on and Referred to :-**

1. (2000) 8 SCC 239 : State of Delhi -Vrs.- Gyan Devi
2. (2012) 9 SCC 460 : Amit Kapoor -Vrs- RameshChander
3. (2000) 8 SCC 239 : State of Delhi -Vrs.- Gyan Devi
4. A.I.R. 1991 S.C. 1260 : State of Bihar and Anr. -Vrs.- P.P. Sharma

Date of Hearing: 08.02.2018

Date of Judgment: 22.02.2018

**JUDGMENT****S. K. SAHOO, J.**

The petitioner in Criminal Revision No.635 of 2008 namely Baishnab Charan Barik and petitioners in Criminal Revision No.454 of 2008 namely D.K. Singh @ Dusmanta Kumar Singh and K.C. Mohapatra @ Kishore Chandra Mohapatra have challenged the impugned order dated 27.02.2008 passed by learned Special Judge (Vigilance), Jeypore in G.R. Case No. 28 of 2002 in framing charges under sections 420, 477-A and 120-B of the Indian Penal Code against all of them and the petitioner Baishnab Charan Barik has also challenged the framing of additional charge under section 13(2) read

with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') against him after rejecting the petition under section 239 of Cr.P.C. filed by the petitioners D.K. Singh @ Dusmanta Kumar Singh and K.C. Mohapatra @ Kishore Chandra Mohapatra for discharge. The said case arises out Berhampur Vigilance P.S. Case No. 28 of 2002.

Since both the criminal revisions arise out of a common order, with the consent of the parties, those were heard analogously and disposed of by this common judgment.

2. The prosecution case, as per the First Information Report dated 13.06.2002 lodged by Sri U. Rama Rao, D.S.P., Vigilance, Rayagada Unit before the Superintendent of Police, Vigilance, Berhampur Division, Berhampur is that during enquiry into the allegation of bungling in purchase of cement by the officers of O.T.D.P., Kashipur during the year 1997, it came to light that for execution of project civil works, it was decided to purchase OPC 43 grade of IDCOL cement through authorised stockists of IDCOL cement and to supply it to the contractors. The cost per bag of OPC 43 grade cement was fixed to Rs.134.00 inclusive of all taxes, loading and unloading charges and transportation charges from Rayagada to Kashipur. One J.E. was entrusted to remain in charge of the store to receive the stock of cement from the authorised dealer in good condition, maintain the stock and store register and issue the same to the contractors as per the orders of competent authority. He was also to certify on the credit bills of suppliers of cement in respect of receipt of the stock in good condition and to account it for in the stock register. On the basis of the certificate of the store keeper (J.E.), the bills were being passed for payment by the Project Manager. During the period from 14.11.1997 to 31.12.1997, the petitioner Baishnab Charan Barik, J.E. was in charge of stores of O.T.D.P., Kashipur after taking charge from J.E. Sri S.S. Nayak.

It is further stated in the F.I.R. that scrutiny of stock register of cement and correspondence file revealed that during the period 14.11.1997 to 31.12.1997 M/s. Sriram Enterprisers, Rayagada supplied 10,000 bags of OPC 43 grade of IDCOL brand cement to O.T.D.P., Kashipur @ Rs.133.60 per bag and received Rs.13,36,000.00 paisa which was received by the petitioner Baishnab Charan Barik as evident from the certificate given by him on the credit bills.

During enquiry at IDCOL godown at Khaliguda, Rayagada, it was ascertained that during the above period, M/s. Sriram Enterprisers had not

lifted a single bag of OPC 43 grade of IDCOL cement from the godown. The supplier also could not produce any documents pertaining to purchase of OPC 43 grade of IDCOL cement either from the IDCOL dealer or from any other firm during the period and therefore, it was construed that the petitioner D.K. Singh @ Dusmanta Kumar Singh, Proprietor, M/s. Sriram Enterprises, Rayagada supplied 10,000 bags of slag cement to O.T.D.P., Kashipur instead of OPC 43 grade cement and managed to get certificate from the petitioner Baishnab Charan Barik who was the store in charge on the bills to have delivered 10,000 bags of OPC 43 grade cement.

It is further stated in the F.I.R. that the petitioner Kishore Chandra Mohapatra, Proprietor, M/s. Kishore Kirana Store, Kashipur supplied 40,000 bags of OPC 43 grade of IDCOL cement during the above period @ Rs.133.60 per bag and received Rs.53,44,000.00 paisa being passed for payment by Project Manager, O.T.D.P., Kashipur on the basis of the certificate of the petitioner Baishnaba Charan Barik on the bills. The inquiry revealed that the petitioner Kishore Chandra Mohapatra lifted 5430 bags of OPC 43 grade of IDCOL brand cement from IDCOL godown at Khaliguda, Rayagada valued at Rs.7,25,448.00 during the above period and he could not produce any documents towards the purchase of 40,000 bags of OPC 43 grade of IDCOL cement during the relevant period. Therefore, it was construed that the said petitioner supplied 34570 of slag cement (IDCOL) to O.T.D.P., Kashipur and managed to get certificate from the petitioner Baishnaba Charan Barik to have supplied OPC 43 grade IDCOL cement. During the said period, the cost of IDCOL slag cement was Rs.5.00 less than OPC 43 grade IDCOL cement and other charges remaining the same, the slag cement per bag was Rs.128.60 and accordingly, the cost of 34570 bags of slag cement of IDCOL Brand came to Rs.44,45,702.00. It is mentioned in the first information report that the petitioner Kishore Chandra Mohapatra derived pecuniary benefits of Rs.1,72,850.00 paisa by submitting false bills in connivance with petitioner Baishnaba Charan Barik.

It is further mentioned in the F.I.R. that during the period from 14.11.1997 to 31.12.1997, the petitioner Baishnaba Charan Barik, being a Government servant connived with the cement suppliers petitioners Sri D.K. Singh and Kishore Chandra Mohapatra, falsified the official records and allowed pecuniary benefits of Rs.2,22,850/- to the cement suppliers causing loss to the project with ulterior motive.

3. During course of investigation, it was found out that the two firms namely M/s. Sriram Enterprises, Rayagada and M/s. Kishore Kirana Store,

Kashipur gave their willingness in writing to the Project Manager, O.T.D.P., Kashipur to supply 43 grade IDCOL cement @ Rs.133.60 paisa per bag which was lesser than the rate of Rs.134/- per bag fixed by the O.T.D.P. authorities. As both the firms were authorised IDCOL cement dealers, the Project Manager placed orders with them to supply OPC 43 Grade of IDCOL cement. Several notices were issued to the cement suppliers i.e. petitioners Kishore Chandra Mohapatra as well as D.K. Singh to produce the stock book, records relating to supply of cement (IDCOL) to O.T.D.P., Kashipur but they failed to produce any documents. It was ascertained that during the period from 14.11.1997 to 31.12.1997, the two agencies like M/s. Sriram Enterprises and M/s. Kishore Kirana Store had not purchased any cement from other cement suppliers of Rayagada. During the period in question, the cost of slag cement was Rs.5/- less than the cost of OPC 43 grade IDCOL cement per bag and thus it was presumed by the Investigating Officer that due to supply of slag cement by the cement suppliers, the Department sustained loss of Rs.2,28,400/-. The Investigating Officer obtained sanction order from the Engineer-in-Chief, Water Resources, Orissa to proceed against the petitioner Baishnaba Charan Barik. As the Investigating Officer found sufficient evidence against the petitioner Baishnab Charan Barik to have entered into criminal conspiracy with petitioners Dusmanta Kumar Singh and Kishore Chandra Mohapatra and manipulated records and documents of O.T.D.P., Kashipur showing receipt of OPC 43 grade IDCOL cement and accepted the delivery challan and credit bills submitted by the two firms as genuine and thereby obtained pecuniary advantage of Rs.2,28,400/- for himself and for the two firms, charge sheet was accordingly placed on 30.12.2003 against the three petitioners under sections 420, 477-A and 120-B of the Indian Penal Code and under section 13(2) read with section 13(1)(d) of the 1988 Act.

4. Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioner Baishnab Charan Barik being ably assisted by Miss Soma Patnaik appearing for the petitioners D.K. Singh @ Dusmanta Kumar Singh and K.C. Mohapatra @ Kishore Chandra Mohapatra while challenging the impugned order contended that prima facie there are no clinching materials available on record to constitute the ingredients of the offences under which charges were framed against the petitioners and on scrutiny of the statements and documents filed by Vigilance police, there are no circumstances which would at least create strong suspicion that slag cement had been supplied by the two suppliers. It is contended that the prosecution has not tendered any evidence that OPC 43 grade IDCOL cement is a restricted commodity and it cannot be

made available from any other source excepting Rayagada depot or that the authorised agents who were examined by Vigilance police were the only dealers of IDCOL cement. It is contended that O.T.D.P., Kashipur, Rayagada in their supply order stipulated three conditions:-

- i) He should supply OPC 43 Grade weighing 50 Kg. net on each bag in good condition @ Rs.133.60 per bag.
- ii) The payment will be made soon after delivery of cement.
- iii) The undersigned reserves the right to cancel the order at any time without assigning any reasons thereof.

It is further contended that at no point of time, Junior Engineer, Asst. Engineer, Executive Engineer, Project Manager or the Contractors complained that cements used were not OPC 43 grade IDCOL cement. Moreover, during investigation of this case, in the 161 Cr.P.C. statements, the witnesses have stated that the contractors have used OPC 43 grade IDCOL cement in the execution of the civil work.

It is strenuously contended that after a long gap five years since the execution of work, the case has been foisted against the petitioners just to harass them and merely because after five years, the suppliers were not able to produce any documents relating to lifting/purchase of OPC 43 grade IDCOL cement before the Investigating Agency, it could not have been assumed that there was no supply of OPC 43 grade IDCOL cement.

It is contended that basing on assumption that the petitioners have got pecuniary benefits by supplying slag cement which was Rs.5/- less than OPC 43 grade IDCOL cement per bag, charge sheet has been submitted which is not sustainable in the eye of law. The learned counsel placed reliance on the statement of witness N. Gumpa Swami, Junior Engineer under whose supervision, the construction works had been done. As per his statement, he had lifted 43 grade IDCOL cement after signing on the stock register and in all the works he had supervised, only OPC 43 grade of IDCOL cement were used. It is contended that the said statement of J.E. is also supported by the other contractors who have been examined as witnesses by the Investigating Agency. It is also contended that the civil work done by O.T.D.P. was time bound project and within a short time period, various types of civil works are to be performed and it is not possible on the part of the suppliers to purchase huge quantity of IDCOL cement from a particular godown. It is contended that framing of charges suffers from non-application of mind and therefore, it should be quashed.

5. Mr. Sangram Das, learned Standing Counsel for the Vigilance department on the other hand contended that for civil construction work, the project authorities of O.T.D.P. decided to purchase OPC 43 grade of IDCOL cement from authorised IDCOL cement dealers and the purchase committee fixed the price per bag of OPC 43 grade IDCOL cement at Rs.134/- inclusive of all taxes, loading and unloading and transportation charges from Rayagada from Kashipur. Two firms namely M/s. Sriram Enterprises, Rayagada and M/s. Kishore Kirana Store, Kashipur expressed their willingness to supply the cement and since both the firms were authorised dealers of IDCOL cement and their quoted rates were lesser than the approved rate, the Project Manager placed orders with them to supply OPC 43 grade IDCOL cement. It is contended that the investigation revealed that there was only one IDCOL godown at Rayagada and during the period from November to December 1997, a total of 1532.350 MT of OPC 43 grade cement was received at the godown for distribution to its dealers from the head office. M/s. Kishore Kirana Store lifted 316 MT of OPC 43 grade cement (6320 bags) from the godown whereas M/s. Sriram Enterprises, Rayagada had not lifted any quantity of OPC 43 grade cement during the period i.e. from 14.11.1997 to 31.12.1997 from the said godown. The local cement dealers dealing with OPC 43 grade cement were examined and they stated that they had not supplied any quantity of 43 grade IDCOL cement to those two suppliers during the year 1997. It is contended that as against lifting of only 316 MT (6320 bags) of 43 grade IDCOL cement, M/s. Kishore Kirana Store had supplied 2100 MT (42000 bags) and against no lifting of IDCOL cement, M/s. Sriram Enterprises, Rayagada had shown supply of 500 MT (10000 bags) to OTDP, Kashipur. Therefore, the aforesaid two firms supplied slag cements and managed to get certificates on their delivery challans and credit bills showing supply of OPC 43 grade IDCOL cement to O.T.D.P., Kashipur in connivance with the petitioner Baishnaba Charan Barik who was the J.E. -cum- Store in charge of O.T.D.P. It is contended that the two firms failed to produce any documents relating to purchase and supply of OPC 43 grade IDCOL cement to O.T.D.P., Kashipur during the relevant period and thus by supplying slag cement whose cost was Rs.5/- lesser than the cost of OPC 43 grade IDCOL cement per bag, the department had sustained a total loss of Rs.2,28,400/- and both the firms i.e. M/s. Sriram Enterprises, Rayagada and M/s. Kishore Kirana Store had gained pecuniary advantage to the tune of Rs.2,28,400/- in connivance with petitioner Baishnaba Charan Barik. The learned counsel placing reliance in the cases of *State of Delhi -Vrs.- Gyan Devi reported in (2000) 8 Supreme Court Cases*

**239, Amit Kapoor -Vrs.- Ramesh Chander reported in (2012) 9 Supreme Court Cases 460** contended that the revision petitions should be dismissed.

6. Section 239 of Cr.P.C., inter alia, provides that if upon considering the police report and the documents sent with it under section 173 of Cr.P.C. and making such examination, if any, of the accused and after giving prosecution and accused an opportunity being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused and record his reasons for so doing.

In case of *State of Delhi -Vrs.- Gyan Devi reported in (2000) 8 Supreme Court Cases 239*, it is held as follows:-

“12. Section 397 of the Code vests the Court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinize the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

9. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex-facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforesaid. Even framing of charge is a much advanced stage in the proceedings under the Code of Criminal Procedure.

xxx xxx xxx xxx xxx

17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine

distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code....”

In case of *Amit Kapoor -Vrs.- Ramesh Chander reported in (2012) 9 Supreme Court Cases 460*, it is held as follows:-

“19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage.

xxx xxx xxx xxx xxx

20. The jurisdiction of the Court under Section 397 can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may be. Though the section does not specifically use the expression 'prevent abuse of process of any court or otherwise to secure the ends of justice', the jurisdiction under Section 397 is a very limited one. The legality, propriety or correctness of an order passed by a court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily.....”

The object of discharge under section 239 of Cr.P.C. is to save the accused from unnecessary and prolonged harassment. When the allegations are baseless or without foundation and no prima facie case are made out, it is just and proper to discharge the accused to prevent abuse of process of the Court. If there is no ground for presuming that accused has committed an offence, the charges must be considered to be groundless. The ground may be any valid ground including the insufficiency of evidence to prove the charge. When the materials at the time of consideration for framing the charge are of such a nature that if unrebutted, it would make out no case whatsoever, the accused should be discharged.

7. In the light of above principles, if the materials available on record is analyzed, it appears that during the period from 14.11.1997 to 31.12.1997, while the petitioner Baishnaba Charan Barik as Junior Engineer was in charge of the stores of O.T.D.P., Kashipur, stock register of cement and correspondence file revealed that M/s. Sriram Enterprises, Rayagada supplied 10,000 bags of OPC 43 grade of IDCOL brand cement to O.T.D.P., Kashipur @ Rs.133.60 paisa per bag and M/s. Kishore Kirana Store, Kashipur also

supplied 40,000 bags of OPC 43 grade of IDCOL brand cement to O.T.D.P., Kashipur at the same rate. Certificates on the credit bills in that respect were given by the petitioner Baishnaba Charan Barik, J.E. The first information report was lodged on 13.06.2002 and charge sheet was submitted on 30.12.2003.

The charges framed against the petitioner Baishnaba Charan Barik read as follows:-

**Firstly:-** That during the period from 14.11.1997 to 31.12.1997 you being the public servant employed as Junior Engineer, O.T.D.P., Kashipur and in charge of stores of O.T.D.P., Kashipur, by corrupt or illegal means and/or by otherwise abusing your position as such public servant, obtained pecuniary advantage of Rs.2,28,400/- for yourself and for the two firm owners namely Shri D.K. Singh, Proprietor, M/s. Sriram Enterprisers, Rayagada and Shri K. Ch. Mohapatra, Proprietor, Kishore Kirana Store, Kashipur by manipulating records and documents of O.T.D.P., Kashipur showing receipt of 43 grade IDCOL cement and accepted the delivery challans and credit bills as genuine submitted by the above two firm owners causing loss to the Government and thereby committed an offence of criminal misconduct punishable under section 13(2) read with section 13(1)(d)(ii) of the Prevention of Corruption Act, 1988 and within my cognizance.

**Secondly:-** That during the aforesaid period you cheated the O.T.D.P., Kashipur by dishonestly inducing it by manipulating records and documents of O.T.D.P., Kashipur showing receipt of OPC 43 grade cement and accepted delivery challans and credit bills from M/s. Sriram Enterprisers, Rayagada and Kishore Kirana Store, Kashipur as genuine causing loss to the Government to the tune of Rs.2,28,400/- due to such pecuniary gain to you and thereby committed an offence punishable under section 420 of the Indian Penal Code and within my cognizance.

**Thirdly:-** That during the aforesaid period, you being the Junior Engineer and store in charge of O.T.D.P., Kashipur willfully with intention to defraud the O.T.D.P., Kashipur falsified the records and documents of the said O.T.D.P., Kashipur showing receipt of 43 grade IDCOL cements from the aforesaid two firms, M/s. Sriram Enterprisers, Rayagada and Kishore Kirana Store, Kashipur causing loss to the Government to the tune of Rs.2,28,400/- and thereby committed an offence punishable under section 477-A of the Indian Penal Code and within my cognizance.

**Fourthly:-** That during the aforesaid period you agreed with the two authorised cement suppliers, M/s. Sriram Enterprisers, Rayagada and Kishore Kirana Store, Kashipur to do an illegal act namely received slag cement bags instead of OPC 43 grade of IDCOL cement from the aforesaid two cement suppliers by manipulating records and documents of O.T.D.P., Kashipur and by accepting the delivery challans and credit bills submitted by the aforesaid two suppliers causing loss to the Government to the tune of Rs.,2,28,400/- and thereby committed an offence punishable under section 120-B of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charges.

Dated, this the 27th day of February, 2008.

The charges framed against the petitioners Kishore Chandra Mohapatra and Dushmant Kumar Singh read as follows:-

**Firstly:-** That during the period from 14.11.1997 to 31.12.1997, you dishonestly cheated O.T.D.P., Kashipur by supplying 42,000 bags of slag cement and 10,000 bags of slag cement respectively to O.T.D.P., Kashipur instead of OPC 43 grade of IDCOL cement with connivance of the Junior Engineer, Shri B.K. Barik, who was in charge of the store of O.T.D.P. at the relevant time by delivering challans and credit bills causing wrongful loss to the Government to the tune of Rs.2,28,400/- and thereby committed an offence punishable under section 420 of the Indian Penal Code and within my cognizance.

**Secondly:-** That during the aforesaid period you being the Proprietors of Kishore Kirana Store, Kashipur and M/s. Sriram Enterprisers, Rayagada respectively willfully with intention to defraud the O.T.D.P., Kashipur falsified the records and documents with the connivance of the Junior Engineer, Shri B.K. Barik with regard to supply of cement to O.T.D.P., Kashipur causing loss to the Government to the tune of Rs.2,28,400/- and thereby committed an offence punishable under section 477-A of the Indian Penal Code and within my cognizance.

**Thirdly:-** That during the aforesaid period you both agreed with the Junior Engineer Shri B.K. Barik to do an illegal act namely to supply of slag cement instead of OPC 43 grade of IDCOL cement to him (B.K. Barik) and to supply delivery challans and credit bills to him for manipulation of records and documents of O.T.D.P., Kashipur and thereby committed an offence punishable under section 120-B of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charges.

Dated this the 27th day of February, 2008.

The statement of the informant Sri U. Rama Rao recorded under section 161 of Cr.P.C., inter alia, indicates that during the relevant period, M/s. Sriram Enterprises has not lifted a single bag of OPC 43 grade cement from the IDCOL godown situated at Khaliguda, Rayagada and M/s. Kishore Kirana Store, Kashipur has lifted only 5430 bags of OPC 43 grade cement but the suppliers have supplied 10,000 bags and 40,000 bags cement respectively to O.T.D.P., Kashipur and the petitioner Baishnab Charan Behera, J.E. had mentioned the receipt of such quantity of cement bags of 43 grade in his stock register. He further stated that the suppliers might have supplied slag cement which was Rs.5/- less than OPC 43 grade cement to get pecuniary benefits.

Therefore, it is apparent that the statement of the informant relating to supply of slag cement in place of OPC 43 grade IDCOL cement by the two suppliers is based on assumption. The supply orders stipulated only three conditions and it was not stipulated as to where from the suppliers would procure OPC 43 grade cement. Merely because it was not lifted from the IDCOL godown situated at Khaliguda, Rayagada in case of M/s Sriram Enterprises and only 5430 bags out of 40,000 supplied bags were lifted in case of M/s. Kishore Kirana Store, it cannot be assumed that the suppliers might have supplied slag cement. Even if the Investigating Officer has examined some other suppliers who used to deal with IDCOL cement and obtained in writing from them that the two suppliers M/s. Sriram Enterprises and M/s. Kishore Kirana Store have not lifted OPC 43 grade IDCOL cement from them but that would not be sufficient to draw an assumption that the suppliers had supplied slag cement. The logic behind drawing such assumption is fallacious. Such an assumption could have been drawn after examining all the suppliers dealing with OPC 43 grade cement and not few of them. Most of the witnesses who have been examined by the Investigating Officer were the competitors of the two suppliers who had also submitted tender papers to supply 43 grade of IDCOL cement to O.T.D.P., Kashipur and they were unsuccessful and they have stated that they had not sold any 43 grade IDCOL cement to either M/s. Sriram Enterprises or M/s. Kishore Kirana Store, Kashipur. The contractors like Sarat Ch. Gouda, Bihari Naik, Mangulu Charan Mandal, Sanjib Kumar Patra have stated that they received 43 grade IDCOL cement for different project works on different dates from the petitioner Baishnaba Charan Barik and put their signatures on the stock register in token of receipt. N. Gumpa Swami, J.E. who was supervising the works has also stated that all the cements which were received by him from the office of O.T.D.P. were of 43 grade IDCOL cement and accordingly he had put his signatures in the stock register and only 43 grade IDCOL cements were used in the works supervised by him.

The two petitioners Kishore Chandra Mohapatra and Dusmanta Kumar Singh were examined on 04.07.2003 by the Inspector of Vigilance and their statements were recorded. The petitioner Dusmanta Kumar Singh has stated that since cements were to be supplied to O.T.D.P. on credit basis and he had no sufficient cash to purchase from IDCOL cement depot, therefore, he purchased 43 grade cement from outside and supplied to O.T.D.P. and he further stated that since the purchases were made in the year 1997, he was not in a position to tell from which agency, he had purchased

the cement. He further stated that since he got back the entire dues relating to the supply of cement to O.T.D.P., there was no purpose in keeping the related documents with him. The petitioner Kishore Chandra Mohapatra has also stated almost in a similar manner. The petitioner Baishnaba Charan Barik was examined by the Inspector of Vigilance Department and he has stated in detail how he was receiving OPC 43 grade IDCOL cement from the suppliers, making entries in the stock register and how he was supplying the same to different contractors as per the orders of the Executive Engineer or Project Manager after making necessary entries in the stock register. He specifically stated that except 43 grade of IDCOL cement, he had not received the cement of any other brand and further stated to have received the cement with the challan copies. The original delivery challans of the suppliers have been seized by the investigating agency.

8. Therefore, when the documentary evidence like stock register, delivery challans indicate about receipt of OPC 43 grade of IDCOL cement in the O.T.D.P. store of Kashipur during the relevant period when the petitioner Baishnaba Charan Barik, J.E. was in charge from the two suppliers M/s. Sriram Enterprises and M/s. Kishore Kirana Store, Kashipur and the contractors have also received cements of 43 grade of IDCOL brand from the store after signing the stock register and all of them including N. Gumpa Swami, J.E. who was supervising the works have stated about the utilization of 43 grade IDCOL cement in the construction works, merely basing on the fact that such cements were not lifted from the IDCOL godown at Khaliguda, Raygada or were not purchased from some of the dealers of IDCOL cement of Raygada district, the assumption drawn by the informant as well as by the investigating officer that the two suppliers had supplied slag cements cannot be accepted particularly in absence of any stipulation in the supply orders to purchase OPC 43 grade cement from a particular party or from IDCOL godown at Khaliguda. Drawing of assumption suffers from non-application of mind which is also not justified in the facts and circumstances of the case.

For general construction applications, there are three types of Ordinary Portland Cement (OPC) available namely, 33, 43 and 53 grade and it is graded according to its strength. Specifications for these different grades of cement shall conform to IS 269:2013, IS 8112:2013, IS 12269:2013 respectively. The grade indicates the compression strength (MPa) of the concrete that will attain after 28 days of setting. Thus OPC 43 grade cement shall conform to IS:8112-1989 and the designed strength of 28 days shall be minimum 43 MPa or 430 kg/sqcm. Compressive strength of cement is

determined by compressive strength test on mortar cubes compacted by means of a standard vibration machine. OPC is manufactured by grinding together OPC Clinker (95 – 97%) along with gypsum (3-5%).

PSC or Portland Slag cement on the other hand is a kind of blended cement manufactured by either grinding the Portland clinker with gypsum and granulated slag or blending the ground granulated blast furnace slag (GGBS) with Ordinary Portland cement. Normal composition of Portland slag cement is 40 % clinker, 5 % gypsum and 60 % blast furnace granulated slag. As per IS:455, the quantity of GGBS can be in the range to 25 % to 70%. The minimum compressive strength requirement is 33 MPa at 28 days for PSC Cement. PSC cement has less heat of hydration as compared to OPC cement. Slag cement is most widely used in concrete, either as a separate cementitious component or as part of blended cement. It works synergistically with Portland cement to increase strength, reduce permeability, improve resistance to chemical attack and inhibit rebar corrosion.

No field testing report or laboratory testing report has been obtained by the investigating agency to substantiate the accusation that it was not OPC 43 grade cement but it was slag cement.

In case of *State of Bihar and Anr. -Vrs.- P.P. Sharma reported in A.I.R. 1991 S.C. 1260*, it is held as follows:-

“47. The investigating officer is the arm of the law and plays pivotal role in the dispensation of criminal justice and maintenance of law and order. The police investigation is, therefore, the foundation stone on which the whole edifice of criminal trial rests an error in its chain of investigation may result in miscarriage of justice and the prosecution entails with acquittal. The duty of the investigating officer, therefore, is to ascertain facts, to extract truth from half-truth or garbled version, connecting the chain of events. Investigation is a tardy and tedious process. Enough power, therefore, has been given to the police officer in the area of investigatory process, granting him or her great latitude to exercise his discretionary power to make a successful investigation. It is by his action that law becomes an actual positive force. Often crimes are committed in secrecy with dexterity and at high places. The investigating officer may have to obtain information from sources disclosed or undisclosed and there is no set procedure to conduct investigation to connect every step in the chain of prosecution case by collecting the evidence except to the extent expressly prohibited by the Code or the Evidence Act or the Constitution. In view of the arduous task involved in the investigation he has been given free liberty to collect the necessary evidence in any manner he feels expedient, on the facts and in given circumstances. His/her primary focus is on the solution of the crime by intensive investigation. It is his duty to ferret out the truth.

Laborious hardwork and attention to the details, ability to sort out through mountainous information, recognized behavioural patterns and above all, to coordinate the efforts of different people associated with various elements of the crime and the case are essential. Diverse methods are, therefore, involved in making a successful completion of the investigation.”

In case of *Jamuna Chaudhary -Vrs.- State of Bihar reported in 1974 Criminal Law Journal 890*, it is held by the Hon'ble Supreme Court as follows:

“11. The duty of the Investigating Officers is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth.”

Therefore, I am of the view that the Investigating Officer has failed to collect any clinching materials to proceed against the petitioners and acted in a mechanical manner. On the available materials on record, there is no prima facie case for commission of the offences alleged against the petitioners. There is no ground for presuming that the petitioners have committed the offences alleged. There is no strong suspicion against the petitioners. Submission of charge sheet is based totally on unfounded assumptions and it has resulted in causing miscarriage of justice. The learned trial Judge has mechanically dealt with the discharge petition filed by the petitioners and after quoting the prosecution allegation, he jumped to the conclusion that there are sufficient grounds for proceeding against the petitioners and rejected the petition. Therefore, without meticulous examination of the materials on record, I am of the humble view that the learned trial Court has committed palpable error in framing charges against the petitioners after rejecting the discharge petition and as such, in the interest of justice, the impugned order cannot be sustained in the eye of law.

9. Accordingly, both the criminal revision petitions are hereby allowed. The impugned order dated 27.02.2008 passed by the learned Special Judge (Vigilance), Jeypore in G.R. Case No. 28 of 2002 in rejecting the petition under section 239 of Cr.P.C. praying for discharge and framing charges stands quashed and set aside and the petitioners are hereby discharged from the offences charged.

Revisions allowed.

## 2018 (I) ILR - CUT-599

S.K.SHOO, J.

CRLA 98 OF 2012

RAMAKRUSHNA SAHU

..... Appellant

. Vrs.

STATE OF ORISSA

.....Respondent

**(A) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 (N.D.P.S. Act) – Sections 20(b)(ii)(C) & 29 r/w sections 482/34 of the Indian Penal Code,1860- Offence under – Appellants were found transporting 595 kgs. 500 grams of contraband ganja in 66 polythene packets through three four wheeler vehicles in contravention of the provisions of section 8(c) of the N.D.P.S. Act and they abetted the commission of offence and were party to criminal conspiracy and used fake number plates in furtherance of their common intention – Only material available on record against the appellant Firoz Alli Khan @ Bulu is the confessional statement of co-accused persons before P.W.14, the Inspector in Charge of Jarada police station, Informant – Held, a confessional statement made by a person whilst he is in custody of a police officer shall not be proved as against him unless it is made in the immediate presence of a Magistrate in view of section 26 of the Evidence Act – Conviction only on the basis of confessional statement of co-accused person is liable to be set aside.**

**(B) INDIAN EVIDENCE ACT, 1872 – Section 25 – Object of the provision- Indicated.**

*Held, the object of section 25 of the Evidence Act, wherein it is mentioned that no confession made to a police officer, shall be proved as against a person accused of any offence, is that the officer would make every effort to collect the evidence of the commission of the crime and from the power he possesses, he has the capacity to influence, pressurise or subject the person to coercion to extract confession. A confessional statement made by a person whilst he is in custody of a police officer shall not be proved as against him unless it is made in the immediate presence of a Magistrate in view of section 26 of the Evidence Act. In the present case, the evidence of Tahasildar-cum-Executive Magistrate (P.W.11) as already indicated is silent regarding any confessional statement by the co-accused persons implicating the appellant Firoz Alli Khan @ Bulu. Confession of a co-accused does not come within the definition of "evidence" as contained in section 3 of the Evidence Act. It cannot be treated as substantive evidence. Law is well settled that the Court cannot start with confession of a co-accused person. It must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on some other evidence.*

(Para 8 & 9)

**(C) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 (N.D.P.S. Act') – Section 42, sub-sections (1) and (2) – Provisions under – Non-compliance thereof – Held, law is well settled that total non-compliance with the provisions under sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible and it vitiates the conviction and renders the entire prosecution case suspect and cause prejudice to the accused – Evidence show there has been total non – compliance of the mandatory requirements – Effect of – Conviction liable to be set aside.**

*“Since the total non-compliance of requirements of sub-sections (1) and (2) of Section 42 of the N.D.P.S. Act is impermissible particularly when the information was received when the police officer was in the police station with sufficient time to take action or where the reliable information calls for immediate action and there is no sufficient time to obtain search warrant or authorization and he has reason to believe that delay would result in the goods or evidence being removed or destroyed and it would not be feasible or practical to take down in writing the information given to him, he could take action as per clauses (a) to (d) of Section 42(1) of the N.D.P.S. Act and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior as held in case of Karnail Singh (supra). P.W.14 has stated that as there was no sufficient time to obtain search warrant from the Court and there was every possibility of escape of culprits with the contraband articles, he immediately along with other police officers and staff left the police station in the police jeep and in that respect station diary entry no.123 was made. The said station diary entry has not been proved in the case. P.W.14 has not stated about sending the copy of recording of ground of belief to his immediate official superior. Thus mere oral evidence of P.W.14 in absence of proof of corresponding documentary evidence is not sufficient to hold regarding compliance of the mandatory provisions of section 42 of the N.D.P.S. Act.”* (Para 12)

**(D) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 (N.D.P.S. Act') – Section 55 read with Rule 119 of the Orissa Police Rules which deals with malkhana register – Provisions under – Duty of the police officer – Indicated – Non-compliance thereof – Entitles the accused the benefit of acquittal.**

*“In view of the glaring inconsistencies in the evidence of prosecution witnesses, absence of clinching evidence relating to compliance of mandatory provision under section 42(2) of the N.D.P.S. Act, absence of any cogent materials that the seized articles along with sample packets were kept in safe custody till its production in the Court, I am of the view that it would be very risky to uphold the impugned judgment and order of conviction in respect of the appellants Ramakrushna Sahu, Trilochan Sahu, Subash Mahapatra @ Subash Ch. Mahapatra and Kailash Chandra Panda under section 20(b)(ii)(C) of the N.D.P.S. Act. Accordingly, the impugned judgment and order of conviction of the appellants under*

*section 20(b)(ii)(C) of the N.D.P.S. Act and the sentence passed thereunder by the learned trial Court is hereby set aside.”*  
(Para 12 &13)

**Case Laws Relied on and Referred to :-**

1. A.I.R. 1964 S.C. 1184: Hari Charan Kurmi –Vrs.- State of Bihar.
2. A.I.R. 1991 S.C. 45 : Raj Kumar Karwal -Vrs.- Union of India.
3. A.I.R. 2008 S.C. 1044: Kanhaiyalal -Vrs.- Union of India.
4. 2013 (12) SCALE 552 : Tofan Singh -Vrs.- State of Tamil Nadu.
5. 1999 (II) Orissa Law Reviews :(SC) 474 : State of Punjab -Vrs.- Baldev Singh.
6. (2016) 64 O.C.R (SC) 827 : State of Rajasthan -Vrs.- Jag Raj Singh @ Hansa.
7. (1994) 7 OCR (SC) 283 :State of Punjab -Vrs.- Balbir Singh.
8. (2009) 44 OCR (SC) 183 :Karnail Singh -Vrs.- State of Haryana.

For Appellants : Mr. Prasanta Kumar Sahoo  
Mr. Jugal Kishor Panda, Mr. Samvit Mohanty  
Mr. Biswajit Nayak, Mr. D.P. Das  
For State: Mr. Chita Ranjan Swain (Addl. Standing Counsel)

Date of Hearing: 08.02.2018

Date of Judgment: 05.03.2018

**JUDGMENT**

**S. K. SAHOO, J.**

The appellant Ramakrushna Sahu in Criminal Appeal No. 98 of 2012, appellant Trilochan Sahu in Criminal Appeal No. 123 of 2012, appellant Subash Mahapatra @ Subash Ch. Mahapatra in Criminal Appeal No. 198 of 2012, appellant Firoz Alli Khan @ Bulu in Criminal Appeal No. 259 of 2012 and appellant Kailash Chandra Panda in Criminal Appeal No. 330 of 2012 faced trial in the Court of learned Sessions Judge -cum- Special Judge, Ganjam, Berhampur in G.R. Case No.02 of 2009(N)(T.R. No.07 of 2009) for offences punishable under sections 20(b)(ii)(C) & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter ‘the N.D.P.S. Act’) and sections 482/34 of the Indian Penal Code on the accusation that on 06.09.2009 at about 4.00 p.m. at Patrapur bus stand, they were found transporting 595 kgs. 500 grams of contraband ganja in 66 polythene packets through three four wheeler vehicles in contravention of the provisions of section 8(c) of the N.D.P.S. Act and they abetted the commission of offence and were party to criminal conspiracy and used fake number plates in furtherance of their common intention.

The learned trial Court vide impugned judgment and order dated 09.01.2012 acquitted all the appellants of the charge under sections 482/34 of the Indian Penal Code and also the appellants namely, Ramakrushna Sahu, Trilochan Sahu, Subash Mahapatra @ Subash Ch. Mahapatra and Kailash Chandra Panda of the charge under section 29 of the N.D.P.S. Act and

also the appellant Firoz Alli Khan @ Bulu of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act. However the appellants namely, Ramakrushna Sahu, Trilochan Sahu, Subash Mahapatra @ Subash Ch. Mahapatra and Kailash Chandra Panda were found guilty under section 20(b)(ii)(C) of the N.D.P.S. Act and each of them was sentenced to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.2,00,000/- (rupees two lakhs only), in default, R.I. for five years each. The appellant Firoz Alli Khan @ Bulu was found guilty under section 29 of the N.D.P.S. Act and sentenced to undergo rigorous imprisonment for twenty years and to pay a fine of Rs.2,00,000/- (rupees two lakhs only), in default, to undergo R.I. for five years.

Though co-accused Suchi @ Suchit Sahoo also faced trial along with the appellants under similar charges and was also found guilty under section 20(b)(ii)(C) of the N.D.P.S. Act and accordingly sentenced by the learned trial Court and he preferred a separate appeal bearing CRLA No.124 of 2012, since the said accused absconded while on interim bail, his appeal was delinked from the present appeals as per the order dated 26.10.2016.

Since all the appeals arise out of a common judgment, with the consent of the parties, those were heard analogously and disposed of by this common judgment.

2. The prosecution case, as per the first information report (Ext.30) lodged by Sri Trinatha Mishra (P.W.14), Inspector in charge of Jarada Police Station, in short, is that on 06.09.2009 at about 1.00 p.m., he received reliable information to the effect that ganja was being transported in three vehicles i.e. TATA SUMO, INDICA Car and SANTRO Car from Vishakapatnam side towards Bhubaneswar. He entered the said fact in the station diary of the police station vide SDE No.120 dated 06.09.2009 and immediately informed the S.P., Berhampur and S.D.P.O., Chikiti over telephone which was reflected in SDE Nos.121 and 122 dated 06.09.2009 respectively. He also submitted report to the S.P. and S.D.P.O. vide DR Nos.1095 and 1096 respectively which was reflected in SDE No.120. P.W.14 then requested S.D.M., Berhampur over telephone to send one Executive Magistrate to remain present during search and seizure. As there was no sufficient time to obtain search warrant and there was every possibility of escape of culprits, he along with other police officials left the police station in police jeep and SDE No.123 was entered in that respect. After reaching at Samuntiapalli Chhak, P.W.14 called two witnesses namely Raj Gopal Padhi (P.W.1) and Mahendra Kumar Sethi (P.W.2) to remain with them during search and seizure and

apprised them regarding the information and raid. At about 3.30 p.m. while the patrolling party members were present at Samuntiapalli Chhak, they found one TATA SUMO, one INDICA Car and one SANTRO Car was coming from B. Nuagaon side in a high speed. Signal was given to stop the vehicles but the drivers of the vehicles did not oblige and drove away towards Patrapur. The patrolling party chased the cars in P.S. Jeep as well as in motor cycles and could be able to detain the vehicles at Patrapur Bus stand. First they guarded the vehicles and it was found that the TATA SUMO, INDICA Car and SANTRO car were bearing Regd. No.OR-05-J-6633, OR-02-Z-4005 and AP-30-A-7789 respectively. While detaining the vehicles, two persons fled away from the vehicles. Meanwhile Sri Debabrata Sahoo (P.W.11), Tahasildar, Chikiti -cum- Executive Magistrate reached at Patrapur Bazar. They found two persons present inside INDICA Car, two persons inside SANTRO Car and one person inside TATA SUMO vehicle. All the three vehicles were loaded with blue & orange coloured polythene packets. After detaining the vehicles, the patrolling party members along with the Executive Magistrate, Chikiti and witnesses gave their identities and explained the accused persons regarding the purpose of detaining them i.e. search of their vehicles relating to possession/transportation of ganja. P.W.14 asked the two persons present in the SANTRO Car to give their identities and they gave their identities as (1) Suchi @ Suchit Sahoo (2) Kailash Ch. Panda (appellant in CRLA No.330 of 2012). The persons present inside the INDICA Car disclosed their identities as Trilochan Sahoo (appellant in CRLA No.123 of 2012) and Subash Mohapatra (appellant in CRLA No.198 of 2012). The person present inside the TATA SUMO disclosed his identity as Balia @ Rama Krushna Sahoo (appellant in CRLA No.98 of 2012). P.W.14 asked them in writing whether they wanted to be searched in presence of Gazetted police officer or Executive Magistrate but all of them gave their written willingness/consent to be searched in presence of the Executive Magistrate. Before search, the patrolling party members, Executive Magistrate and the independent witnesses gave their personal search to them and accordingly, search lists were prepared. Then the personal search of the accused persons were taken after bringing them from the vehicles. During personal search, two NOKIA 6030 sets and one E-Touch China made Mobile phone were found with Suchi @ Suchit Ku. Sahoo and NOKIA (1650 Model) set found with Kailash Ch. Panda (appellant in CRLA No.330 of 2012) and old NOKIA mobile set with Subash Mohapatra (appellant in CRLA No.198 of 2012). When the TATA Sumo vehicle was searched, 33 closed polythene packets containing ganja and two registration number plates bearing

registration No.OR-13-4262 were found. The INDICA car was loaded with twenty four closed polythene packets containing ganja. The SANTRO Car was found loaded with nine closed polythene packets containing ganja. Two registration number plates bearing No.OR-02-AJ-7330 were found inside the SANTRO Car. P.W.14 sent N.C. Pati, A.S.I. of police to Patrapur Bazar to bring weighing instrument to weigh the ganja. After prolonged interrogation, the above five accused persons disclosed that they along with Bulu Khan (appellant in CRLA No.259 of 2012), Kapila Sahoo, S/o-Dama Sahu of Vill-Jagannathpur, Gudum, P.S./Dist-Khurda, Satya Swain of Balimela and one Fakira of Nayagarh were dealing with ganja business since about last two years and they were bringing ganja from village Gudum near Vishakhapatnam (Andhra Pradesh) and selling the same at Khurda, Bhubaneswar, Cuttack and Puri towns under the leadership of Bulu Khan and Kapila Sahu. They further disclosed that on that day, Bulu Khan (appellant in CRLA No.259 of 2012) was piloting them in one INDICA Car bearing Regn. No. OR-02-X-7803 & transporting ganja from one place to another. Kapil Sahu was driving detained SANTRO Car and Fakir of Nayagarh was driving the detained TATA SUMO and both of them fled away leaving the vehicles. Meanwhile, A.S.I. of police N.C. Pati came with one K Tripati Kumar Patro, S/o-K. Koti Patro of Main road, Patrapur who was dealing in rice business and he came with his electronic weighing machine.

P.W.14 brought out twenty four packets from the INDICA Car through the labourers and his staff and opened it in presence of the witnesses and Executive Magistrate, Chikiti and it was found that all those packets were containing ganja. He made homogeneous blending of all ganja and K. Tripati Kumar Patro weighed the ganja and the total ganja came to 186 Kg. 400 grams (One hundred eighty six Kg. and four hundred grams). He prepared two samples of 250 gms each from all the blending ganja and packed the ganja in eight bags and marked the bags as Exts. A to H. The empty polythene packets and gunny bags which were containing ganja were packed in another bag and marked as Ext.I. The two sample packets were marked as Exts.1 and 2.

P.W.14 then brought out thirty three closed polythene packets from the TATA SUMO car, opened it in presence of the witnesses and Executive Magistrate, Chikiti and found ganja inside it. He made homogeneous blending of all the ganja and it was weighed and found to be 346 kg. 800 grams (three hundred forty six Kgs. and eight hundred grams). The ganja was packed in eighteen separate bags and those were marked as Exts.J to Z and

A1. He prepared samples of 250 grams in two polythene packets each, sealed it and marked as Exts.3 and 4. The empty polythene and gunny bags were kept in another bag and marked as Ext.A2.

P.W.14 then brought out nine polythene packets from the SANTRO car and opened it and those packets were found to be containing ganja. After homogeneous blending, the ganja were kept in four bags and marked as Exts.A3 to A6 and the total weight became 62 kg. 300 gm. He prepared two sample packets of 250 gms. each and marked it as Exts.5 and 6. The empty polythene and gunny bags were kept in a separate bag and marked as Ext.A7.

It is further stated in the F.I.R. that all the bags containing ganja and marked as Exts.A to Z and A1 to A7 were stitched and sealed with the personal brass seal of P.W.14. The sample ganja were first packed in polythene packets and sealed. Then the sealed sample packets were kept inside cloth packets and sealed with the personal brass seal of P.W.14. All the stitching, packing and sealing were done in presence of the witnesses, Executive Magistrate and the appellants gave their signatures on the exhibits. P.W.14 seized the electronic weighing machine from K. Tripati Kumar Patro in presence of Executive Magistrate and witnesses and left it in his zima after executing proper zimanama. He took the facsimile seal impression of his brass seal on a separate paper in presence of the witnesses and Executive Magistrate and kept in a paper cover and sealed it and the said sealed paper packet was marked as Ext.8. P.W.14 left his personal brass seal used in sealing the exhibits in the zima of Sri Akhila Kumar Patnaik (P.W.15) after executing proper zimanama. P.W.14 seized the exhibit bags containing ganja, sample packets, Nokia mobile phones and TATA Sumo, INDICA car and SANTRO car bearing Regn. Nos. OR-05-J-6633, OR-02-Z-4005 and AP-30-A-7789 respectively and fake number plates in presence of the witnesses, appellants and Executive Magistrate, Chikiti at 9.30 p.m. under proper seizure list. He gave the copy of seizure list to the appellants. The entire process was photographed and video graphed. As the accused persons namely Suchi @ Suchit Sahu, Trilochan Sahu, Subash Mohapatra, Rama Krushna Sahu and Kailash Ch. Panda were in exclusive and conscious possession of contraband ganja and dealing with it illegally, they were arrested by P.W.14 after observing all the formalities of arrest on 06.09.2009 at 10.30 p.m. after explaining them the ground of arrest. P.W.14 verified the engine number and chassis number of the seized vehicles and those were found to have been tampered with.

3. P.W.14 drew up a plain paper first information report at the spot and sent it to Jarada police station for registration. The appellants and the seized properties were brought to the police station and the seized properties were kept inside the police station malkhana after entering the same in the property register vide Mal Item No.51/2009 and in that respect station diary entry no. 132 was made.

On the basis of such first information report, Jarada P.S. Case No.100 of 2009 was registered on 06.09.2009 under sections 20(b)/29 of the N.D.P.S. Act against the five appellants and also against accused Suchi @ Suchit Sahoo and Kapila Sahoo.

P.W.14 made over the charge of investigation to Biranchi Prasad Dehury (P.W.16), S.D.P.O., Chikiti on 07.09.2009. P.W.16 examined the informant and visited the spot and he received the exhibits from the Inspector in Charge, Jarada police station. He forwarded the appellants to Court and produced the seized exhibits before the Court. He kept the seized exhibits at Baidanathpur police station malkhana on the direction of the Court after sealing the same properly as it was late. P.W.16 received the seized exhibits from Baidanathpur police station on 08.09.2009 and produced it before the S.D.J.M., Berhampur and as per the direction of the S.D.J.M., the exhibits were sent to R.F.S.L., Berhampur for chemical examination and opinion. He also deposited the remaining seized ganja in the Court Malkhana. He submitted a detail report to the Superintendent of Police, Berhampur regarding search and seizure etc. On 09.09.2009 he seized one INDICA Car bearing registration no.OR-02-X-7802 as per seizure list Ext.17 at Jankia from appellant Firoz Alli Khan @ Bulu (appellant in CRLA No.259 of 2012) for his involvement in the case. He examined the seizure witnesses, arrested appellant Bulu @ Firoz Alli Khan as he was allegedly piloting the other three vehicles in the transportation of ganja. He requested the Superintendent of Police at Berhampur for call details of the seized mobile phones on 23.09.2009. He also seized the malkhana register of Jarada police station under seizure list Ext.18 and the malkhana register was given in the zima of B.D. Parida, S.I. of police as per zimanama (Ext.32). The Tahasildar, Patrapur was issued with requisition for demarcation of the spot. On 16.10.2009 he seized the detailed report submitted to the office of S.P., Berhampur as per seizure list Ext.33

On 20.11.2008 P.W.16 seized the photograph and CD from one Raj Gopal Padhy and prepared the seizure list vide Ext.6/1. On the same day, he received the call details of the seized phones from the office of

Superintendent of Police, Berhampur. On 05.12.2009 he received the spot demarcation report from the Tahasildar, Patrapur. On 28.12.2009 he seized the malkhana register of Baidyanathpur police station relating to the month of September 2009 vide page No.428 to SLNo.16/2009 and prepared the seizure list vide Ext.34. He left the seized malkhana register in the zima of S.I. of Police Lalit Mohan Meher under proper zimanama vide Ext.35. On the same day he received the chemical examination report from the R.F.S.L., Berhampur marked as Ext.36 which indicated that the exhibits marked as no.1, 3 and 5 contained flowering and fruiting tops of cannabis plant commonly known as ganja. On 02.01.2010 P.W.16 submitted charge sheet under sections 20(b)/29 of the N.D.P.S. Act and sections 482/34 of the Indian Penal Code keeping the investigation open for further verification of the seized vehicles by Scientific Officer and arrest of the other accused persons. On 27.04.2010 he submitted the supplementary charge sheet.

4. The defence plea of the appellants is one of denial and it is further pleaded that nothing was seized from their possession and they have been falsely entangled in the case.

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

P.W.1 Raj Gopal Padhi, P.W.2 Mahendra Kumar Sethi, P.W.3 Simanchala Pati, P.W.4 Sankara Mohanty and P.W.5 Narayan Swami did not support the prosecution case for which they were declared hostile.

P.W.6 Narayan Chandra Pati who was the A.S.I. of police attached to Jarada police station was one of the members of the patrolling party and he stated about the detention of the vehicles, presence of the accused persons in those vehicles and seizure of contraband ganja from the vehicles.

P.W.7 Baba Khan and P.W. 8 B. Ujala Patra did not support the prosecution case.

P.W.9 Satyanarayan Mohanty and P.W.10 M. Ramesh Rao were the home guards attached to Jarada police station and they were the members of patrolling party who stated about the arrest of the accused persons and recovery of contraband ganja from the three vehicles.

P.W.11 Debabrata Sahu was the Tahasildar, Chikiti who remained present at the time of search of the vehicles and seizure of contraband ganja by the police.

P.W.12 Rajendra Prasad Ratha was the constable attached to Jarada police station and he stated about the seizure of malkhana register of Jarada police station, extract of station diary entry and command certificate by the investigating officer under seizure list Ext.18.

P.W.13 Radhamadhaba Padhy was the A.S.I. of police attached to the office of the Superintendent of Police, Berhampur and he stated about the release of two letters in his zima under zimanama Ext.19.

P.W.14 Trinath Mishra was the IIC of Jarada police station and he is the informant in the case and he stated about the detention of the vehicles, presence of the accused persons in the vehicles and seizure of contraband ganja from the vehicles.

P.W.15 Akhil Kumar Patnaik stated about the release of brass seal in his zima by P.W.14 vide zimanama Ext.7/3.

P.W.16 Biranchi Prasad Dehury was the S.D.P.O., Chikiti and he is the investigating officer who on completion of investigation submitted charge sheet.

The prosecution exhibited thirty six documents. Exts.1/11, 2/2, 3/3, 4/3, 5/3, 6/1, 17/3, 18, 33 and 34 are the seizure lists, Exts.9/3, 10, 11, 12/2, 13/2, 14/2 and 15/2 are the search lists, Exts. 7/2, 8/2, 19, 32 and 35 are the zimanama, Exts.20 to 24 are the written options given to the accused persons, Exts.25 to 29 are the written consent given by the accused persons, Ext.30 is the F.I.R., Ext.31 is the spot map and Ext.36 is the chemical examination report.

The prosecution also proved forty four material objects. M.O.I to M.O.VI are the sample packets, M.O.VII to XI are the mobile phones, M.O.XII to XLIII are the packets containing ganja and M.O. XLIV is the brass seal.

6. The learned Trial Court formulated the following points for determination:-

(I) Whether the accused persons were found in illegal and unauthorized possession of contraband Ganja (cannabis) at the alleged time and place of seizure;

(II) Whether the accused persons abetted the commission of offence under Section 20(b)(ii) (C) of the NDPS Act and were the party to a criminal conspiracy to commit such offence in pursuance of such criminal conspiracy at the alleged time and place of seizure;

(III) Whether the accused persons used fake number plates in furtherance of their common intention at the alleged time and place of seizure.

The learned trial Court after analysing the evidence on record has been pleased to hold that the evidence of P.W.14 is quite clear, consistent, convincing, credible and above reproach and his evidence does not suffer from any inherent infirmity or improbability and therefore, there is no cogent reason or ground to doubt his veracity. It has been further held that there is no infraction or non-compliance of the mandatory provisions under sub-section (2) of Section 42 of the N.D.P.S. Act. It is further held that P.W.6, P.W.9, P.W.10, P.W.11, P.W.12, P.W.13, P.W.14 and P.W.16 were the departmental witnesses but their evidence cannot be discarded as it did not suffer from any inherent infirmity or improbability. It is further held that no explanation whatsoever has been offered by the accused persons as to how and under what circumstance such huge quantity of ganja came into their possession and therefore, it is amply established that the accused persons were found in illegal and unauthorized possession of contraband ganja. It is further held that with regard to use of fake number plates which were recovered and seized, there is no evidence in proof of the charge that those number plates were fake and those had been used by the accused persons and therefore, the charge under section 482 read with section 34 of the Indian Penal Code fails.

7. Mr. Biswajit Nayak, learned counsel appearing for the appellant Firoz Alli Khan @ Bulu in CRLA No.259 of 2012 contended that the only material available against the appellant is the confessional statement of co-accused persons before police which has got no evidentiary value and there is no material on record relating to the ownership/possession of seized contraband ganja with the appellant. It is further contended that though as per the disclosure statement of five accused persons, the appellant in his INDICA Car bearing registration OR-02-X-7803 was piloting the three cars from which contraband ganja packets were seized but nobody had seen any such INDICA car piloting the three offending vehicles. It is further contended that relating to the disclosure made by the five accused persons regarding the involvement of the appellant, the evidence of the official witnesses except P.W.14 is completely silent in that respect and therefore, the learned trial Court erred in convicting the appellant under Section 29 of the N.D.P.S. Act.

Mr. Prasant Kumar Sahoo, Mr. Jugal Kishor Panda Mr. Samvit Mohanty and Mr. D.P. Das, learned counsels appearing for the other appellants contended that there has been non-compliance of mandatory

provisions under section 42(2) of the N.D.P.S. Act so also the provisions under section 55 of the N.D.P.S. Act. It is further contended that the malkhana registers of the concerned police stations have not been produced during trial by the prosecution to prove the safe custody of contraband ganja before its production in Court and dispatch for chemical analysis. It is further contended that neither the station diary entry nor the dispatch register was also produced during trial. It is further contended that there is no plausible explanation as to why the seized ganja were not produced during Court hours on 07.09.2009 before the learned Special Judge even though the articles were seized on 06.09.2009 and first information report was also lodged on that day. It is further contended that the brass seal which was given on the packets of seized ganja as well as sample packets was not produced in Court at the time of production of the seized ganja for verification and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellants.

Mr. Chita Ranjan Swain, learned Addl. Standing Counsel appearing for the State in all the appeals on the other hand contended that the learned trial Court has not only discussed the evidence of the official witnesses vividly but after analysing the same has come to the opinion that there are no infirmities in their version. It is further contended that since the vehicles were detained and search and seizure was made in a public place, therefore, section 43 of the N.D.P.S. Act and not section 42 of the N.D.P.S. Act is applicable in the case. It is further contended that there is compliance of the mandatory provisions of the N.D.P.S. Act and the seized ganja packets and the sample packets were kept in the malkhana of the police station in sealed condition and there was no chance of tampering with the articles. It is further contended that since huge quantity of ganja was seized from the possession of the appellants, for preparation of necessary documents and its production in Court, the delay caused cannot be said to be inordinate so as to create suspicion and therefore, the appeals preferred by the appellants should be dismissed.

**Discussion of evidence against appellant Firoz Alli Khan @ Bulu (CRLA No. 259 of 2012):**

8. It is not disputed at the Bar that the appellant Firoz Alli Khan @ Bulu was not present in any of the three vehicles from which contraband ganja packets of commercial quantity were found. As per the F.I.R., after prolonged interrogation, the five persons found in the three vehicles disclosed that they along with the appellant Firoz Alli Khan @ Bulu and Kapila Sahu, Satya Swain and one Fakira of Nayagarh were dealing with ganja business since

last two years and that they were bringing ganja from Gudum village near Vishakhapatnam and selling the same in Khurda, Bhubaneswar, Cuttack and Puri districts under the leadership of the appellant Firoz Alli Khan @ Bulu and Kapila Sahu and that the appellant Firoz Alli Khan @ Bulu was piloting them in one INDICA car bearing registration no.OR-02-X-7803.

P.W.14, the informant in his evidence has stated that during interrogation, the five persons present in the vehicles disclosed that they along with the appellant Firoz Alli Khan @ Bulu, Kapila Sahu, Satya Swain and one Fakira of Nayagarh were involved in ganja business since last two years and they used to bring ganja from village Gudum near Vishakhapatnam and selling them at Khurda, Bhubaneswar, Cuttack and Puri town and on the relevant date, appellant Firoz Alli Khan @ Bulu was piloting them in his INDICA car bearing registration no.OR-02-X-7803.

The said vehicle bearing registration no.OR-02-X-7803 was seized from the appellant Firoz Alli Khan @ Bulu by P.W.16 as per seizure list Ext.17/3 but the R.C. book of the vehicle in question which was also seized under the same seizure list indicated that such vehicle stood in the name of one Kailash Chandra Panda, son of Baidanath panda of village-Gudum, P.S.-Khurda, Dist-Khurda. The registered owner of the vehicle has not been examined in this case.

The other official witnesses like P.W.6 Narayan Chandra Pati, A.S.I. of police, P.W.9 Satyanarayan Mohanty and P.W.10 M. Ramesh Rao, the two home guards attached to Jarada police station, P.W.11 Debabrata Sahu, Tahasildar, Chikiti who were also present at the spot at the time of search and seizure have not stated about any such disclosure made by the five persons present in the vehicles implicating the appellant in the crime.

Therefore, the only material available on record against the appellant Firoz Alli Khan @ Bulu is the confessional statement of co-accused persons before P.W.14, the Inspector in Charge of Jarada police station.

9. The object of section 25 of the Evidence Act, wherein it is mentioned that no confession made to a police officer, shall be proved as against a person accused of any offence, is that the officer would make every effort to collect the evidence of the commission of the crime and from the power he possesses, he has the capacity to influence, pressurise or subject the person to coercion to extract confession.

A confessional statement made by a person whilst he is in custody of a police officer shall not be proved as against him unless it is made in the immediate presence of a Magistrate in view of section 26 of the Evidence Act. In the present case, the evidence of Tahasildar-cum-Executive Magistrate (P.W.11) as already indicated is silent regarding any confessional statement by the co-accused persons implicating the appellant Firoz Alli Khan @ Bulu.

Confession of a co-accused does not come within the definition of "evidence" as contained in section 3 of the Evidence Act. It cannot be treated as substantive evidence. Law is well settled that the Court cannot start with confession of a co-accused person. It must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on some other evidence. (Ref:- **A.I.R. 1964 S.C. 1184, Hari Charan Kurmi –Vrs.- State of Bihar**)

In case of **Raj Kumar Karwal -Vrs.- Union of India reported in A.I.R. 1991 S.C. 45**, questions were raised as to whether the officers of the Department of Revenue Intelligence (DRI) who have been invested with the powers of an officer-in-charge of a police station under section 53 of N.D.P.S. Act are "police officers" within the meaning of section 25 of the Evidence Act and if the answer is "yes", whether the confessional statement recorded by such officer in course of investigation of a person accused of an offence under the said Act, is admissible in evidence as against him? The Hon'ble Court held as follows:--

"19. ....These provisions found in Chapter V of the Act show that there is nothing in the Act to indicate that all the powers under Chapter XII of the Code, including the power to file a report under Section 173 of the Code have been expressly conferred on officers who are invested with the powers of an officer-in-charge of a police station under Section 53, for the purpose of investigation of offences under the Act.

xx x x xx xx xx xx

21. For the offences under the Act, the investigation is entrusted to officers in whom powers of an officer-in-charge of a police station are vested by a notification issued under Section 53 of the Act by the concerned Government. Thus a special investigating agency is created to investigate the commission of offences under the Act. There is no doubt that the Act creates new offences, empowers officers of certain departments to effect arrest, search and seizure, outlines the procedure therefor, provides for a special machinery to investigate these offences and provides for the constitution of Special Courts for the trial of offences under the

Act, notwithstanding anything contained in the Code.....Any person on whom to investigate under chapter XII is conferred can be said to be a 'police officer', no matter by what name he is called. The nomenclature is not important, the content of the power he exercises is the determinative factor. The important attribute of police power is not only the power to investigate into the commission of cognizable offence but also the power to prosecute the offender by filing a report or a charge sheet under Section 173 of the Code. That is why this Court has since the decision in *Badku Joti Savant (A.I.R. 1966 S.C. 1746)* accepted the ratio that unless an officer is invested under any special law with the powers of investigation under the Code, including the power to submit a report under Section 173, he cannot be described to be a 'police officer' under Section 25 of Evidence Act. Counsel for the appellants, however, argued that since the Act does not prescribe the procedure for investigation, the officers invested with power under Section 53 of the Act must necessarily resort to the procedure under Chapter XII of the Code which would require them to culminate the investigation by submitting a report under Section 173 of the Code. Attractive though the submission appears at first blush, it cannot stand close scrutiny. In the first place as pointed out earlier there is nothing in the provisions of the Act to show that the legislature desired to vest in the officers appointed under Section 53 of the Act, all the powers of Chapter XII, including the power to submit a report under Section 173 of the Code.....We must, therefore, negative the contention that an officer appointed under Section 53 of the Act, other than a police officer, is entitled to exercise 'all' the powers under Chapter XII of the Code, including the power to submit a report or charge-sheet under Section 173 of the Code."

In case of **Kanhaiyalal -Vrs.- Union of India reported in A.I.R. 2008 S.C. 1044**, where a question was raised whether a statement made by accused on being summoned before the Investigating Officer appointed by Narcotic Superintendent taken under section 67 of the NDPS Act can be treated as a confessional statement and whether the accused could be convicted on the basis thereof in the absence of any other corroborative evidence, it was held as follows:-

"36. A parallel may be drawn between the provisions of Section 67 of the NDPS Act and Sections 107 and 108 of the Customs Act and to a large extent Section 32 of the Prevention of Terrorism Act, 2002 and Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. These are all special Acts meant to deal with special situations and circumstances. While the provisions of the Prevention of Terrorism Act, 2002 and TADA Act, 1987, are much more stringent and excludes from its purview the provisions of Sections 24 to 27 of the Evidence Act with regard to confession made before a police officer, the provisions relating to statements made during inquiry under the Customs Act and under the NDPS Act are less stringent and continues to attract the provisions of the Evidence Act. In the case of both the latter enactments, initially an inquiry is contemplated during which a person may be called upon to provide any information relevant to the inquiry as to whether there has been any contravention of the provisions of the Act or any

Rule or Order made there under. At that stage the person concerned is not an accused although he may be said to be in custody. But on the basis of the statements made by him, he could be made an accused subsequently. What is important is whether the statement made by the person concerned is made during inquiry prior to his arrest or after he had been formally charged with the offence and made an accused in respect thereof. As long as such statement was made by the accused at a time when he was not under arrest, the bar under Sections 24 to 27 of the Evidence Act would not operate nor would the provisions of Article 20(3) of the Constitution be attracted. It is only after a person is placed in the position of an accused that the bar imposed under the aforesaid provision will come into play. Of course, this Court has also held in Pon Adithan's case (supra) that even if a person is placed under arrest and thereafter makes a statement which seeks to incriminate him, the bar under Article 20(3) of the Constitution would not operate against him if such statement was given voluntarily and without any threat or compulsion and if supported by corroborating evidence.

37. The law involved in deciding this appeal has been considered by this Court from as far back as in 1963 in Pyare Lal Bhargava's case (supra). The consistent view which has been taken with regard to confessions made under provisions of Section 67 of the NDPS Act and other criminal enactments, such as the Customs Act, 1962, has been that such statements may be treated as confessions for the purpose of Section 27 of the Evidence Act, but with the caution that the Court should satisfy itself that such statements had been made voluntarily and at a time when the person making such statement had not been made an accused in connection with the alleged offence. In addition to the above, in the case of **Raj Kumar Karwal -Vrs.- Union of India and Ors. 1991 Cri.L.J. 97**, this Court held that officers of the Department of Revenue Intelligence who have been vested with powers of an Officer-in-Charge of a police station under Section 53 of the NDPS Act, 1985, are not 'police officers' within the meaning of Section 25 of the Evidence Act. Therefore, a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence against him. It was also held that power conferred on officers under the NDPS Act in relation to arrest, search and seizure were similar to powers vested on officers under the Customs Act. Nothing new has been submitted which can persuade us to take a different view.

38. Considering the provisions of section 67 of the NDPS Act and the view expressed by this Court in RaJ Kumar Karwal's case (A.I.R. 1991 S.C. 45), with which we agree, that an officer vested with the powers of an Officer-in-charge of a police station under section 53 of the above Act is not a "police officer" within the meaning of Section 25 of the Evidence Act. It is clear that a statement made under section 67 of the NDPS Act is not the same as a statement under section 161 of the code, unless made under threat or coercion. It is this vital difference, which allows a statement made under section 67 of the NDPS Act to be used as a confession against the person making it and excludes it from the operation of section 24 to 27 of the Evidence Act."

In case of **Tofan Singh -Vrs.- State of Tamil Nadu reported in 2013 (12) SCALE 552**, doubting the correctness of the dicta in Kanhaiyalal case (supra), it was held as follows:-

“34. We have also to keep in mind the crucial test to determine whether an officer is a police officer for the purpose of Section 25 of the Evidence Act viz. the "influence or authority" that an officer is capable of exercising over a person from whom a confession is obtained. The term "police officer" has not been defined under the Code or in the Evidence Act and, therefore, the meaning ought to be assessed not by equating the powers of the officer sought to be equated with a police officer but from the power he possesses from the perception of the common public to assess his capacity to influence, pressure or coercion on persons who are searched, detained or arrested. The influence exercised has to be, assessed from the consequences that a person is likely to suffer in view of the provisions of the Act under which he is being booked. It, therefore, follows that a police officer is one who:

(i) is considered to be a police officer in "common parlance" keeping into focus the consequences provided under the Act.

(ii) is capable of exercising influence or authority over a person from whom a confession is obtained.”

The matter was referred to a larger Bench for re-consideration of the issue as to whether the officer investigating the matter under N.D.P.S. Act would qualify as police officer or not and whether the statement recorded by the Investigating Officer under section 67 of the N.D.P.S. Act can be treated as confessional statement or not, even if the Officer is not treated as police officer.

10. Since the only material available on record against the appellant Firoz Alli Khan @ Bulu is the confessional statement of co-accused persons before P.W.14, the Inspector in Charge of Jarada police station which is not corroborated by the other official witnesses, in these circumstances, the evidence against the appellant is rather slender and it is not safe to uphold his conviction on such evidence, particularly when there remains no evidence that the appellant was dealing with ganja business or that he had entered into criminal conspiracy with the co-accused persons or abetted the commission of any offence under Chapter IV of N.D.P.S. Act. There is also no clinching substantive evidence that on the relevant day, he was piloting the vehicles of the co-accused persons in an INDICA car which stood in the name of another person.

11. In view of the above analysis, CRLA No. 259 of 2012 is allowed. The impugned judgment and order of conviction of appellant Firoz Alli Khan @

Bulu under section 29 of the N.D.P.S. Act and the sentence passed thereunder by the learned trial Court is not sustainable in the eye of law and accordingly, the same is hereby set aside.

**Discussion of evidence against appellants Ramakrushna Sahu (CRLA No.98 of 2012), Trilochan Sahu (CRLA No. 123 of 2012), Subash Mahapatra @ Subash Ch. Mahapatra (CRLA No. 198 of 2012) and Kailash Chandra Panda (CRLA No. 330 of 2012):**

12. The evidence of P.W.6 Narayan Chandra Pati, P.W.9 Satya Narayan Mohanty, P.W.10 M. Ramesh Rao, P.W.11 Debabrata Sahoo and P.W.14 Trinath Mishra are relevant so far as the presence of the appellant Rama Krushna Sahoo, Trilochan Sahoo, Subash Mohapatra @ Subash Chandra Mohapatra and Kailash Chandra Panda in the offending vehicles as well as seizure of contraband ganja of commercial quantity from those vehicles.

(i) P.W.6 Narayan Chandra Pati, A.S.I. of Police stated that he accompanied the patrolling party on the date of occurrence and further stated about the approach of the three vehicles from the side of Andhra Pradesh towards Patrapur and about their detention at Patrapur bus stand. He further stated about the fleeing away of two persons from the vehicles and apprehension of five accused persons from the vehicle. He further stated about the detection of ganja packets in the vehicles, weighment of ganja found in those packets, drawal of sample of ganja and its seizure and sealing of ganja packets with the personal seal of the Inspector in charge in presence of P.W.11, the Tahasildar, Chikiti.

It is contention by the learned counsels for the appellants that P.W.6 has not named which of the accused persons were present in which vehicle and he has also not stated about handing over of the personal seal by the Inspector in charge to any person after ganja packets and sample packets were seized. It is further contended that even though P.W.6 stated about the search of the vehicles and seizure of contraband ganja in his presence but he is not a witness to the seizure list and therefore, his evidence cannot be accepted.

Learned counsel for the State on the other hand contended that P.W.6 has corroborated the evidence of P.W.14, the informant who has given the evidence in detail and there are no material discrepancies between the two and therefore, the evidence of P.W.6 cannot be discarded.

Adverting to the contentions raised by the learned counsels for the respective parties, it is apparent that the seizure lists (Ext.1/11) does not indicate that P.W.6 is a witness to the seizure. The seizure list indicates that P.W.1 and P.W.2 are the two seizure witnesses who have not supported the prosecution case. The seizure list further indicates that the time of seizure to be 9.30 p.m. whereas P.W.6 stated that he along with others stayed at the spot till 9.00 p.m. which presupposes that he had left the spot prior to the preparation of the seizure list. P.W.6 stated that they apprehended five persons at Patrapur bus stand by chasing and intercepting the vehicles and those five persons are the accused persons in the case. Six accused persons were facing trial and it is not known as to which five accused persons P.W.6 was referring to as his evidence is silent as to which of the accused persons were present in which vehicle. He has also not stated about the personal search of the patrolling party members and also of the accused persons present in the vehicles before the search of the vehicles.

Therefore, in my humble view, the evidence of P.W.6 cannot be accepted as lending support to the evidence of P.W.14.

(ii) P.W.9 Satya Narayan Mohanty and P.W.10 M. Ramesh Rao were the home guards attached to Jarada police station and they stated to have accompanied the patrolling party on the date of occurrence, approach of the three vehicles from Andhra Pradesh side, interception of the vehicles at Patrapur bus stand, arrest of five accused persons from the vehicles after two of the occupants fled away. He further stated about the recovery of bags containing contraband ganja from the vehicles and its weighment.

Similar contentions were raised by the learned counsels for the respective parties as were raised in case of P.W.6.

Considering the submissions raised at the Bar by the learned counsels for the respective sides, it is found that the evidence of P.W.9 and P.W.10 are silent regarding presence of any of the appellants in the vehicles in question inasmuch as they have stated that they arrested five accused persons but they have not stated who those five accused persons are. They have not stated as to who was present in which vehicle, about the personal search of the patrolling party members and also of the accused persons present in the vehicles, drawal of sample or sealing of the sample packets and the bulk quantity of ganja. They are also not signatories to the seizure list (Ext.1/11) and therefore, the evidence of P.W.9 and P.W.10 are no way helpful to the prosecution and no reliance can be placed on such evidence.

(iii) P.W.11 Debabrata Sahu, the Tahasildar of Chikiti stated to have arrived at the spot where the three vehicles were detained and he found the accused persons were sitting inside the vehicles. He disclosed his identities as Executive Magistrate before the accused persons and the accused persons gave their written options for search in his presence. He further stated to have given his personal search and also seizure of five mobile phones from the accused persons under different seizure lists and seizure of contraband ganja in his presence as per seizure list.

It is contended by the learned counsels for the appellants that the evidence of P.W.11 is silent as to which of the accused persons were present in which vehicle and he has not stated about the personal search of the other patrolling party members being taken in his presence and his evidence is totally silent about any weighment of ganja in his presence, drawal of samples of ganja by P.W.14 and also sealing of the bulk ganja packets as well as sample packets or handing over the personal seal of P.W.14 to anybody and therefore, his evidence is far from convincing and as such cannot be accepted as lending corroboration to the evidence of P.W.14.

Learned counsel for the State on the other hand contended that even though the evidence of P.W.11 is not elaborate one but it can still be taken as a corroborative piece of evidence as the signatures of P.W.11 find place on the seizure lists (Ext.1/11).

Considering the submission raised at the Bar, I am of the view that even though the signatures of P.W.11 appears on three pages of seven pages seizure list Ext.1/11 but being an important witness on behalf of the prosecution, it was expected of him to adduce evidence in detail as to how the search was made, the nature of articles seized, the procedure followed at the time of search and seizure by P.W.14, the weighment of the contraband ganja, the drawal of samples and the sealing of articles. The evidence of P.W.11 is a cryptic one and the material aspects of the prosecution case like personal search of other patrolling party members being taken, the nature of articles seized from each of the vehicles and its quantity, drawal of samples and also about the sealing of the sample packets and bulk ganja packets at the spot, is conspicuously absent in his evidence. P.W.11 has admitted that he had not given any endorsement or any documents to the effect that polythene bags containing ganja were opened in his presence and that he cannot say which bag containing ganja was seized from which accused.

In view of the nature of evidence adduced by P.W.11, I am of the humble view that his evidence is no way helpful to the prosecution and therefore, not acceptable.

(iv) As discussed above, the evidence of the other official witnesses to the search and seizure is found to be not satisfactory. The only evidence in that respect left out is that of P.W.14 Trinath Mishra, the Inspector in charge of Jarada police station.

P.W.14 has stated about the receipt of reliable information regarding transportation of ganja in three vehicles from Visakhapatanum side towards Bhubaneswar which he entered in the station diary of the police station as S.D.E. No.120 dated 06.09.2009. He further stated about intimating the fact to Superintendent of Police, Berhampur and S.D.P.O., Chikiti over telephone which he entered in the station diary entries no.121 and 122 and he also submitted the report to those authorities which found mentioned in S.D.E. No.120 as per dispatch register no.1095 and 1096 respectively. He further stated that requesting S.D.M., Berhampur to depute one Executive Magistrate to remain present during search and seizure, he immediately along with other police officials left the police station in police jeep without obtaining any search warrant from the Court as there was no sufficient time to obtain search warrant and there was every possibility of escape of the culprits with the contraband articles.

Contentions were raised by the learned counsels for the appellants regarding non-compliance of provision under section 42 of the N.D.P.S. Act by P.W.14. Learned counsel for the State on the other hand contended that the vehicles were detained and search and seizure was made in a public place and therefore, section 43 of the N.D.P.S. Act and not section 42 of the N.D.P.S. Act is applicable in the case.

Law is well settled that total non-compliance with the provisions under sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible and it vitiates the conviction and renders the entire prosecution case suspect and cause prejudice to the accused. Section 42 (2) of the N.D.P.S. Act states that when an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall send a copy thereof to his immediate official superior within seventy-two hours. Under section 42 (1), if the empowered officer receives reliable information from any person relating to commission of an offence under the N.D.P.S. Act that the contraband articles and

incriminating documents have been kept or concealed in any building, conveyance or enclosed place and he reasonably believes such information, he has to take down the same in writing. However, if the empowered officer reasonably believes about such aspects from his personal knowledge, he need not take down the same in writing. Similarly recording of grounds of belief before entering and searching any building, conveyance or enclosed place at any time between sunset and sunrise is necessary under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act if the concerned officer has reason to believe that obtaining search warrant or authorization for search during that period would afford opportunity for the concealment of evidence or facility for the escape of an offender. The copy of information taken down in writing under sub-section (1) or the grounds of belief recorded under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act has to be sent to his immediate superior official within seventy-two hours.

In case of **State of Punjab -Vrs.- Baldev Singh reported in 1999 (II) Orissa Law Reviews (SC) 474**, it is held as follows:-

“10. The proviso to Sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide Sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to Sub-section (1), shall forthwith send a copy of his belief under the proviso to Sub-section (1) to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a *public place*. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful.”

Regarding compliance of provisions under sections 42(1) and 42(2) of the N.D.P.S. Act in case of seizure of contraband articles from a vehicle in a public place which was based on earlier reliable information, it is apparent that there is no evidence that the three vehicles were of public conveyance.

In case of **State of Rajasthan -Vrs.- Jag Raj Singh @ Hansa reported in (2016) 64 Orissa Criminal Reports (SC) 827** while discussing

regarding the compliance of section 42 of the N.D.P.S. Act in case of a vehicle which was seized at the public place carrying contraband articles, a Division Bench of the Hon'ble Supreme Court held that since the jeep cannot be said to be a public conveyance within the meaning of Explanation to section 43 of the N.D.P.S. Act, hence, section 43 was clearly not attracted and provisions of section 42(1) proviso were required to be complied with and it was further held that the aforesaid statutory mandatory provisions having not complied with, the High Court did not commit any error in setting aside the conviction.

The present is not a case where P.W.14 suddenly carried out search at a public place. P.W.14 himself stated that he had received the reliable information while he was at the police station and he has come up with a case of compliance of section 42 of the N.D.P.S. Act. There is no material that the offending vehicles come within public conveyance and when the search was conducted after recording information under section 42(1), therefore, even though the seizure was made in a public place during day time, in my humble view, compliance of the provisions of section 42 of the N.D.P.S. Act is necessary.

The Hon'ble Supreme Court while discussing the provision under section 42 of the N.D.P.S. Act in case of **State of Punjab -Vrs.- Balbir Singh reported in (1994) 7 Orissa Criminal Reports (SC) 283** has been pleased to hold that the object of N.D.P.S. Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the benefit while carrying out arrest or search as provided under the proviso to section 42(1). To that extent they are mandatory. Consequently, the failure to comply with these requirements thus affects the prosecution case and therefore, vitiates of the trial.

The decision rendered in the case of *Baldev Singh (supra)* was further considered by a five-Judge Bench in the case of **Karnail Singh -Vrs.- State of Haryana reported in (2009) 44 Orissa Criminal Reports (SC) 183** wherein it was held in the concluding paragraph as follows:-

"17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in sub-section (1) of Section 42 from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

In view of the settled position of law, now it is to be seen whether the contentions raised by the learned counsels for the appellants that there is non-compliance of mandatory provision under section 42(1) and 42(2) of the N.D.P.S. Act is sustainable or not.

P.W.14 has come up with a case of compliance of section 42 of the N.D.P.S. Act in his examination in chief but in cross-examination, he has stated that he reduced the information to writing at the police station but he did not remember through whom he sent the written information to his higher authority and that he had not received any information regarding endorsement from his higher authority relating to the receipt of information. He further stated that the office of the S.D.P.O., Chikiti is about 20 kms. from Jarada police station. P.W.16 was the S.D.P.O., Chikiti who took charge of investigation of the case on 07.09.2009 from P.W.14 and he stated that the distance between Jarada police station and his office at Chikiti is 25 kms. and he further stated that there is nothing on record to show on which basis he went to Jarada police station and took charge of investigation of the case. The relevant station diary entries nos.120, 121 and 122 dated 06.09.2009 which were stated to have been made at Jarada police station by P.W.14 after receipt of reliable information regarding transportation of ganja and also regarding intimation given to the official superior have not been proved in the case. The entries of dispatch register nos. 1095 and 1096 regarding sending intimation to the official superior have also not been proved. No report with the copy of the S.D. Entry No.120 dated 06.09.2009 alleged to have been sent by P.W.14 to the office of S.P., Berhampur and S.D.P.O., Chikiti has been proved in the case. Nobody from the office of S.P., Berhampur has been examined to substantiate regarding receipt of any written information from P.W.14. The S.D.P.O., Chikiti who has been examined as P.W.16 is also silent regarding receipt of any written information as contemplated under section 42 of the N.D.P.S. Act from P.W.14.

Therefore, there is no corresponding documentary evidence in support of the oral evidence led by P.W.14 that he made station diary entries after receipt of reliable information relating to transportation of ganja in three vehicles and regarding dispatch of the report with the copy of the station diary entry to S.P., Berhampur and S.D.P.O., Chikiti. Since the total non-compliance of requirements of sub-sections (1) and (2) of Section 42 of the N.D.P.S. Act is impermissible particularly when the information was received when the police officer was in the police station with sufficient time to take action or where the reliable information calls for immediate action and there is no sufficient time to obtain search warrant or authorization and he has reason to believe that delay would result in the goods or evidence being removed or destroyed and it would not be feasible or practical to take down in writing the information given to him, he could take action as per clauses (a) to (d) of Section 42(1) of the N.D.P.S. Act and thereafter, as soon

as it is practical, record the information in writing and forthwith inform the same to the official superior as held in case of **Karnail Singh** (supra). P.W.14 has stated that as there was no sufficient time to obtain search warrant from the Court and there was every possibility of escape of culprits with the contraband articles, he immediately along with other police officers and staff left the police station in the police jeep and in that respect station diary entry no.123 was made. The said station diary entry has not been proved in the case. P.W.14 has not stated about sending the copy of recording of ground of belief to his immediate official superior. Thus mere oral evidence of P.W.14 in absence of proof of corresponding documentary evidence is not sufficient to hold regarding compliance of the mandatory provisions of section 42 of the N.D.P.S. Act.

Coming to the contentions raised by the learned counsels for the appellants regarding non-compliance of the provisions under section 55 of the N.D.P.S. Act, the said section mandates an officer in-charge of the police station to take charge and keep in safe custody of articles seized under the Act within the local area of that police station which may be delivered to him and shall allow any officer who may accompany such article to the police station or who may be deputed for the purpose to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer in charge of the police station.

In the present case P.W.14 himself was the Inspector in Charge of Jarada police station and the contraband articles were seized within the local limits of his police station. He has stated that the seized properties were kept inside the malkhana of the police station after entering the same in the property register vide mal item no.51/2009 and kept in safe custody vide S.D. Entry No.132. He has stated that he had entered in the station diary book that he had kept the seized properties in the malkhana. Neither the relevant station diary entry nor the malkhana register has been proved in the case. P.W.16 has stated that on 07.09.2009 he produced the seized exhibits before the Court and on the same day at night, he kept the seized exhibits at Baidyanathpur police station on the direction of the Court as it was late and that the seized exhibits were kept in safe custody in Baidyanathpur police station malkhana after sealing the same properly. He further stated to have received the seized exhibits from Baidyanathpur police station on 08.09.2009 at 11.00 a.m. and produced the same before the S.D.J.M., Berhampur at 12.00 noon. Neither the Inspector in Charge of Baidyanathpur police station has been examined to prove regarding safe custody of the seized articles in the malkhana nor the

malkhana register of Baidyanathpur police station has been proved in the case. P.W.16 has stated that he has not seized the malkhana register of Jarada police station on the day he took charge of investigation. He further stated that Benudhar Parida was in charge of malkhana of Jarada police station but he has not examined him. He further stated that the I.I.C. of Baidyanathpur police station did not put his official seal on the seized sample ganja and bulk ganja. The order sheet of the learned Special Judge, Berhampur indicates that the seized articles were produced on 07.09.2009 in his residential office at 10.05 p.m. and a prayer was made by the S.D.P.O., Chikiti for sending the samples already drawn for chemical analysis to the R.F.S.L., Berhampur and to receive the seized articles in the Court malkhana. The learned Special Judge directed for production of the samples before the S.D.J.M., Berhampur on 08.09.2009 for sending the same for chemical analysis and to produce the seized articles to be kept in Court malkhana. The I.O. was directed to keep the seized articles and the samples drawn in safe custody till then. When the articles were seized on 06.09.2009 and the first information report was lodged on that day itself and P.W.16 took charge of investigation of the case on 07.09.2009 at 8.45 a.m., it is not understood as to why the seized articles along with the sample packets were produced in the night at 10.05 p.m. in the residential office of the learned Special Judge, Berhampur. It was the duty of the prosecution to adduce cogent evidence regarding safe custody of the seized articles along with sample packets in the malkhana of Jarada police station as well as Baidyanathpur police station.

Rule 119 of the Orissa Police Rules which deals with malkhana register states, inter alia, that all the articles of which police take charge, shall be entered in detail, with a description of identifying marks on each article, in a register to be kept in P.M. form No. 18 in duplicate, and a receipt shall be obtained whenever any article or property of which the police take charge is made over to the owner or sent to the Court or disposed of in any other way and these receipt shall be numbered serially and filed, and the number of receipts shall be entered in column No. 7. Therefore, it is clear that whenever any article is seized and kept in police malkhana, details thereof should be entered in the malkhana register and while taking it out, the entry should also be made in such register. This would indicate the safe custody of the articles seized during investigation of a case before its production in Court.

When the malkhana registers of Jarada police station as well as Baidyanathpur police station have not been proved in the case and the officers in charge of malkhana of the respective police stations have not been

examined, it is difficult to believe that the seized articles along with the sample packets were in safe custody before its production in Court for being sent for chemical analysis.

According to the prosecution case, the brass seal used by P.W.14 for sealing the seized ganja as well as sample packets was kept with P.W.15. Except P.W.14, no other official witnesses have stated about handing over the brass seal to P.W.15. The brass seal was not produced in Court when the seized ganja and sample packets were produced for verification. It is also the requirement of law that when the contraband articles are seized and sealed with the seal impression then the brass seal has to be left in the zima of a reliable person under zimanama and instruction is to be given to such person to produce it before the Court for verification at the time of production of articles. During trial, the brass seal was produced by P.W.15 and it was marked as M.O. LXIV.

13. In view of the glaring inconsistencies in the evidence of prosecution witnesses, absence of clinching evidence relating to compliance of mandatory provision under section 42(2) of the N.D.P.S. Act, absence of any cogent materials that the seized articles along with sample packets were kept in safe custody till its production in the Court, I am of the view that it would be very risky to uphold the impugned judgment and order of conviction in respect of the appellants Ramakrushna Sahu, Trilochan Sahu, Subash Mahapatra @ Subash Ch. Mahapatra and Kailash Chandra Panda under section 20(b)(ii)(C) of the N.D.P.S. Act. Accordingly, the CRLA No.98 of 2012, CRLA No. 123 of 2012, CRLA No. 198 of 2012 and CRLA No. 330 of 2012 filed by the respective appellants are allowed. The impugned judgment and order of conviction of the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act and the sentence passed thereunder by the learned trial Court is hereby set aside.

14. In the result, the CRLA No.98 of 2012 filed by appellant Ramakrushna Sahu, CRLA No. 123 of 2012 filed by appellant Trilochan Sahu, CRLA No. 198 of 2012 filed by appellant Subash Mahapatra @ Subash Ch. Mahapatra, CRLA No. 259 of 2012 filed by appellant Firoz Alli Khan @ Bulu and CRLA No. 330 of 2012 filed by appellant Kailash Chandra Panda are allowed. The appellants who are in custody shall be released forthwith if their detention is not required in any other case. Lower Court records with a copy of this judgment be sent down to the learned Trial Court forthwith for information.

2018 (I) ILR - CUT- 627

SUJIT NARAYAN PRASAD, J.

W.P.(C) NO. 12171 OF 2005

M/S. LOTUS CHEMEICALS PVT

.....Petitioner

. Vrs.

ASST. PROVIDENT FUND COMMISSIONER,  
(COMPL.)ROURKELA

.....Opp. Parties

**EMPLOYEES PROVIDENT FUND AND MISCELLANEOUS PROVISIONS OF THE ACT, 1952 – Section 7-A read with 7-Q – Proceeding under – Petitioner a manufacturer, not deposited statutory dues of EPF – Order directing depositing of the amount due – Challenge is made on the ground that petitioner was not given opportunity before passing of the order – Record proves contrary to the plea taken – Held, the orders impugned not required interference – Writ petition dismissed.**

“According to the considered view of this Court since the EPF is the beneficial legislation and has been incorporated for the purpose of benefit of the poor class of people and from the order, it appears that the statutory deduction has not been made since the month of March, 1994 till April, 2004 which has come on the basis of the report submitted by the Squad team, as such the provision has seriously been flouted by the petitioner-establishment, hence the authority in exercise of power under Section 7A has passed the order on 31.05.2004.”

**Case Laws Relied on and Referred to :-**

1. (1988) 57 FIR (SOC) 7:1987 : Meghdoot Cinema vrs. RPF Commissioner
2. AIR 1964 SC 477 : Syed Yakooob Vrs. K. S. Radhakrishnan & Ors.
3. (1976) 2 SCC 868 : Swaran Singh and another vrs. State of Punjab & Ors.
4. (2012) 5 SCC 443 : Heinz India Private Limited and another vrs. State of Uttar Pradesh & Ors.

For Appellant : M/s. Laxmidhar Pangari, B. Jena, S.R.  
Pani, R.R. Sahoo.

For Respondent : M/s. P.K. Parhi, D. Rath.

---

Date of hearing: 12.03.2018      Date of judgment : 12.03.2018

**JUDGMENT**

***S.N.PRASAD, J.***

This writ petition is under Article 226 and 227 of the Constitution of India for quashing the order dated 31.05.2004 passed by the Asst. Provident Fund Commissioner (C), Rourkela under Annexure-5 and the order dated 24.05.2005 passed by the E.P.F. Tribunal under Annexure-10 and stay the further proceeding of the Certificate Case No.10 of 2005 dated 07.04.2005 during pendency of the writ petition.

2. Brief facts of the case of the petitioner is that the petitioner-establishment is a manufacturer of Sodium Sulphate (Yellow) and Sodium Dichromate (Hydrous & Anhydrous) since last 13 years from the date of filing of the writ petition and is having a permanent E.P.F. Code No. OR/7009. The joint squad consisting of the Enforcement Officer, SRO, Rourkela (EPFO) and the Insurance Inspector, ESIC, Rourkela conducted a joint inspection of the petitioner-establishment on 07.03.2003 and on physical verification it was allegedly found that 19 workers engaged for the work of the establishment have been allegedly evaded from payment of EPF dues from 03/1994 and as a result they were not getting the EPF benefits since their date of eligibility, hence a proceeding under Section 7-A of the Employees Provident Fund and Miscellaneous Provisions of the Act, 1952 was initiated in which the authorized representative of the petitioner appeared and submitted records including balance-sheet for the year 2000-01 and 2001-02 to establish that there has been no evasion of employees and no EPF dues whatsoever has been evaded.

The authorized officer has passed the order under Sub-section 3A of Section 7A of the EPF and M.P. Act, 1952 imposing EPF dues of Rs. 4,50,808/- assessed for the period from 03/1994 to 04/2004 along with interest under Section 7Q of the Act amounting to Rs. 1,83,568/- for the period from 07/1997 to 04/2004.

According to the petitioner, the order passed by the EPF authority under Section 7A is without any basis and even though it was closed due to illegal stoppage of work/strike by the worker since 16.03.2001 and even on the date of inspection i.e. on 07.03.2003 but without appreciating this aspect of the matter, the order has been passed under Section 7A of the EPF and MP Act, 1952.

It is the further case of the petitioner that he has preferred appeal against the order passed by the EPF authority under Section 7A being ATA No.397/(10)/2005 but the same has been dismissed on the ground of limitation and as such according to the petitioner he has been deprived from a valuable right by its non-consideration by the appellate tribunal, hence this writ petition.

3. Learned counsel for the petitioner while assailing the order passed by the appellate authority has relied upon the judgment rendered by the Hon'ble Allahabad High Court in Civil Misc. Writ Petition No.66766 of 2005 decided on 07.07.2006 on the issue of dismissal of appeal by the Tribunal and to

substantiate the argument that even after dismissal of the writ petition, the High Court under Article 226 of the Constitution of India has got wide power to exercise it in consideration of the issue on merit.

4. The opposite parties have appeared and filed counter affidavit inter alia therein it has been stated that there is no infirmity in the order passed by the competent authority in exercise of power conferred under Section 7A of the Act, 1952 which has been passed after providing ample opportunity of hearing to the petitioner-establishment, however the petitioner-establishment has appeared intermittently and not produced the entire record as required, as such the authority having no option but to decide the issue on merit by adopting the principle of best assessment basing upon the available records considering the fact that the Act 1952 is the beneficial legislation and also considering the fact that the petitioner-establishment is trying to delay the matter by not appearing or not producing the documents.

He submits that even the petitioner-establishment has not followed the statutory right to prefer an appeal before the appellate tribunal as conferred under Section 7-I of the Act, 1952 since it has been filed after delay of 260 days, hence the Tribunal has rightly rejected the appeal by giving the reason beyond the period of 120 days limitation as provided under the statute cannot be relaxed, hence according to him there is no infirmity in the order passed by the appellate tribunal.

He further submits that when the petitioner has defaulted in making payment even in spite of order under Section 7A as well as 7Q of the Act, 1952, then a certificate proceeding has been initiated to make recovery so that it can be paid in favour of concerned workers. On the basis of such submission, it has been submitted that this Court may not interfere with the order passed by the authorities.

5. Heard the leaned counsel for the parties and on appreciation of the rival submission, it is evident that the petitioner-establishment is registered under the provision of EPF & MP Act, 1952 after having granted EPF Code No. OR/7009, as such the petitioner is liable to comply in respect of all eligible employees as per the provision of the Act, since the date of eligibility. The petitioner-establishment since was not carrying the provision as stipulated under the Act by not depositing the contributions under the EPF, hence a inspection was conducted by the joint squad by visiting the establishment on 7.3.2003 and on physical verification it was found that a good number of workers engaged for the work of the establishment, were not

getting the benefit of EPF, since their date of eligibility and as such the Squad has submitted a report and on its receipt, the petitioner-establishment was called upon to show cause for violation of statutory rules vide letter dated 21.05.2003, whereby and where under the petitioner- establishment was directed to submit its reply within 7 days of receipt of the same. The notice issued upon the petitioner-establishment was received on 26.05.2003 but no reply was submitted within the given time, as such the action under Section 7A of the Act, 1952 was initiated vide decision taken by the authority on 6.6.2003 for determination of dues in respect of the reportedly evaded employees wherein the employer was afforded opportunity to represent the case on 27.06.2003, the date fixed for hearing by the then Asst. Provident Fund Commissioner, the case was adjourned on 28.07.2003 and thereafter to 19.08.2003, due to non-appearance of anybody, accordingly the summon under Section 30 C.P.C. was issued to enforce the attendance of the employer/any authorized representative in the proceeding. The case was listed for hearing on 26.08.2003 and was rescheduled to 09.10.2003 and on 09.10.2003, none appeared nor any communication has been received by the petitioner-establishment, hence summon under Section 30 C.P.C. was issued to enforce the attendance of employer/establishment on 07.11.2003, however on the said date a time petition was received from the Manager of the establishment seeking 15 days time, thereafter the matter was adjourned on 28.11.2003 by issuing summon under Section 32 C.P.C. to enforce the attendance and in pursuance of the summon issued under Section 32 C.P.C. and in pursuance to the same, even then none appeared nor any written submission was received, hence the fine amounting to Rs.2,000/- was imposed, the attachment order was issued to the Bank and show cause for warrant of arrest under Section 32 of the C.P.C. was also issued, the matter was adjourned to 23.12.2003, on the said date one Sri Deepak Mohanty, authorized representative appeared and submitted that he would produce all records on the next date, he has also requested for a copy of the names allegedly evaded employees so that he could check up his records. The said prayer has been acceded to and the hearing was adjourned to 13.01.2004, on that date Sri Deepak Mohanty had appeared and submitted the Balance sheet for 2000-2001 & 2001-2002. The establishment was advised to produce Balance sheet for 2002-2003 but he had not come up with any other records for which he sought for one final opportunity. Accordingly, the next date was fixed on 13.02.2004, on that date none appeared nor any written communication was received.

It is also evident from the order passed under Section 7A that an undertaking was given by the establishment, if anybody will not appear and unable to produce all records on the next date, Provident Fund Officer can decide the case *ex parte* and put his signature. Accordingly, the EPF authority in absence of available documents which was not appropriate for assessment has ordered the establishment to produce all record or else the case shall be decided *ex parte* with all consequence lying upon the establishments.

Accordingly, the case was adjourned to 26.03.2004, on that date Sri Deepak Mohanty had appeared and submitted a written brief that report regarding evaded employees found is totally false and fraudulent. He has submitted that the establishment had not deposited requisite due, due to heavy financial crisis and about why returns not deposited, it was answered by the establishment that there was no staff during the strike period and documents could not be collected. The authority had directed the establishment to submit Balance Sheet for 2002-03 as well as proof of closures if any, which Mr. Mohanty agreed and has submitted the balance sheet for 2002-03 on 22.04.2004 but closure proof has not been submitted.

6. The members of the Squad team has appeared on 10.05.2004 but none appeared for the establishment. The team has submitted that he has submitted a correct report and the authority after considering the fact that none was there had posted the case *ex parte* and considering the scope, spirit and purpose of the EPF and MP Act, 1952 and relying upon the judgment rendered by the Patna High Court in the case of **Meghdoot Cinema vrs. RPF Commissioner** (1988) 57 FIR (SOC) 7:1987, wherein it has been held that if an establishment failed to avail of the opportunity afforded under Section 7A, the authority concerned could take a decision on the basis of available material, accordingly, the Asst. Provident Fund Commissioner applying his mind has assessed the quantum for the period from 03/1994 to 04/2004 directing the establishment to deposit a sum of Rs.4,50,808/- and also the interest @ 12% per annum under the provision of Section 7Q.

The petitioner has assailed the said order under Section 7-I but the same was rejected on account of delay of 260 days.

Learned counsel for the petitioner has assailed the order passed under Section 7A as well as 7I on the ground that he has not been provided opportunity of hearing, as such prayed to exercise the power conferred to this Court under Article 226 of the Constitution of India.

7. This Court after considering the prayer and going across the material available on record, is of the view that a man cannot be remediless and it has to be adjudicated on merit where in the instant case, the petitioner after loosing from the authority under Section 7A of the Act, 1952 has approached to the appellate authority in exercise of power has passed order under Section 7I but the same has been dismissed on the ground of limitation and as such both the orders have been challenged, hence this Court has decided to hear the matter on merit for its adjudication and detail hearing was done in which the learned counsel for the parties have argued their cases at length and on appreciation of their argument, this Court thinks it appropriate to decide the case by critically examining the order passed under Section 7A vis-à-vis 7I of the Act, 1952.

8. This Court thinks it proper to see the legality and propriety of the order passed under Section 7I which has been dismissed by the appellate authority under the ground of limitation. It is not in dispute that if a statute provides the provision of appeal it has to be adhered to. It is also not in dispute that the EPF and MP Act, 1952 which is a Central legislation having been provided under Section 7I to assail the order passed under Section 7A, 14B. The procedure for filing of appeal has been provided under the provision of Rule 7 of the Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997, wherein it has been provided under Regulation 7(2) that the appeal may be filed within 60 days from the date of issuance of notification/order, provided that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring appeal within the prescribed period, may extend the said period by a further period of 60 days, meaning thereby the appeal is to be filed before the appellate Tribunal within a maximum period of 120 days subject to its condonation and beyond that it cannot be extended. It is settled that if any legislation has been provided, it has to be followed in its strict sense and if there is specific time period framed in the legislation to entertain an appeal, the authorities concerned are not supposed to extend that period by assuming the power conferred under the Limitation Act, 1963. Here in the instant case, the maximum period of filing an appeal is 60 days, subject to its condonation for a further period of 60 days, hence the condonation is only to be done for maximum period of 60 days, which suggests that the provision of Limitation Act, 1963 will not be applicable.

9. It is settled position of law that the court of law or the Tribunal is supposed to follow the statutory provision and it cannot be interpreted, if

there is no ambiguity and it is settled that the things is to be done as per the statutory provision, hence applying the said principle, it is the considered view of this Court that the Tribunal has not committed any error in passing the order under Section 7-I by rejecting it, since appeal was preferred after delay of 260 days, hence the Tribunal is having no power to condone the said delay period, in view of the provision of Rule 7 of the Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997 as discussed herein above.

This Court is of the further view that the petitioner has assailed the order passed under Section 7A and the certificate proceeding, as such in exercise of power conferred under Article 226 of the Constitution of India, it will be in the ends of justice to enter into the merit of claim of the petitioner to look into the legality and propriety of the order passed under Section 7A of the Act, 1952 otherwise the petitioner will be deprived from the adjudication of the issue which he has raised in this writ petition, hence this Court has thought it proper to go into the legality and propriety of the order passed under Section 7A of the Act, 1952, which is also one of the prayer in the instant writ petition.

10. It is admitted fact as would be evident from the order passed under Section 7A that the petitioner-establishment has been subjected to a proceeding under Section 7A of the Act, 1952 for making default of deposit of statutory deduction in the EPF account of the workmen for the period from 03/1994 to 04/2004. The petitioner-establishment has been noticed, asked to file response to the show cause with a direction to come out with the documents to rebut the report submitted by the Joint Squad regarding applicability of the Act and non-deposit of the statutory amount in the EPF Account of the concerned workmen but the petitioner-establishment has not produced the entire documents and also was not diligent in pursuing his case before the authority in spite of the repeated adjournments having been granted by the authority, not only that the summons were issued under Section 30 and 32 of the C.P.C. for securing their presence and for calling upon the relevant documents but the entire documents as required by the authority has not been submitted on the plea that the strike is going on.

11. It is the settled position of law that if anything come against any aggrieved parties on the basis of the fact finding report and if the notice is being issued upon him, it is upon him to deny the allegation on the basis of the relevant documents but here the petitioner has not followed the said position of law by not producing the relevant documents to satisfy that the provision of EPF Act has not been flouted rather the petitioner has tried to

evade in producing the relevant documents and as such the authority has come to conclusion that the petitioner-establishment has flouted the statutory provision which ultimately affects the spirit of the statute, for the purpose for which has been enacted by the Parliament which is by way of beneficial legislation and for that purpose the authority has been empowered to conduct an enquiry and to take penal action for compliance of the provision as contained therein although subject to the opportunity of hearing to them.

12. Learned counsel for the petitioner has submitted that he has not been provided with adequate and sufficient opportunity, as such the order passed under Section 7A is not sustainable but on the basis of the material available and the order passed under Section 7A, the contention of the learned counsel for the petitioner is absolutely contrary, since so many adjournments have been granted, documents has been called upon but it is the petitioner-establishment who has not diligently pursued the matter by not producing the relevant documents, hence whatever the documents was available with the E.P.F. authority basing upon the enquiry report the order has been passed inflicting liability upon the petitioner holding therein that in defaulted in making statutory deposit in the EPF Account of the concerned worker, hence passed the order.

13. According to the considered view of this Court since the EPF is the beneficial legislation and has been incorporated for the purpose of benefit of the poor class of people and from the order, it appears that the statutory deduction has not been made since the month of March, 1994 till April, 2004 which has come on the basis of the report submitted by the Squad team, as such the provision has seriously been flouted by the petitioner-establishment, hence the authority in exercise of power under Section 7A has passed the order on 31.05.2004.

14. It is settled that the issuance of writ of certiorari can be exercised only if there is error apparent on the face of record or if the order is without jurisdiction then only the High Court sitting under Article 226 of the Constitution of India is supposed to interfere, but after going through the material available on record, this Court finds that there is no error apparent on the face of record and the order is also within the jurisdiction which was passed under Section 7A of the Act, 1952. Reference in this regard may be made to the judgment rendered by Hon'ble Supreme Court by its Full Bench in the case of **Syed Yakoob Vrs. K. S. Radhakrishnan and others** reported in *AIR 1964 SC 477* wherein at paragraph-7 their Lordships have been pleased to hold as follows:-

“7.The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdictions. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was' insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Art. 226 to issue a writ of certiorari can be legitimately exercised.”

I have also perused the judgment rendered by the Hon'ble Apex Court in the case of **Swaran Singh and another vrs. State of Punjab and others** reported in (1976) 2 SCC 868, their Lordships discussing the power of writ court under Article 226 for issuance of writ of Certiorari has been pleased to hold at para-12 and 13, that certiorari jurisdiction can be exercised only for correcting errors of jurisdiction committed by inferior courts or tribunals. A writ of certiorari can be issued only in the exercise of supervisory jurisdiction which is different from Appellate jurisdiction. The writ jurisdiction can extend only to cases where orders are passed by inferior courts or tribunals in excess of their jurisdiction or as a result of their refusal to exercise jurisdiction vested in them or they act illegally or improperly in the exercise of their jurisdiction causing grave miscarriage of justice. In regard to finding of fact recorded by an inferior tribunal, a writ of certiorari can be issued only

if in recording such a finding, the tribunal has acted on evident which is legally inadmissible or has refused to admit admissible evidence or if the finding is not supported by any evidence at all, because in such cases the error amounts to an error of law, a pure error of fact, however grave, cannot be corrected by a writ.

In another judgment rendered by the Hon'ble Apex Court in the case of **Heinz India Private Limited and another vrs. State of Uttar Pradesh and others** reported in (2012) 5 SCC 443, their Lordships has been pleased to hold at para-66 and 67, which is being quoted herein below:-

“66. That the Court dealing with the exercise of power of judicial review does not substitute its judgment for that of the legislature or executive or their agents as to matters within the province of either, and that the court does not supplant “the feel of the expert” by its own review, is also fairly well settled by the decisions of this Court. In all such cases judicial examination is confined to finding out whether the findings of fact have a reasonable on evidence and whether such findings are consistent with the laws of the land.

67. In Dharangadhra Chemical Works Ltd. vrs. State of Saurashtra reported in AIR 1957 SC 264, this Court held that decision of a tribunal on a question of fact which it has jurisdiction to determine is not liable to be questioned in proceedings under Article 226 of the Constitution unless it is shown to be totally unsupported by any evidence.

15. Accordingly and considering the limited scope conferred to this Court under Article 226 in the matter of issuance of writ of certiorari, it is the considered view of this Court that the order passed by the authority under Section 7A, needs no interference.

In view thereof, the order passed by the authority under Section 7A is declined to be interfered with.

In consequence of this finding, this Court also declines to interfere with the certificate proceeding. In the entirety facts and circumstances, the writ fails and is dismissed.

Writ petition dismissed.

**2018 (I) ILR - CUT- 636**

**S.N.PRASAD, J.**

W.P. (C) NO. 1201 OF 2018

**SANATAN DASH**

..... Petitioner

.Vrs.

**CM-CUM-DIRECTOR, OPTC LTD. BBSR & ORS.**

..... Opp. Parties

**(A) OCS (PENSION) RULES, 1992 – Rule 66 – Sanction of provisional pension – Can only be during pendency of departmental or judicial proceeding – Petitioner convicted by order dated 23.12.2003 in a criminal case – Provisional pension sanctioned on 05.04.2005 after superannuation on 31.08.2004 – Effect of sanction – Held – Illegal and liable to be struck down.** (Page-7)

**(B) CRIMINAL TRIAL – Conviction – Appeal filed – Held, appeal is not the continuation of the criminal proceeding as the higher court will exercise its power by way of separate proceeding to test the finding of the judgment – The convicted person can get the service benefit if in the appeal, the order of conviction is stayed.** (Page-15)

For Petitioner : M/s. Manoja Ku. Khuntia, G.R. Sethi, J.K.  
Digal, B. Pattnaik.

For Opp. Parties

---

Date of hearing: 20.03.2018

Date of judgment : 20.03.2018

### **JUDGMENT**

**S.N.PRASAD, J.**

The instant writ petition has been filed for quashing the order dated 24.11.2017 as contained under Anenxure-3, whereby and where under the provisional pension sanctioned vide office order No.21091 dated 12.12.2017, has been withheld with immediate effect as per Rule-7(1) of OCS Pension Rules, 1992 till finalization of the appeal against the judgment of conviction in connection with a judicial proceeding instituted against the petitioner for the offence under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

2. Case of the petitioner in brief is that he was appointed as Lower Division Clerk in the year 1965 under Orissa State Electricity Board (hereinafter referred to as 'Board') the Board after having been taken over by the GRIDCO, he became the employee of the GRIDCO. He was promoted to the rank of Upper Division Clerk and thereafter to the rank of Head Clerk, while continuing as such he was posted as Jr. Accountant and finally posted as Accountant, during the period he was working as Accountant has discharged his duty to the utmost satisfaction of all concerned. The Department of Energy, Govt. of Odisha issued a notification dated 19.06.2005 bringing out a transfer scheme called as Odisha Electricity Reform (Transfer of Transmission electrical activities) Scheme, 2005 for transfer of undertakings, assets liabilities, proceeding and personnel of

GRIDCO related to transmission of electricity to OPTCL named as Odisha Power Transmission Corporation Ltd. (hereinafter called as OPTCL), as per the said Scheme all the employees of GRIDCO were transferred to OPTCL.

The petitioner while working there has been implicated in a criminal case related to an offence committed by him under Section 7 and 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988 and as such a T.R. Case No.26 of 1993 has been initiated in which he was convicted to undergo rigorous imprisonment for 2 years and pay fine of Rs.1000/-. The petitioner has challenged the said judgment before this Court in Criminal Appeal No.322 of 2003 which has been admitted for final hearing by this Court vide order dated 18.12.2003 and stayed the realization of fine till disposal of the appeal and also released on bail by furnishing the sureties and bonds of Rs.20,000/-.

The petitioner on attaining the age of superannuation retired from service on 31.08.2004, but after his retirement, even though the Criminal Appeal was pending, his provisional pension was sanctioned vide order dated 5.4.2005. While the petitioner was getting the provisional pension, a show cause notice was issued to him on 23.10.2017 asking him to respond to the said show cause notice as to why provisional pension extended in his favour be not stopped since the provision to extend the benefit of provisional pension as stipulated under Rule 66 of the OCS (Pension) Rules, 1992 is only in case of departmental or judicial proceeding but the moment the conviction order is there, the provision as contained under Rule-66 of the OCS (Pension) Rules, 1992 will not be applicable.

The petitioner in the light of the said show cause has responded to it by filing response dated 30.10.2017 stating therein that under the provision of Rule-46 which provides that pension/gratuity shall be forfeited of a Government servant who is dismissed or removed from service. In the proviso, it is provided that the authority competent to dismiss or remove him from service may, if the case is receiving of special consideration, sanction a compassionate allowance not exceeding two-third of pension or gratuity or both which would have been admissible to him if he had retired on compensation pension, as such it was requested that he may be allowed to draw provisional pension. The authority thereafter has passed order on 24.11.2017 withholding the provisional pension with immediate effect by exercising the power conferred under Rule-7(1) of OCS (Pension) Rules, 1992 till finalization of the appeal.

3. The petitioner being aggrieved with the said order is before this Court on the grounds that the order dated 24.11.2017 has not passed by the competent authority since according to the learned counsel for the petitioner the “pension sanctioning authority” happens to be the appointing authority and the Chairman-cum-Managing Director of the Corporation is the appointing authority, he is only having the power to take decision for withholding the provisional pension but the order has been passed by the General Manager (HRD), Pension, hence the decision is without jurisdiction.

Second ground taken by the petitioner is that under the provision of Rule-46, the pension can be forfeited only on the ground of dismissal or removal from service but since the petitioner has allowed to attain the age of superannuation, as such the same cannot be forfeited.

Third ground has been taken that the petitioner has challenged the order conviction and sentence before this Court by preferring an appeal and as such the appeal being in continuation of the trial court proceeding will amount to pendency of the criminal proceeding, hence the provision of Rule 66 of the OCS (Pension) Rules, 1992 will be applicable.

4. This Court, after hearing the learned counsel for the petitioner and on appreciation of her argument, both on factual as well as legal aspect has considered it by going through the statutory provision as contained in OCS (Pension) Rules, 1992.

It is the admitted position that the provision of OCS (Pension) Rules, 1992 is applicable to the petitioner, as such the arguments advanced on behalf of the petitioner is required to be appreciated on the basis of legal provision as contained in OCS (Pension) Rules, 1992 which has been incorporated under the proviso to Article 309 of the Constitution of India. The provision contains the definition of “Pension Sanctioning Authority” under the provision of Rule 2(q), which speaks as follows:-

**Rule 2(q)** “Pension Sanctioning Authority” means the appointing authority competent to make appointment to the post held by the retiring Government servant:

[Provided that where the appointing authority is the Government or the Principal Secretary, Commissioner-cum-Secretary or Secretary to Government or Heads of Departments listed in Appendix-3 in the Orissa Service Code, may delegate the power of authority to sanction pension to any subordinate officer not below the rank of Group-A, working under his/her direct control.]

[Provided further that in case of sanction of provisional pension of a retired Government servant as provided under Rule 65 and Rule 66 of these Rules, the

‘Pension Sanctioning Authority’ means the Head of Office under whom the retiring Government servant worked last even if such Head of Office is not the appointing authority of the said Government servant.]”

It is evident from the said provision that the pension sanctioning authority means the appointing authority competent to make appointment to the post held by the retiring Government servant. Provided that where the appointing authority is the Government or the Principal Secretary, Commissioner-cum-Secretary or Secretary to Government or Heads of Departments listed in Appendix-3 in the Orissa Service Code, may delegate the power of authority to sanction pension to any subordinate officer not below the rank of Group-A, working under his/her direct control, further provided that in case of sanction of provisional pension of a retired Government servant as provided under Rule 65 and Rule 66 of these Rules, the ‘Pension Sanctioning Authority’ means the Head of Office under whom the retiring Government servant worked last even if such Head of Office is not the appointing authority of the said Government servant.

Thus, it is evident that the first proviso speaks regarding the authority to sanction pension while the second proviso speaks regarding the power conferred upon the authority so far as the provisional pension which is to be extended under the provision of Rule 65 and 66 is concerned.

Rule 7 conferred power upon the Government to withhold or withdraw pension, which speaks as follows :-

**“7. Right of Government to Withhold or Withdraw Pension**(1) The Government reserve to themselves the right of withholding a pension or gratuity, or both either in full or in part, or withdrawing a pension in full or in part. whether permanently or for specified period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence in duty during the period of his service including service rendered on re-employment after retirement: Provided that the Odisha Public Service Commission shall be consulted before any final orders are passed: Provided further that when a part of pension is withheld / withdrawn, the amount of such pension shall not be reduced below the amount of minimum limit. (2) (a) Such departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service, whether before his retirement or during his reemployment, shall, after the final retirement of the Government servant, be deemed to be a proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service: Provided that when the departmental proceedings are instituted by an authority, subordinate to Government that authority shall submit a report recording its findings to the Government. (b) such

departmental proceedings as referred to in sub-rule (1) if not instituted while the Government servant was in service, whether before his retirement or during his reemployment(i) shall not be instituted save with the sanction of Government; (ii) shall not be in respect of any event which took place more than four years before such institution ; and (iii) shall be conducted by such authority and in such place as the Government may, direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service; (c) [deleted] Vide Finance Department Notification No.33464/F., dtd.04.08.2006 (d) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceeding are instituted or where departmental proceedings are continued under clauses (a) and (b), a provisional pension as provided in rule 66 shall be sanctioned. 8 (e) Where the Government decide not to withhold or withdraw pension but order recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant. Explanation-For the purpose of this rule,- (a) Departmental proceedings shall be deemed to be instituted on the date on which the statement of charges are issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from the date of his suspension; and (b) judicial proceedings shall be deemed to be instituted,- (i) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made; and (ii) in the case of civil proceedings, on the date of presentation of the plaint in the Court.”

It is evident from the provision of Rule-7(1) which confers power upon the Government right of withholding a pension or gratuity, or both either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if in any departmental or judicial proceedings the pensioner found guilty of grave misconduct or negligence in duty during the period of his service including service rendered on re-employment after retirement subject to certain conditions mentioned therein.

Provision of Rule-65 contains the power to sanction provisional pension i.e., in the case where the appointing authority is facing difficulty in forwarding the pension papers referred to in Rule 62 to the Accountant General, Orissa within the prescribed period therein and as such in the intervening period, the provisional pension is allowed to be extended in favour of the retiring employee.

Rule 66 speaks regarding grant of provisional pension where departmental or judicial proceeding is pending, the same is being reproduced herein below:-

**“66. Grant of provision pension where departmental or judicial proceeding is pending –**

(1) Where departmental or judicial proceedings are pending in respect of Government servant on the date of his retirement, referred to in, he shall be paid a provisional pension not exceeding the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant; or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension.

(2) No gratuity shall be paid to the Government servant until the conclusion of the Departmental or judicial proceedings and issue of final order thereon. Provided that where departmental proceedings have been instituted under Rule 16 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 for imposing any of the penalties specified in Clauses (i), (ii) and (iii-A) if Rule 13 of the said rules, the payment of gratuity shall be authorized to be paid to the Government servant.

(3) The provisional pension shall be authorized during the period commencing from the date of retirement up to and including the date on which, after the conclusion of departmental or judicial proceeding, final orders are passed by the competent authority.

(4) The authority competent to sanction pension shall be the authority competent to sanction provisional pension.

(5) Payment of provisional pension made under Sub-rule(1) shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of such proceedings but no recovery shall be made where the pension finally-sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period.”

It is evident that the provisional pension is to be extended in favour of such employees against whom departmental or judicial proceedings are pending on the date of his retirement, referred to in, he shall be paid a provisional pension not exceeding the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant.

It is further evident from the said provision that the provisional pension shall be authorized during the period commencing from the date of retirement up to and including the date on which, after the conclusion of departmental or judicial proceeding, final orders are passed by the competent authority and the authority competent to sanction pension shall be the authority competent to sanction provisional pension.

5. It is not in dispute that the petitioner was implicated in a criminal case related to trial for by the competent court of criminal jurisdiction for an offence under Section 13(2) read with Section 13 (1)(d) of Prevention of Corruption Act in which he has been convicted to undergo rigorous imprisonment for 2 years and pay fine of Rs.1000/-. The order of conviction was passed on 23.12.2003, while the petitioner was in service, but he was neither been dismissed nor removed from service on account of conviction in a criminal case rather allowed to retire from service w.e.f. 31.08.2004 and provisional pension was sanctioned on 5.4.2005.

6. The petitioner contends that the date when the provisional pension was sanctioned the authority who has sanctioned the pension was knowing the fact very well regarding his conviction but instead of passing order of dismissal, he has been allowed to continue in service and thereafter the provisional pension has also been extended in his favour, further reason that the criminal appeal has been preferred by the petitioner before this Court which has been admitted for final hearing and as such there was no new facts which led the authority to come out with the decision dated 24.11.2017 by withholding the provisional pension by exercising the power conferred under Rule-7(1) of the OCS (Pension) Rules, 1992.

Thus, the petitioner is claiming that if any illegality has been committed contrary to the statutory provision, the same may be allowed to continue.

7. There is no dispute in the legal position that the provisional pension is to be extended against whom the departmental proceeding or judicial proceeding is pending. The day when the order of conviction was passed i.e. on 23.12.2003, the petitioner was in service and he was allowed to superannuate from service w.e.f. 31.08.2004 and thereafter he has been granted provisional pension w.e.f. 5.04.2005 and how it has been granted, it is not known to the Court since it is contrary to the provision of Rule 66. This is the only provision to sanction provisional pension and the situation to extend the said benefit is only in case of pendency of departmental or judicial proceeding but admittedly on the day when the provisional pension was extended, the order of conviction was there, which was passed on 23.12.2003 but the authority who has sanctioned the provisional pension on 05.04.2005, knowing this fact very well has sanctioned the pension which will be said to be contrary to the provision of Rule 66 of the OCS (Pension) Rules, 1992 and it is settled if any decision taken by the authority contrary to the rules will be

said to be void-ab-initio and it is the duty of the Court, if it come to notice, it has to be struck down by following the principle that illegality, if committed, should not be allowed to be perpetuated and as such following the settled position of law, the sanction of provisional pension is declared to be illegal.

8. The ground which has been taken by the petitioner is that the order dated 24.11.2017 has been passed by the General Manager (HRD) Pension, who is not the competent authority, as such the same is fit to be quashed, but this argument is not sustainable in view of the specific provision as contained in second proviso, the definition of "Pension Sanctioning Authority" as contained under the provision of Rule 2(q) of the OCS (Pension) Rules, 1992 as indicated herein above which stipulates that the situations of extending the benefit of provisional pension and even though it can be sanctioned by the authority who is not the appointing authority.

9. This Court, after taking into consideration the second proviso to the provision of Rule 2(q) of the OCS (Pension) Rules, 1992, is of the view that the action of the General Manager (HRD), Pension in coming out with the office order dated 24.11.2017 cannot be struck down by accepting the plea of the petitioner that the General Manager (HRD), Pension happens not to be the appointing authority, accordingly, the said plea is rejected.

10. The petitioner has produced the copy of the office order dated 5.4.2005, which is the pension sanctioning order, which has been issued by the order under the signature of the Manager (HRD), PEN but it is evident from the order dated 24.11.2017 that the same has been issued by the General Manager (HRD), Pension, who happens to be the ultimate authority so far as pension is concerned under the Corporation and the GM (HRD), as such his jurisdiction either to sanction provisional pension or withholding cannot be doubted.

11. The petitioner also claims that the order of withholding the pension has been passed under the provision of Rule 7(1) of the OCS (Pension) Rules, 1992, which is only for the purpose of withholding the pension and not the provisional pension but it is settled that merely on account of reference of wrong provision, the order cannot be said to be illegal and the authority by referring to the provision of Rule 7(1) of OCS (Pension) Rules, 1992 has not gone into the implication of the same since the occasion to exercise the power under Rule 7(1) of the OCS (Pension) Rules, 1992 has not yet come because the petitioner has not yet been given the final pension and the implication of Rule 7(1) of the OCS (Pension) Rules, 1992 is only in the case of final

pension and not in the case of provisional pension rather the provisional pension will automatically be ceased in case of final order passed after conclusion of the departmental or judicial proceeding as per the provision as contained under sub-rule 3 of Rule 66 of the OCS (Pension) Rules, 1992 as quoted above and as such even ignoring the said provision of Rule 7(1) of the OCS (Pension) Rules, 1992, no material change will come rather after conviction in a criminal case, the provisional pension will be ceased under the provision of sub-rule 3 of Rule 66 of OCS (Pension) Rules, 1992, hence the argument advanced by the learned counsel for the petitioner is not sustainable in the eye of law.

12. Learned counsel for the petitioner further submits that since against the order of conviction, the petitioner has filed an appeal, the appeal having been admitted and the order of sentence has been kept in abeyance, hence it will amount to continuation of the proceeding of the trial court and as such it would be said to be pending proceeding, hence the provision of Rule 66 will be applicable, but this argument is not sustainable, in view of the fact that the moment, the trial Court passes an order of conviction and sentence, it will be said to be concluded so far as criminal trial is concerned and if any appeal is preferred under the provision of Section 374 of the Cr.P.C. it will not be said to be continuation of the criminal proceeding rather the higher Court will exercise its power by way of separate proceeding to test the finding of the said judgment. The convicted person can get the benefit, only if in the appeal, the order of conviction will be stayed.

13. But here in the instant case, the order of conviction has not been stayed rather the sentence has been stayed in exercise of power conferred under Section 389 of the Cr.P.C. and there is no dispute in the settled position of law that sentence is the consequence of conviction and in case of suspension of the sentence, the convicted person may come out of judicial custody during pendency of the appeal and the conviction will be said to be operative till it be reversed by the appellate court, hence the contention raised by the petitioner is not acceptable to this Court, accordingly the same is rejected.

14. Learned counsel for the petitioner at last submits that since the authorities were knowing this fact that there is an order of conviction and the provisional pension has been extended, as such it be allowed to continue but the same is not acceptable to this Court for the reason that if there is no illegality in the process or decision making process which is contrary to the statutory provision, it has to be rectified the moment it came to the notice of

the authority or the court of law and if it will not to be done it will amount to allow the illegality to perpetuate.

15. This Court, after following the said legal position is of the view that the contention raised by the learned counsel for the petitioner in this regard is having no force, accordingly the same is rejected.

In view of the discussions made hereinabove and in the entirety facts and circumstances, the petitioner fails to make out a case for issuance of positive order in his favour. Accordingly, the writ petition fails and is dismissed.

Writ petition dismissed.

**2018 (I) ILR - CUT-646**

**D.P.CHOUDHURY, J.**

CRLMC NO. 2151 OF 2005

**SASWAT MISHRA & ANR.**

.....Petitioners

.Vrs.

**DAYANIDHI SHARMA & ANR.**

.....Opp. Parties

**(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Prayer for quashing of order taking cognizance against the Collector & Culture Officer – Offence alleged under section 7 of Lotteries (Regulation) Act, 1998 r/w sections 4 & 5 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978 – No sanction obtained – Held, if the act complained of has got nexus with the discharge of public duty. Even if, it is excess of any public servant while discharging public duty, Section 197, Cr.P.C. will protect him- Order of cognizance quashed. (Para -15)**

**(B) ODISHA LOKPAL & LOKAYUKTAS ACT – Proceeding before him – Observations – Effect of – Held, it is well settled in law that the learned Lokpal is the recommending authority and any observation of the Lokpal can be only laid before the Assembly for necessary action by the State Government. (Para- 20 )**

**Case Laws Relied on and Referred to :-**

1. (2012) 53 OCR (SC) 924 : Om Prakash & Ors. v. State of Jharkhand.
2. AIR 2000 SC 3187 : Abdul Wahab Ansari v. State of Bihar and Another.
3. AIR 2004 SC 2179 : State of Orissa and others v. Ganesh Chandra Jew.

4. AIR 2004 SC 2179 : State of Orissa and others -V- Ganesh Chandra Jew.
5. (2012) 53 OCR (SC) – 924 : Om Prakash and others v. State of Jharkhand.
6. (2006) 4 SCC 584 : Sankaran Moitra v. Sadhna Das and another.
7. (2006) 1 SCC 557 : Rakesh Kumar Mishra v. State of Bihar and others.

For petitioners : M/s. D. Nayak, M. Mohanty, R.K. Pradhan,  
S.K. Das & U.R. Jena

For Opposite Parties : M/s. Chinmaya Mohanty, S. Rath  
& B.R. Mohanty ,Mr. B.K. Senapati,  
Addl. Govt Adv.

---

Date of Argument: 29.01.2018      Date of Judgment: 28.03.2018

### **JUDGMENT**

#### ***DR. D.P.CHOUDHURY, J.***

Challenge has been made to the order of taking cognizance dated 27.6.2005 for the commission of offence under Section 7 of the Lotteries (Regulation) Act 1998 and Sections 4 and 5 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978 and issuance of process against the petitioners by the learned Sub-Divisional Judicial Magistrate, Bhawanipatna in I.C.C. Case No.8 of 2005.

2. Mr. D. Nayak, learned Senior Advocate for the petitioners submitted that in the year 1994, the Commissioner-cum-Secretary to Government, Sports, Culture & Youth Services Department vide D.O. No.8742/SC dated 1.9.1994 requested all the Collectors of different districts including the then Collector, Kalahandi district to form District Council of Culture, in the district and register its Society under the Societies Registration Act, 1860 for promotion of culture and providing for a coordinating agency at the District level. It is also directed in that letter that the District Council of Culture would function under the leadership of the Collector of the respective districts under sub-rule (2) of Rule 7 of the District Council of Culture Rules, 1994.

3. Mr. Nayak, learned counsel for the petitioners submitted that in accordance with the said direction of the State Government since 1997 Kalahandi Ustav was being celebrated in the month of January of every year. The petitioner No.1 being the Collector, Kalahandi in the year 2002 and petitioner No.2 being the Culture Officer, in the district of Kalahandi, in

pursuance of the aforesaid letter of the Government and as per bye-law of the District Council of Culture took decision to observe Kalahandi Ustav for the year 2002. In order to celebrate Kalahandi Ustav in the month of November 2002, a lottery Uthan Ustav was observed as per decision taken in the District Cultural Council Committee. Since it is a part of the Kalahandi Ustav, the entire account was audited by the Government Auditor and found no irregularity. Due to effort of the petitioners the balance was increased to Rs.5,22,339/- but opposite party No.1 made allegation falsely against the petitioners stating that such activities of petitioners were offensive and he made complaint to Lokpal, Chief Secretary and other authorities. At the same time he also filed complaint before the learned Sub-Divisional Judicial Magistrate, Bhawanipatna on 21.3.2005.

4. Mr. Nayak, learned Senior Advocate for the petitioners further submitted that the learned S.D.J.M. without complying the statutory provisions under Section 197 of the Cr.P.C. and without appreciating the initial statement of the complainant and complaint petition took cognizance of the offence mechanically under Section 7 of the Lotteries (Regulation) Act 1998 (hereinafter called “the Act 1998”) and Sections 4 and 5 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978 (hereinafter called “the Act, 1978”). He further submitted that the learned S.D.J.M. without application of judicial mind has taken cognizance of such offence and issued process to the petitioners.

5. Mr. Nayak, learned counsel for the petitioners contended that the entire act as alleged in this case is connected with the discharge of duties duly performed by the petitioners who are the Collector and Cultural Officer of the district at that time. Since the act complained of has got nexus with the due discharge of duties, they are protected under Section 197 of Cr.P.C. He relied on the decisions reported in *(2012) 53 OCR (SC) 924; Om Prakash & Ors. v. State of Jharkhand Through the Secretary, Department of Home, Ranchi-1 & Anr., AIR 2000 SC 3187; Abdul Wahab Ansari v. State of Bihar and Another and AIR 2004 SC 2179; State of Orissa and others v. Ganesh Chandra Jew.*

6. Mr. Nayak, learned counsel for the petitioners further submitted that while passing the impugned order, the learned Magistrate was quite aware that sanction under Section 197 Cr.P.C. is necessary but observed in the order that it can be heard at the later stage. But Section 197 of Cr.P.C. is clear to show that no cognizance of offence can be taken without sanction being

obtained from the State Government or Central Government as the case may be if the Act alleged is committed during due discharge of duty of a public servant and they are removable by the sanction of the Central Government or the State Government as the case may be. Moreover, the impugned order suffers from infirmity as in the instant case no enquiry under Section 202 of Cr.P.C. was held as the Court did not feel it necessary to do so. Whenever there is an allegation against a public servant, propriety demands that enquiry under Section 202 of Cr.P.C. should be held to find out the truth about the allegation made in the complaint. On several counts he submitted that the entire order of taking cognizance and issuance of process is per se illegal and improper for which the same are liable to be quashed.

7. Mr. Rath, learned counsel for the opposite party No.1 submitted that in spite of the objection by the complainant and other respectable persons, the petitioners' organization circulated the Lottery Scheme violating the provisions of the Regulation 1998. Also introduction of entry tickets during the Ustav violates the provisions of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978. According to him, when the petitioners did not restrain them from such illegal activities, the complainant made complaint before the learned Lokpal, Orissa who after conducting preliminary investigation submitted a report under Section 10(4)(c) of the Act to the Governor for kind information. There the learned Lokpal has observed that since organizing lotteries being violative of the provisions of the Lottery (Regulation) Act is an offence, complainant can file a complaint in a competent Criminal Court which is the proper remedy. So, the complainant has filed the complaint against the petitioners and after examining the complainant and the complaint, the learned Magistrate applied his judicial mind after scrutinizing the facts he appropriately took cognizance of the offence and issued process to the petitioners. There is no illegality committed by the court below.

8. Mr. B.K. Senapati, learned Additional Government Advocate submitted that the act complained of against the petitioners is undoubtedly during discharge of their duties. When there is any excess as alleged by the complainant, the sanction under Section 197 of Cr.P.C. is mandatory as the act complained of has nexus with the discharge of duty. So, this Court may pass any order as appropriate in this case.

9. **DISCUSSIONS**

Section 197 Cr.P.C. states as follows:

**“197. Prosecution of Judges and public servants -** (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State of the State Government:

[Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression " State Government" occurring therein, the expression "Central Government" were substituted.]

**[Explanation.** – For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under Section 166A, Section 166B, Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 370, Section 375, Section 376, Section 376A, Section 376C, Section 376D or Section 509 of the Indian Penal Code (45 of 1860).]

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub- section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the

expression "Central Government" occurring therein, the expression "State Government" were substituted.

[(3-A) Notwithstanding anything contained in sub-section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3-B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.”

**10.** The aforesaid provision is clear to show that no cognizance can be taken against a public servant if the act complained of is performed during discharge of duty and he or she is removable from service by the sanction of the Government. On the other hand, previous sanction under Section 197 of Cr.P.C. is the pre-condition for taking cognizance of offence against a public servant if the offence purportedly to have been committed in due performance of official duty.

11. It is reported in the case of *State of Orissa and others –V- Ganesh Chandra Jew; AIR 2004 SC 2179* where Their Lordships at paragraph-11 have observed in the following manner:

“..... Use of the expression, 'official duty' implies that the act or omission must have been done by the public in the course of his service and that it should have been in discharge of his duty. The Section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.“

12. In *Om Prakash and others v. State of Jharkhand Through The Secretary, Department of Home, Ranchi 1 and another, (2012) 53 OCR (SC) - 924*, the Hon'ble Apex Court at paragraph 29 has held as follows:

“29. The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it (*K. Satwant Singh*). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection (*Ganesh Chandra Jew*). If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood.”

13. In *Sankaran Moitra v. Sadhna Das and another, (2006) 4 SCC 584*, the Hon'ble Supreme Court in paragraphs 22 and 23 has observed as follows:

“22. Learned counsel for the complainant argued that want of sanction under Section 197(1) of the Code did not affect the jurisdiction of the Court to proceed, but it was only one of the defences available to the accused and the accused can raise the defence at the appropriate time. We are not in a position to accept this submission. Section 197(1), its opening words and the object sought to be achieved by it, and the decisions of this Court earlier cited, clearly indicate that a prosecution hit by that provision cannot be launched without the sanction contemplated. It is a condition precedent, as it were, for a successful prosecution of a public servant when the provision is attracted, though the question may arise necessarily not at the inception, but even at a subsequent stage. We cannot therefore accede to the request to postpone a decision on this question.

23. xxxx But still, it would be an offence committed during the course of the performance of his duty by the appellant and it would attract Section 197 of the Code. Going by the principle, stated by the Constitution Bench in **Matajog Dobey v. H.C.Bhari (1955) 2 SCR 925**, it has to be held that a sanction under Section 197(1) of the Code of Criminal Procedure is necessary in this case.”

**14.** In the decision reported in **Rakesh Kumar Mishra v. State of Bihar and others, (2006) 1 SCC 557**, the Hon’ble Apex Court in paragraph 18 has observed as follows:

“18. Section 197(I) provides that when any person who is or was a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government, and (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, or the State Government.”

**15.** With due regard to the aforesaid decision, it appears that no Court can take cognizance of any offence issuing process to the public servant without sanction of the State Government or the Central Government, as the case may be, if the act complained of has got nexus with the discharge of public duty. Even if it is excess of any public servant while discharging public duty, Section 197, Cr.P.C. will protect him. Not only the act complained of has got nature of duty discharged but also such public servant is only removable from office save by or with the sanction of the State Government or Central Government as the case may be.

**16.** Now adverting to the facts of this case, it appears that the learned Magistrate on 27.6.2005 has passed order of taking cognizance and relevant portion of the same is placed below in the following manner:

**“27.6.2005**

The complainant is present. Perused the complaint petition, statement of the complainant recorded u/s.200 Cr.P.C., Xerox copies of the orders passed by Hon'ble Lokpal, Orissa in case No.IIIA of 2004 and other connecting documents including Xerox-copies of the Judgment of Hon'ble Apex Court reported in A.I.R. 1983 S.C. 64 in B.S. Sambhu-Versus-T.S. Krishna Swamy, A.I.R. 1983 S.C. 610 in Manohar Nath Kaul-Versus-State, (2002) 6 S.C.C. 543 in Rajkishor Roy-Versus-Kamleswar Pandey and another and other connecting documents. Heard on the points of sanction as required U/s.197 Cr.P.C. at length. It is stated that in view of the observation of Hon'ble Apex Court in the aforesaid cases and the nature of allegation in question of sanction can be decided at a later stage. Therefore, there is no huddle on issuing process against the accused persons named in the complaint. Further this Court should not insist for inquiry U/s.202 Cr.P.C. as prima facie case against the accused persons is made out.

I have carefully gone through the entire material on record. I find sufficient grounds for proceeding against accused Saswat Kumar Mishra and Sukru Swain for commission offences U/s.7 of Lotteries (Regulation) Act, 1998 and Section 4 and 5 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978. Issue summons to the above accused persons fixing 21.9.05 for appearance. I find insufficient material to proceed against Fakirmohan Pradhan. Hence,

the complaint in respect of him is dismissed. Put up on the date fixed the complainant to take steps forthwith.”

Sd/-R.K. Tosh,  
S.D.J.M.,  
Bhawanipatna”

17. Moreover, the complaint and initial statement of the complainant clearly show that the present petitioners have organized the lottery after obtaining necessary permission of the State Government to promote the welfare scheme of the local people. The act complained of has got thus close nexus with the discharge of duty. Moreover, they are removable by the order of the sanction of the State Government. So, the ingredients of Section 197 Cr.P.C. are well fulfilled to protect the petitioners who are public servant. Now applying the aforesaid decisions of the Hon’ble Supreme Court in *State of Orissa and others –V- Ganesh Chandra Jew (supra)*; *Om Prakash and others v. State of Jharkhand (supra)*; *Sankaran Moitra v. Sadhna Das and another (supra)*; and *Rakesh Kumar Mishra v. State of Bihar and others (supra)*, prior sanction of the State Government is necessary to proceed with the offences. This fact is also well observed in the impugned order. When the statute is clear to show that obtaining of sanction of the State Government is a pre-condition to take cognizance of the offence, any observation that the question of sanction can be considered after taking cognizance of the offence is absolutely beyond the purview of the jurisdiction of the Magistrate. However, the learned Magistrate has relied on the decision reported in *AIR 1983 SC 64; B.S. Sambhu V. T.S. Krishnaswamy* and *AIR 1983 SC 610; Manohar Nath Kaul V. State of Jammu and Kashmir* to support his finding. On perusal of the decision in *B.S. Sambhu (supra)* and *Manohar Nath Kaul (supra)*, it appears the sanction under Section 197 Cr.P.C. is not necessary where the act complained of has no nexus with the discharge of duty. Similarly in *Raj Kishor Roy v. Kamleshwar Pandey and another*, reported in *(2002) 6 SCC 543*, Their Lordships have approved the proposition that Section 197 Cr.P.C. is mandatory where the act has been done by the public servant in the course of his service or in the discharge of his duty. But due to peculiar facts and circumstances of the case, Their Lordships left the question of sanction open to be decided during trial. However, it is clear from the decision that if the act complained of has nexus with the discharge of duty or performance of public duty, the protection under Section 197 Cr.P.C. is available to the public servant. The learned Magistrate has failed to understand the import of the case laws cited by him.

**18.** From the aforesaid order, it appears that basing upon the statement of the complainant and initial statement along with other material, the learned Magistrate took cognizance of the offence. It appears from the complaint and initial statement of the complainant that he has filed the complaint basing on the observation of the learned Lokpal where the complainant has made similar allegations. Basing upon the observation of the learned Lokpal, he appears to have filed the present complaint.

**19.** It is revealed from the observation of the learned Lokpal that the present petitioners had requested the learned Lokpal to investigate the matter under Section 8 of the Odisha Lokpal and Lokayuktas Act but same request was turned down by the learned Lokpal. It is further available from his observation that the acts of the present petitioners were absolutely performance of duty as per order of the State Government and in that the learned Lokpal has not cast any aspersion against the present petitioners. Rather, it is observed that there is no criminal intention behind the same. Lastly it is observed at para-14 of the order of the learned Lokpal in the following manner:

“14. In case organizing lottery violates the provisions of the Lottery (Regulation) Act and is an offence, complainant can file a complaint in a competent Criminal Court which is the proper remedy. Therefore, I refuse to investigate U/s 10 (4) (c) of the Act to make any recommendation under section 12 (3) of the Act”.

The aforesaid observation of the learned Lokpal clearly shows that if the act of organizing lottery violates the necessary provisions of the Lottery (Regulation) Act then only the complainant has remedy in filing a complaint in a competent Criminal Court but that does not mean the learned Lokpal has directed the complainant to file complaint against the petitioners.

**20.** Bereft of the above observation, it is well settled in law that the learned Lokpal is the recommending authority and any observation of the Lokpal can be only laid before the Assembly for necessary action by the State Government. In the instant case the learned Lokpal has not recommended to the State Government for which the contention of the learned counsel for opposite party No.2 falls flat. Moreover, the observation of the learned Lokpal in normal situation does not direct the Criminal Court under the Odisha Lokpal and Lokayuktas Act to take cognizance of the offence. So, the

question of binding of the observation of the learned Lokpal upon a criminal court is beyond the purview of principle of law.

**21.** Once the complaint is filed under Section 200 Cr.P.C., that will be followed by recording of the initial statement of the complainant and the learned Magistrate is at liberty to make enquiry under Section 202, Cr.P.C. to find out whether the process can be issued. So, it is the wisdom of the learned Magistrate to take cognizance of the offence basing on the materials placed before him. On the other hand, the Magistrate has got independent discretion to take cognizance of the offence and issuance of process. Learned Magistrate should be unfazed with any observation of any authority except under Cr.P.C. as long as it is not exhibited as piece of evidence. The 'evidence' means the oral testimony or with the documentary evidence admitted into evidence.

**22.** Now adverting to the present case, except the statement of the complainant in the complaint, no witnesses were examined by the complainant to corroborate him. No document has also exhibited by the complainant in his initial statement to lend support to his testimony. Unless the certified copy of the order of the learned Lokpal is made exhibited, the Court cannot take cognizance of the said document. Therefore, there is no material before the learned Magistrate to find out a prima facie case to make out an offence under Section 7 of the Lotteries (Regulation) Act 1998 and Sections 4 and 5 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978.

**23.** Moreover, since the allegation has been made against a responsible Government servant who is none other than the Collector of the district and the other responsible public servants, the learned Magistrate should hold the enquiry under Section 202, Cr.P.C. if at all he decided to go with the procedure as enshrined in Chapter-XV of the Cr.P.C. At the same time, he has got option to send the complaint to the Police Station under Section 156(3), Cr.P.C. to register same and conduct investigation. In absence of holding enquiry under Section 202, Cr.P.C., the order of taking cognizance and issuance of process basing on the statement of the complainant and complaint is defective one.

**24.** In terms of the above discussion, the Court is of the view that the learned Magistrate without application of judicial mind has taken cognizance

of the offence and as such taking of cognizance of offence and issuance of process being abuse of process of the Court, they are quashed under Section 482, Cr.P.C. The CRLMC is disposed of accordingly. The LCR received be sent back immediately.

CRLMC disposed of.