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Asian Resurfacing of Road Agency PVT. LTD. & Anr. -V- Central Bureau of Investigation.

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Subash Chandra Biswal -V- State of Orissa & Ors.

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Ajay Kumar Behera -V- State of Odisha & Ors.

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Management of S.A I.L., R.S.P. Rourkela-V- P.O, Industrial Tribunal, Odisha, Bhubaneswar & Ors.

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Prafulla Bhaisal & Ors. -V- State of Odisha & Ors.

2018 (I) I.L.R. Cut…….. 747

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Prafulla Bhaisal & Ors. -V- State of Odisha & Ors.

2018 (I) I.L.R. Cut…….. 747

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Azeed Ahemad -V- The Transport Commissioner-Cum-Chairman, STA & Anr.

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ORISSA MOTOR SPIRIT (TAXATION ON SALES) Act, 1946 – Section 3(2) read with Section 28 – Demand raised – Not paid – Certificate case initiated under Orissa Public

Demands Recovery Act for realization of the dues – Suit filed challenging the demand – Whether maintainable? – Held No, Section 28(1) of the Act provides that any person aggrieved by any order under sub-section (2) of Section 3 or under section 8 may file appeal within thirty days – Sub-section (2) of Section 28 provides that every order passed in appeal under sub-section (2) shall subject to the provisions of sub-section (3), be final – Where a special statute provides for an appeal, jurisdiction of the Civil Court is impliedly barred – Since the statute gives a finality to the orders passed by the competent authority under the Act, the Civil Court's jurisdiction must be held to be excluded – The substantial questions of law are answered accordingly.

State of Orissa & Ors. -V- Jaykrushna Brahmachari

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Bisikesan Naik -V- State of Orissa & Anr.

2018 (I) I.L.R. Cut…….. 785

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Kulwant Singh -V- Union of India & Ors.

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State of Orissa & Ors. -V- Maa Kurai Shuni Brick Industries & Ors.

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Ranjeet Kumar Das -V- State of Orissa & Ors.

2018 (I) I.L.R. Cut…….. 695

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Ranjeet Kumar Das -V- State of Orissa & Ors.

2018 (I) I.L.R. Cut…….. 695

SERVICE – Direction for disposal of representation after two

decades – Effect of – held, Law is well-settled in the case of *C. Jacob Vs. Director of Geology Min. Indus. Est. & Anr.,* reported in (2008) 10 SCC 115 that direction for disposal of representation will not give rise to a fresh cause of action to maintain an Original Application before the Tribunal seeking for a relief which has become stale.

Ajay Kumar Behera -V- State of Odisha & Ors.

2018 (I) I.L.R. Cut…….. 740

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Anupama Behera -V- GRIDCO & Ors.

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2018 (I) ILR - CUT- 659 (S.C.)

SUPREME COURT OF INDIA

ADARSH KUMAR GOEL, J. NAVIN SINHA, J. & R.F. NARIMAN,J.

CRIMINAL APPEAL NO. 1375-1376 OF 2013

WITH

Criminal Appeal Nos.1383/2013, 1377/2013, 1382/2013, 1394/2013, 1384/2013, 1393/2013, 1386-1387/2013, 1385/2013, 1406/2013, 1396/2013, 1395/2013, 1391/2013, 1389/2013, 1388/2013, 1398/2013, 1397/2013, Special Leave Petition (Crl.) No.2610/2013, Criminal Appeal Nos. 1390/2013, 1399/2013, 1402/2013, 1400/2013, 1401/2013, 1404/2013, 1403/2013, 1405/2013, Special Leave Petition (Crl.) Nos. 6835/2013, 6834/2013, 6837/2013, Criminal Appeal No.388/2014, Special Leave Petition (Crl.) Nos.10050-10051/2013, 9652-9653/2013, Criminal Appeal No. 234/2014, Special Leave Petition (Crl.) Nos. 5678/2014, 1451/2014, 1399/2014, 2508/2014, 2970/2014, 2507/2014, 2939/2014, 2977/2014, 4709/2014, 6372/2014, 6391/2014, 6691-6692/2014 and 9363/2017.

ASIAN RESURFACING OF ROAD AGENCY PVT. LTD. & ANR. .....Appellants

.Vrs.

CENTRAL BUREAU OF INVESTIGATION .....Respondent

(A) CRIMINAL LAW – Question referred relates to the issue as to *"Whether an order on charge framed by a Special Judge under the provisions of Prevention of Corruption Act, being an interlocutory order, and when no revision against the order or a petition under Section 482 of Cr.P.C. lies, can be assailed under Article 226/227 of the Constitution of India, whether or not the offences committed include the offences under Indian Penal Code apart from offences under Prevention of Corruption Act?" –* Approach to be adopted by the High Court in dealing with the matters challenging the order framing charge and grant of stay orders – Discussed – Apex Court settled the law – All stay orders deemed to be vacated in civil & criminal proceeding after six months.

"*Thus, we declare the law to be that order framing charge is not purely an interlocutory order nor a final order. Jurisdiction of the High Court is not barred irrespective of the label of a petition, be it under Sections 397 or 482 Cr.P.C. or Article 227 of the Constitution. However, the said jurisdiction is to be exercised consistent with the legislative policy to ensure expeditious disposal of a trial without the same being in any manner hampered. Thus considered, the challenge to an order of charge should be entertained in a rarest of rare case only to correct a patent error of jurisdiction and not to re-appreciate the matter. Even where such challenge is entertained and stay is granted, the matter must be decided on day-to-day basis so that stay does not operate for an unduly long period. Though no mandatory time limit may be fixed, the decision may not exceed two-three months normally. If it remains pending longer, duration of stay should not exceed six months, unless extension is granted by a specific speaking order, as already indicated. Mandate of speedy justice applies to the PC Act cases as well as other cases where at trial stage proceedings are stayed by the higher court i.e. the High Court or a court below the High Court, as the case may be. In all pending matters before the High Courts or other courts relating to PC Act or all other civil or criminal cases, where stay of*

proceedings in a pending trial is operating, stay will automatically lapse after six months from today unless extended by a speaking order on above parameters. Same course may also be adopted by civil and criminal appellate/revisional courts under the jurisdiction of the High Courts. The trial courts may, on expiry of above period, resume the proceedings without waiting for any other intimation unless express order extending stay is produced. *(Paras 17, 28, 35 and 36)*

(B) CRIMINAL TRIAL– GRANT OF STAY ORDERS – CAUSE OF DELAY – DUTY OF THE COURT – INDICATED – *Held, it is well accepted that delay in a criminal trial, particularly in the PC Act cases, has deleterious effect on the administration of justice in which the society has a vital interest. Delay in trials affects the faith in Rule of Law and efficacy of the legal system. It affects social welfare and development. Even in civil or tax cases it has been laid down that power to grant stay has to be exercised with restraint. Mere prima facie case is not enough. Party seeking stay must be put to terms and stay should not be incentive to delay. The order granting stay must show application of mind. The power to grant stay is coupled with accountability. Wherever stay is granted, a speaking order must be passed showing that the case was of exceptional nature and delay on account of stay will not prejudice the interest of speedy trial in a corruption case. Once stay is granted, proceedings should not be adjourned and concluded within two-three months. The wisdom of legislature and the object of final and expeditious disposal of a criminal proceeding cannot be ignored. In exercise of its power the High Court is to balance the freedom of an individual on the one hand and security of the society on the other. Only in case of patent illegality or want of jurisdiction the High Court may exercise its jurisdiction. The acknowledged experience is that where challenge to an order framing charge is entertained, the matter remains pending for long time which defeats the interest of justice.* *(Paras 28, 30 & 31)*

Case Laws Relied on and Referred to :-

1 159 (2009) DLT 636 : Dharambir Khattar vrs Central Bureau of Investigation.[1]
2 166(2010) DLT 362 : R.C. Sabharwal vrs Central Bureau of Investigation.[2]
3 (2006)7 SCC 188 : CBI vrs Ravi Shankar Srivastava[3]
4 AIR 2009 SC 1032 : Dharimal Tobacco Products Ltd. and Ors. vrs State of Maharashtra and Anr.[4]
5 (1977) 4 SCC 551 : Madhu Limaye vrs The State of Maharashtra[5]
6 (1997) 4 SCC 241 : Krishnan vrs Krishnaveni[6]
7 (2003) 6 SCC 641 : State versus Navjot Sandhu[7].
8. 178(2011) DLT 501 : Anur Kumar Jain vrs CBI.[8]
9 (1980) Suppl. SCC 92 : *V*.C. Shukla vrs State through CBI[9]
10 (1947) 2 SCR 685 : S. Kuppuswami Rao vrs the King[10]
11 (2001) 8 SCC 607 : Satya Narayan Sharma vrs State of Rajasthan[11]
12 (1997) 3 SCC 261 : L. Chandra Kumar vrs Union of India and Ors.[12]
13 (1979) 3 SCC 118 : Chander Shekhar Singh vrs Siya Ram Singh.[13]

14 (1977) 4 SCC 137 : Amarnath vrs State of Haryana[14]
15 (1968) 2 SCR 685 = AIR 1968 SC 733 : Mohanlal Maganlal Thacker v. State of Gujarat[15]
16 (1980) Supp. SCC 92 : V.C. Shukla vrs State through CBI[16]
17 (2017) 14 SCC 809 : Girish Kumar Suneja vrs Central Bureau of Investigation[17].
18 (2014) 9 SCC 516 : Manohar Lal Sharma vrs Principal Secretary and ors.[18]
21. (2010) 8 SCC329 : Shalini Shyam Shetty versus Rajendra Shankar Patil[21]
22 (1994) 3 SCC 569 : Kartar Singh vrs State of Punjab[22]
23 [1967] 3 SCR 926 : Ratilal Bhanji Mithani vrs Asstt. Collector of Customs, Bombay and Anr.[23]
25 (2014) 3 SCC 92 : Hardeep Singh vrs State of Punjab[25]
26 (2012) 2 SCC 688: Imtiaz Ahmad vrs State of U.P.[26]
27. Kartar Singh v. State of Punjab, (1994) 3 SCC 569 at 714
28. 1967 SCR (3) 926 at 930-931 : Ratilal Bhanji Mithani v. Assistant Collector of Customs.
29. (2001) 8 SCC 607 : Satya Narayan Sharma v. State of Rajasthan.
30. (1977) 4 SCC 137 : Amar Nath v. State of Haryana.
31. SCC 92 at 128-129 : V.C. Shukla v. State through C.B.I. (1980) Supp.
32. (2004) 13 SCC 269 at 276-279 : Poonam Chand Jain and another v. Fazru.
33. (2017) 14 SCC 809 : Girish Kumar Suneja v. C.B.I.
34. (1997) 3 SCC 261 at 301 : L. Chandra Kumar v. Union of India and others.
35. (1965) 1 SCR 413 at 499 : In re Special Reference 1 of 1964.

Date of Judgment : 28.03 2018

JUDGMENT

ADARSH KUMAR GOEL, J.

CRIMINAL APPEAL NOS.1375-1376 OF 2013

1. These appeals have been put up before this Bench of three Judges in pursuance of order of Bench of two Judges dated 9th September, 2013 as follows:

> *"Leave granted.*
>
> *Learned counsel for the parties are agreed that there is considerable difference of opinion amongst different Benches of this Court as well as all the High Courts. Mr. Ram Jethmalani, learned Senior Counsel appearing for petitioner in Criminal Appeal arising out of Special Leave Petition (Criminal)No.6470 of 2012 submits that the subsequent decisions rendered by the two-judge Benches are per incuriam, and in conflict with the ratio of law laid down in the Constitution Bench decision in Mohanlal Maganlal Thacker v. State of Gujarat [(1968) 2 SCR 685].*
>
> *In this view of the matter, we are of the opinion that it would be appropriate if the matters are referred to and heard by a larger Bench. Office is directed to place the matters before the Hon'ble the Chief Justice of India for appropriate orders.*

In the meantime, further proceedings before the trial Court shall remain stayed."

2. Since the question of law to be determined is identical in all cases, we have taken up for consideration this matter. In the light of answer to the referred question this as well as all other matters may be considered for disposal on merits by the appropriate Bench.

3. Brief facts first. F.I.R. dated 7th March, 2001 has been recorded with the Delhi Special Police Establishment: CBI/SIU-VIII/New Delhi Branch under Section 120B read with Sections 420, 467, 468, 471 and 477A of IPC and Section 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 (the PC Act) at the instance of Municipal Corporation of Delhi (MCD) against the appellant and certain officers of MCD alleging causing of wrongful loss to the MCD by using fake invoices of Oil Companies relating to transportation of Bitumen for use in "Dense Carpeting Works" of roads in Delhi during the year 1997 and 1998.

4. After investigation, charge sheet was filed against the appellant and certain employees of MCD by the respondent-CBI before the Special Judge, CBI, New Delhi on 28th November, 2002. The appellants filed an application for discharge with the Special Judge, CBI. On 1 st February, 2007, the Special Judge, CBI directed framing of the charges after considering the material before the Court. It was held that there was a *prima facie* case against the appellant and the other accused. The appellants filed Criminal Revision No. 321 of 2007 before the Delhi High Court against the order framing charge. The Revision Petition was converted into Writ Petition (Criminal)No.352 of 2010.

5. Learned Single Judge referred the following question of law for consideration by the Division Bench:

> *"Whether an order on charge framed by a Special Judge under the provisions of Prevention of Corruption Act, being an interlocutory order, and when no revision against the order or a petition under Section 482 of Cr.P.C. lies, can be assailed under Article 226/227 of the Constitution of India, whether or not the offences committed include the offences under Indian Penal Code apart from offences under Prevention of Corruption Act?"*

6. The learned Single Judge referred to the conflicting views taken in earlier two single Bench decisions of the High Court in ***Dharambir Khattar versus Central Bureau of Investigation*** *and* ***R.C. Sabharwal versus Central Bureau of Investigation***. It was observed :

> *"However, since there are two views, one expressed by the Bench of Justice Jain in R.C. Sabharwal's (supra) case and one held by the Bench of Justice Muralidhar in Dharamvir Khattar's case (supra) and by this Bench, I consider that it was a fit case where a Larger Bench should set the controversy at rest."*

7. In ***Dharambir Khattar*** (supra), the view of learned Single Judge is as follows :

> *"32. To conclude this part of the discussion it is held that in the context of Section 19(3)(c) the words "no Court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial..." includes an interlocutory order in the form of an order on charge or an order framing charge. On a collective reading of the decisions in* ***V.C. Shukla*** *and* ***Satya Narayan Sharma****, it is held that in terms of Section 19(3)(c) PCA, no revision petition would be maintainable in the High Court against order on charge or an order framing charge passed by the Special Court.*
>
> *33. Therefore, in the considered view of this Court, the preliminary objection of the CBI to the maintainability of the present petitions is required to be upheld...."*

8. In ***R.C. Sabharwal*** (supra), another learned Single Judge held that even though no revision may lie against an interlocutory order, there was no bar to the constitutional remedy under Articles 226 and 227 of the Constitution. At the same time, power under Section 482 could not be exercised in derogation of express bar in the statute in view of decisions of this Court in ***CBI versus Ravi Shankar Srivastava***[3] ***,Dharimal Tobacco Products Ltd. and Ors. versus State of Maharashtra and Anr.***[4] , ***Madhu Limaye versus The State of Maharashtra***[5] , ***Krishnan versus Krishnaveni***[6] and ***State versus Navjot Sandhu***[7] .

9. It was observed :

> *"37. In view of the authoritative pronouncement of the Hon'ble Supreme Court in the case of* ***Navjot Sandhu*** *(supra), coupled with its earlier decisions in the case of* ***Madhu Limaye*** *(supra), it cannot be disputed that inherent powers of the High Court, recognized in Section 482 of the Code of Criminal Procedure, cannot be used when exercise of such powers would be in derogation of an express bar contained in a statutory enactment, other than the Code of Criminal Procedure. The inherent powers of the High Court have not been limited by any other provisions contained in the Code of Criminal Procedure, as is evident from the use of the words ?Nothing in this Code? in Section 482 of the Code of Criminal Procedure, but, the powers under Section 482 of the Code of Criminal Procedure cannot be exercised when exercise of such powers would be against the legislative mandate contained in some other statutory enactment such as Section 19(3)(c) of Prevention of Corruption Act."*

"29. The fact that the procedural aspect as regards the hearing of the parties has been incorporated in Section 22 does not really throw light on whether an order on charge would be an interlocutory order for the purposes of Section 19(3)(c) PCA. A collective reading of the two provisions indicates that in the context of order on charge an order discharging the accused may be an order that would be subject-matter of a revision petition at the instance perhaps of the prosecution. Since all provisions of the statute have to be given meaning, a harmonious construction of the three provisions indicates that the kinds of orders which can be challenged by way of a revision petition in the High Court is narrowed down to a considerable extent as explained in the case of ***Satya Narayan Sharma."***

Further, after referring to ***Nagendra Nath Bora v. Commissioner of Hills Division and Appeals, Assam***, *AIR 1958 SC 398;* ***Nihandra Bag v. Mahendra Nath Ghughu,*** *AIR 1963 SC 1895;* ***Sarpanch, Lonand Grampanchayat v. Ramgiri Gosavi and Anr.,*** *AIR 1968 SC 222*; ***Maruti Bala Raut v. Dashrath Babu Wathare and Ors.,*** *(1974) 2 SCC 615;* ***Babhutmal Raichand Oswal v. Laxmibai R. Tarte and Anr.,*** *AIR 1975 SC 1297;* ***Jagir Singh v. Ranbir Singh and Anr.,*** *AIR 1979 SC 381;* ***Vishesh Kumar v. Shanti Prasad,*** *AIR 1980 SC 892;* ***Khalil Ahmed Bashir Ahmed v. Tufelhussein Samasbhai Sarangpurwala,*** *AIR 1988 SC 184;* ***M.C. Mehta v. Kamal Nath and Ors.,*** *AIR 2000 SC 1997* and ***Ranjeet Singh v. Ravi Prakash,*** *AIR 2004 SC 3892,* it was observed :

*"**25. It is well known fact that trials of corruption cases are not permitted to proceed further easily and a trial of corruption case takes anything upto 20 years in completion. One major reason for this state of affairs is that the moment charge is framed, every trial lands into High Court and order on charge is invariably assailed by the litigants and the High Court having flooded itself with such revision petitions, would take any number of years in deciding the revision petitions on charge and the trials would remain stayed.** Legislature looking at this state of affairs, enacted provision that interlocutory orders cannot be the subject matter of revision petitions. This Court for reasons as stated above, in para No. 3 & 4 had considered the state of affairs prevalent and came to conclusion that no revision against the order of framing of charge or order directing framing of charge would lie. Similarly, a petition under Section 482 of Cr. P.C. would also not lie. I am of the opinion that once this Court holds that a petition under Article 227 would lie, the result would be as is evident from the above petitions that every order on charge which earlier used to be assailed by way of revision would be assailed in a camouflaged manner under Article 227 of the Constitution and the result would be same that proceedings before the trial court shall not proceed.*

26. The decisions on a petition assailing charge requires going through the voluminous evidence collected by the CBI, analyzing the evidence against each accused and then coming to conclusion whether the accused was liable to be charged or not. This exercise is done by Special Judge invariably vide a detailed speaking order. Each order on charge of the Specia l Judge, under Prevention of

Corruption cases, normally runs into 40 to 50 pages where evidence is discussed in detail and thereafter the order for framing of charge is made. If this Court entertains petitions under Article 227 of the Constitution to re-appreciate the evidence collected by CBI to see if charge was liable to be framed or, in fact, the Court would be doing so contrary to the legislative intent. No court can appreciate arguments advanced in a case on charge without going through the entire record. The issues of jurisdiction and perversity are raised in suchpetitions only to get the petition admitted. The issue of jurisdiction is rarely involved. The perversity of an order can be argued in respect of any well written judgment because perversity is such a term which has a vast meaning and an order which is not considered by a litigant in its favour is always considered perverse by him and his counsel.

(Emphasis added)

10. The Division Bench in the impugned judgment[8] reframed the questions as follows:

"(a) Whether an order framing charge under the 1988 Act would be treated as an interlocutory order thereby barring the exercise of revisional power of this Court?

(b) Whether the language employed in Section 19 of the 1988 Act which bars the revision would also bar the exercise of power under Section 482 of the Cr.P.C. for all purposes?

(c) Whether the order framing charge can be assailed under Article 227 of the Constitution of India?"

11. After discussing the law on the point, the Bench concluded:

"(a) An order framing charge under the Prevention of Corruption Act, 1988 is an interlocutory order.

(b) As Section 19(3)(c) clearly bars revision against an interlocutory order and framing of charge being an interlocutory order a revision will not be maintainable.

(c) A petition under Section 482 of the Code of Criminal Procedure and a writ petition preferred under Article 227 of the Constitution of India are maintainable.

(d) Even if a petition under Section 482 of the Code of Criminal Procedure or a writ petition under Article 227 of the Constitution of India is entertained by the High Court under no circumstances an order of stay should be passed regard being had to the prohibition contained in Section 19(3)(c) of the 1988 Act.

(e) The exercise of power either under Section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution of India should be sparingly and in exceptional circumstances be exercised keeping in view the law laid down in Siya Ram Singh [(1979) 3 SCC 118], Vishesh Kumar [AIR 1980 SC 892], Khalil Ahmed Bashir Ahmed [AIR 1988 SC 184, Kamal Nath and Ors. [AIR 2000 SC 1997 Ranjeet Singh [AIR 2004 SC 3892] and similar line of decisions in the field.

(f) It is settled law that jurisdiction under Section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution of India cannot be exercised as

a "cloak of an appeal in disguise" or to re-appreciate evidence. The aforesaid proceedings should be used sparingly with great care, caution, circumspection and only to prevent grave miscarriage of justice."

12. It was held that order framing charge was an interlocutory order and no Revision Petition under Section 401 read with Section 397(2) Cr.P.C. would lie to the High Court against such order. Reliance was mainly placed on ***V.C. Shukla versus State through CBI***[9]**.** Therein, Section 11A of the Special Courts Act, 1979 was interpreted by a Bench of four Judges of this Court. The Bench applied the test in ***S. Kuppuswami Rao versus the King***[10]. Reliance was also placed on ***Satya Narayan Sharma versus State of Rajasthan***[11], wherein Section 19 (3)(c) of the Prevention of Corruption Act, 1988 was the subject matter of consideration.

13. It was, however, held that a petition under Section 482 Cr.P.C. will lie to the High Court even when there is a bar under Section 397 or some other provisions of the Cr.P.C. However, inherent power could be exercised only when there is abuse of the process of Court or where interference is absolutely necessary for securing the ends of justice. It must be exercised very sparingly where proceedings have been initiated illegally, vexatiously or without jurisdiction. The power should not be exercised against express provision of law. Even where inherent power is exercised in a rare case, there could be no stay of trial in a corruption case. Reliance in this regard was mainly placed on judgments of this Court in ***Satya Narayan Sharma*** (supra) and ***Navjot Sandhu*** (supra).

14. As regards a petition under Article 227 of the Constitution, it was held that the said power was part of basic structure of the Constitution as held in ***L. Chandra Kumar versus Union of India and Ors.***[12] and could not be barred. But the Court would refrain from passing an order which would run counter to and conflict with an express intendment contained in Section 19(3)(c) of the PC Act. Reliance was also placed on ***Chander Shekhar Singh versus Siya Ram Singh***[13]**.**

15. Learned counsel for the appellants submitted that the High Court was in error in holding that the order framing charge was an interlocutory order. In any case, since petition under Section 482 Cr.P.C. and under Article 227 of the Constitution has been held to be maintainable, there could be no prohibition against interference by the High Court or the power of the High Court to grant stay in spite of prohibition under Section 19(3)(c) of the PC Act.

16. Learned counsel for the CBI, however, supported the view of the High Court.

17. We have given due considerations to the rival submissions and perused the decisions of this Court. Though the question referred relates to the issue whether order framing charges is an interlocutory order, we have considered further question as to the approach to be adopted by the High Court in dealing with the challenge to the order framing charge. As already noted in para 10, the impugned order also considered the said question. Learned counsel for the parties have also addressed the Court on this question.

18. It is not necessary to refer to all the decisions cited at the Bar. Suffice it to say that a Bench of three Judges in ***Madhu Limaye*** (supra) held that legislature has sought to check delay in final disposal of proceedings in criminal cases by way of a bar to revisional jurisdiction against an interlocutory order under sub-Section 2 of Section 397 Cr.P.C. At the same time, inherent power of the High Court is not limited or affected by any other provision. It could not mean that limitation on exercise of revisional power is to be set at naught. Inherent power could be used for securing ends of justice or to check abuse of the process of the Court. This power has to be exercised very sparingly against a proceeding initiated illegally or vexatiously or without jurisdiction. The label of the petition is immaterial. This Court modified the view taken in ***Amarnath versus State of Haryana***[14] and also deviated from the test for interlocutory order laid down in ***S. Kuppuswami Rao*** (supra). We may quote the following observations in this regard:

> *"**6.** The point which falls for determination in this appeal is squarely covered by a decision of this Court, to which one of us (Untwalia, J.) was a party in **Amar Nath v. State of Haryana.** But on a careful consideration of the matter and on hearing learned Counsel for the parties in this appeal **we thought it advisable to enunciate and reiterate the view taken by two learned Judges of this Court in Amar Nath case but in a somewhat modified and modulated form. …..***
>
> *xxxx xxxx xxxx xxxx*
>
> ***10.** As pointed out in **Amar Nath** case **the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry, trial or other proceeding, is to bring about expeditious disposal of the cases finally.** More often than not, the revisional power of the High Court was resorted to in relation to interlocutory orders delaying the final disposal of the proceedings. The Legislature in its wisdom decided to check this delay by introducing sub-section (2) in Section 397. On the one hand, a bar has been put in the way of the High Court (as also of the Sessions Judge) for exercise of the revisional power in relation to any interlocutory order, on the other, the power has been conferred in*

almost the same terms as it was in the 1898 Code. On a plain reading of Section 482, however, it would follow that nothing in the Code, which would include sub-section (2) of Section 397 also, "shall be deemed to limit or affect the inherent powers of the High Court", But, if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers. In such a situation, what is the harmonious way out? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. ***But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of, a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction.*** *Take for example a case where a prosecution is launched under the Prevention of Corruption Actwithout a sanction. then the trial of the accused will be without jurisdiction and even after his acquittal a second trial after proper sanction will not be barred on the doctrine of Autrefois Acquit. Even assuming, although we shall presently show that it is not so, that in such a case an order of the Court taking cognizance or issuing processes is an interlocutory order. does it stand to reason to say that inherent power of theHigh Court cannot be exercised for stoppingthe criminal proceeding as early as possible, instead of harassing the accused upto the end? The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure, the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible.*

xxxx xxxx xxxx xxxx

13. …..But in our judgment such an interpretation and the universal application of the ***principle that what is not a final order must be an interlocutory order is neither warranted nor justified.*** *If it were so it will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by Section 397(1). On such a strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Chapter XXIX of the Code. This does not seem to be the*

> *intention of the Legislature when it retained the revisional power of the High Court in terms identical to the one in the 1898 Code. In what cases then the High Court will examine the legality or the propriety of an order or the legality of any proceeding of an inferior criminal court? Is it circumscribed to examine only such proceeding which is brought for its examination after the final determination and wherein no appeal lies? Such cases will be very few and far between. …….*
>
> *…There may be an order passed during the course of a proceeding which may not be final in the sense noticed in* ***Kuppuswami*** *case, but, yet it may not be an interlocutory order — pure or simple. Some kinds of order may fall in between the two. By a rule of harmonious construction, we think that the bar in sub-section (2) of Section 397 is not meant to be attracted to such kinds of intermediate orders……"*

18. Referring to the judgment in ***Mohanlal Maganlal Thacker v. State of Gujarat***[15] **,** it was held that the test adopted therein that if reversal of impugned order results in conclusion of proceedings, such order may not be interlocutory but final order. It was observed :

> *"15. …….In the majority decision four tests were culled out from some English decisions. They are found enumerated at p. 688. One of the tests is "if the order in question is reversed would the action have to go on?" Applying that test to the facts of the instant case it would be noticed that if the plea of the appellant succeeds and the order of the Sessions Judge is reversed, the criminal proceeding as initiated and instituted against him cannot go on. If, however, he loses on the merits of the preliminary point the proceeding will go on. Applying the test of* ***Kuppuswami*** *case such an order will not be a final order. But applying the fourth test noted at p. 688 in* ***Mohan Lal*** *case it would be a final order. The real point of distinction, however, is to be found at p. 693 in the judgment of Shelat, J. The passage runs thus:*
>
> *"As observed in* ***Ramesh v. Gendalal Motilal Patni****[(1966) 3 SCR 198 : AIR 1966 SC 1445] the finality of that order was not to be judged by co-relating that order with the controversy in the complaint viz. whether the appellant had committed the offence charged against him therein. The fact that that controversy still remained alive is irrelevant."*

19. The principles laid down in ***Madhu Limaye*** (supra) still hold the field and have not been in any manner diluted by decision of four Judges in ***V.C. Shukla versus State through CBI***[16] or by recent three Judge Bench decision in ***Girish Kumar Suneja versus Central Bureau of Investigation***[17]**.** Though in ***V.C. Shukla*** (supra), order framing charge was held to be interlocutory order, judgment in ***Madhu Limaye*** (supra) taking a contrary view was distinguished in the context of the statute considered therein. The view in ***S. Kuppuswami Rao*** (supra), was held to have been endorsed in ***Mohanlal Maganlal Thacker*** (supra) though factually in ***Madhu Limaye*** (supra), the

said view was explained differently, as already noted. Thus, in spite of the fact that ***V.C. Shukla*** (supra) is a judgment by Bench of four Judges, it cannot be held that the principle of ***Madhu Limaye*** (supra) does not hold the field. As regards ***Girish Kumar Suneja*** (supra), which is by a Bench of three Judges, the issue considered was whether order of this Court directing that no Court other than this Court will stay investigation/trial in ***Manohar Lal Sharma versus Principal Secretary and ors.*** *[Coal Block allocation cases]* violated right or remedies of the affected parties against an order framing charge. It was observed that the order framing charge being interlocutory order, the same could not be interfered with under Section 397(2) nor under Section 482 Cr.P.C.[19] It was further held that stay of proceedings could not be granted in PC Act cases even under Section 482 Cr.P.C. It was further observed that though power under Article 227 is extremely vast, the same cannot be exercised on the drop of a hat as held in ***Shalini Shyam Shetty versus Rajendra Shankar Patil… as uder :***

> *"37. … This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 of the Constitution is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above."*

20. It was observed that power under Section 482 Cr.P.C. could be exercised only in rarest of rare cases and not otherwise.

> ***38.*** *The Criminal Procedure Code is undoubtedly a complete code in itself. As has already been discussed by us, the discretionary jurisdiction under Section 397(2) CrPC is to be exercised only in respect of final orders and intermediate orders. The power under Section 482 CrPC is to be exercised only in respect of interlocutoryorders to give effect to an order passed under the Criminal Procedure Code or to prevent abuse of the process of any court or otherwise to serve the ends of justice.* ***As indicated above, this power has to be exercised only in the rarest of rare cases and not otherwise. If that is the position, and we are of the view that it is so, resort to Articles 226 and 227 of the Constitution would be permissible perhaps only in the most extraordinary case.*** *To invoke the constitutional jurisdiction of the High Court when the Criminal Procedure Code restricts it in the interest of a fair and expeditious trial for the benefit of the accused person,* ***we find it difficult to accept the proposition that since Articles 226 and 227 of the Constitution are available to an accused person, these provisions should be resorted to in cases that are not the rarest of rare but for trifling issues.***

21. Reliance was also placed on judgment by seven Judge Bench in ***Kartar Singh versus State of Punjab***[22] laying down as follows :

> *"40. …**If the High Courts entertain bail applications invoking their extraordinary jurisdiction under Article 226 and pass orders, then the very scheme and object of the Act and the intendment of Parliament would be completely defeated and frustrated.** But at the same time it cannot be said that the High Courts have no jurisdiction. Therefore, we totally agree with the view taken by this Court in Abdul Hamid Haji Mohammed [(1994) 2 SCC 664] that if the High Court is inclined to entertain any application under Article 226, **that power should be exercised most sparingly and only in rare and appropriate cases in extreme circumstances.** What those rare cases are and what would be the circumstances that would justify the entertaining of applications under Article 226 cannot be put in straitjacket."*

22. It was further observed that no stay could be granted in PC Act cases in view of bar contained in Section 19(3)(c). The relevant observations are :

> ***"64.** A reading of Section 19(3) of the PC Act indicates that it deals with three situations: (i) Clause (a) deals a situation where a final judgment and sentence has been delivered by the Special Judge. We are not concerned with this situation. (ii) Clause (b) deals with a stay of proceedings under the PC Act in the event of any error, omission or irregularity in the grant of sanction by the authority concerned to prosecute the accused person. It is made clear that no court shall grant a stay of proceedings on such a ground except if the court is satisfied that the error, omission or irregularity has resulted in a failure of justice—then and only then can the court grant a stay of proceedings under the PC Act. (iii) Clause (c) provides for a blanket prohibition against a stay of proceedings under the PC Act even if there is a failure of justice [subject of course to Clause (b)]. It mandates that no court shall stay proceedings "on any other ground" that is to say any ground other than a ground relatable to the error, omission or irregularity in the sanction resulting in a failure of justice.*
>
> ***65.** A conjoint reading of clause (b) and clause (c) of Section 19(3) of the PC Act makes it is clear that a stay of proceedings could be granted only and only if there is an error, omission or irregularity in the sanction granted for a prosecution and that error, omission or irregularity has resulted in a failure of justice. **There is no other situation that is contemplated for the grant of a stay of proceedings under the PC Act on any other ground whatsoever, even if there is a failure of justice.** Clause (c) additionally mandates a prohibition on the exercise of revision jurisdiction in respect of any interlocutory order passed in any trial such as those that we have already referred to. In our opinion, the provisions of clauses (b) and (c) of Section 19(3) of the PC Act read together are quite clear and do not admit of any ambiguity or the need for any further interpretation."*

23. We may also refer to the observations of the Constitution Bench in ***Ratilal Bhanji Mithani versus Asstt. Collector of Customs, Bombay and Anr.***[23] about the nature of inherent power of the High Court:

"The inherent powers of the High Court preserved by Section 561-A of the Code of Criminal Procedure are thus vested in it by "law" within the meaning of Art. 21. The procedure for invoking the inherent powers is regulated by rules framed by the High Court. The power to make such rules is conferred on the High Court by the Constitution. The rules previously in force were contained in force by Article 372 of the Constitution."

24. As rightly noted in the impugned judgment, a Bench of seven Judges in ***L.Chandra Kumar*** (supra) held that power of the High Court to exercise jurisdiction under Article 227 was part of the basic structure of the Constitution.

25. Thus, even though in dealing with different situations, seemingly conflicting observations may have been made while holding that the order framing charge was interlocutory order and was not liable to be interfered with under Section 397(2) or even under Section 482 Cr.P.C., the principle laid down in ***Madhu Limaye*** (supra) still holds the field. Order framing charge may not be held to be purely a interlocutory order and can in a given situation be interfered with under Section 397(2) Cr.P.C. or 482 Cr.P.C. or Article 227 of the Constitution which is a constitutional provision but the power of the High Court to interfere with an order framing charge and to grant stay is to be exercised only in an exceptional situation.

26. We have thus no hesitation in concluding that the High Court has jurisdiction in appropriate case to consider the challenge against an order framing charge and also to grant stay but how such power is to be exercised and when stay ought to be granted needs to be considered further.

27. As observed in ***Girish Kumar Suneja*** (supra) in the PC Act cases, the intention of legislature is expeditious conclusion of trial on day-to-day basis without any impediment through the stay of proceedings and this concern must be respected. This Court also noted the *proviso* to Section 397(1) Cr.P.C. added by Section 22(d) of the PC Act that a revisional court shall not ordinarily call for the record of proceedings. If record is called, the Special Judge may not be able to proceed with the trial which will stand indirectly stayed. The right of the accused has to be considered *vis-à-vis* the interest of the society. As already noted, the bench of seven Judges in ***Kartar Singh*** (supra) held that even constitutional power of the High Court under Article 226 which was very wide ought to be used with circumspection in accordance with judicial consideration and well established principles. The power should be exercised sparingly in rare and extreme circumstances.

28. It is well accepted that delay in a criminal trial, particularly in the PC Act cases, has deleterious effect on the administration of justice in which the society has a vital interest. Delay in trials affects the faith in Rule of Law and efficacy of the legal system. It affects social welfare and development. Even in civil or tax cases it has been laid down that power to grant stay has to be exercised with restraint. Mere *prima facie* case is not enough. Party seeking stay must be put to terms and stay should not be incentive to delay. The order granting stay must show application of mind. The power to grant stay is coupled with accountability[24].

30. Wherever stay is granted, a speaking order must be passed showing that the case was of exceptional nature and delay on account of stay will not prejudice the interest of speedy trial in a corruption case. Once stay is granted, proceedings should not be adjourned and concluded within two-three months.

31. The wisdom of legislature and the object of final and expeditious disposal of a criminal proceeding cannot be ignored. In exercise of its power the High Court is to balance the freedom of an individual on the one hand and security of the society on the other. Only in case of patent illegality or want of jurisdiction the High Court may exercise its jurisdiction. The acknowledged experience is that where challenge to an order framing charge is entertained, the matter remains pending for long time which defeats the interest of justice.

32. We have already quoted the judicial experience as noted in the earlier judgments in Para 9 above that trial of corruption cases is not permitted to proceed on account of challenge to the order of charge before the High Courts. Once stay is granted, disposal of a petition before the High Court takes long time. Consideration of the challenge against an order of framing charge may not require meticulous examination of voluminous material which may be in the nature of a mini trial. Still, the Court is at times called upon to do so inspite of law being clear that at the stage of charge the Court has only to see as to whether material on record reasonably connects the accused with the crime. Constitution Bench of this Court in ***Hardeep Singh versus State of Punjab***[25] observed :

24 ***Siliguri Municipality vs. Amalendu Das*** (1984) 2 SCC 436 para 4; ***Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd. and Ors.*** (1985) 1 SCC 260 para 5; ***Union Territory of Pondicherry and Ors. vs. P.V. Suresh and Ors.*** (1994) 2 SCC 70 para 15; and ***State of West Bengal and Ors. vs. Calcutta Hardware Stores and Ors.*** (1986) 2 SCC 203 para 5

100. *However, there is a series of cases wherein this Court while dealing with the provisions of Sections 227, 228, 239, 240, 241, 242 and 245 CrPC, has consistently held that the court at the stage of framing of the charge has to apply its mind to the question whether or not there is any ground for presuming the commission of an offence by the accused. The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of prima facie case is to be applied. The court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further. (Vide State of Karnataka v. L. Muniswamy[(1977) 2 SCC 699], All India Bank Officers' Confederation v. Union of India[(1989) 4 SCC 90] Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia [(1989) 1 SCC 715] State of M.P. v. Krishna Chandra Saksena [(1996) 11 SCC 439] and State of M.P. v. Mohanlal Soni [(2000) 6 SCC 338]*

101. *In Dilawar Balu Kurane v. State of Maharashtra [(2002) 2 SCC 135] this Court while dealing with the provisions of Sections 227 and 228 CrPC, placed a very heavy reliance on the earlier judgment of this Court in Union of India v. Prafulla Kumar Samal [(1979) 3 SCC 4] and held that while considering the question of framing the charges, the court may weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out and whether the materials placed before the court disclose grave suspicion against the accused which has not been properly explained. In such an eventuality, the court is justified in framing the charges and proceeding with the trial. The court has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but the court should not make a roving enquiry into the pros and cons of the matter and weigh evidence as if it is conducting a trial.*

102. *In Suresh v. State of Maharashtra[(2001) 3 SCC 703], this Court after taking note of the earlier judgments in Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya[(1990) 4 SCC 76] and State of Maharashtra v. Priya Sharan Maharaj[(1997) 4 SCC 393], held as under: (Suresh case, SCC p. 707, para 9)*

*"9. … at the stage of Sections 227 and 228 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 disclose the existence of all the ingredients constituting the alleged offence. The court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as the gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the court has to consider the material with a view to find out if there is ground ** for presuming that the accused has committed the offence ** or that there is not sufficient ground for proceeding against him and ** not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction **. (Priya Sharan case, SCC p. 397, para 8)" (emphasis in original)*

> ***103.*** *Similarly in State of Bihar v. Ramesh Singh[(1997) 4 SCC 39], while dealing with the issue, this Court held: (SCC p. 42, para 4)*
>
> *"4. … If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial."*

33. If contrary to the above law, at the stage of charge, the High Court adopts the approach of weighing probabilities and re-appreciate the material, it may be certainly a time consuming exercise. The legislative policy of expeditious final disposal of the trial is thus, hampered. Thus, even while reiterating the view that there is no bar to jurisdiction of the High Court to consider a challenge against an order of framing charge in exceptional situation for correcting a patent error of lack of jurisdiction, exercise of such jurisdiction has to be limited to rarest of rare cases. Even if a challenge to order framing charge is entertained, decision of such a petition should not be delayed. Though no mandatory time limit can be fixed, normally it should not exceed two-three months. If stay is granted, it should not normally be unconditional or of indefinite duration. Appropriate conditions may be imposed so that the party in whose favour stay is granted is accountable if court finally finds no merit in the matter and the other side suffers loss and injustice. To give effect to the legislative policy and the mandate of Article 21 for speedy justice in criminal cases, if stay is granted, matter should be taken on day-to-day basis and concluded within two-three months. Where the matter remains pending for longer period, the order of stay will stand vacated on expiry of six months, unless extension is granted by a speaking order showing extraordinary situation where continuing stay was to be preferred to the final disposal of trial by the trial Court. This timeline is being fixed in view of the fact that such trials are expected to be concluded normally in one to two years.

34. In ***Imtiaz Ahmad versus State of U.P.***[26] this Court after considering a report noted:

> *"(a) As high as 9% of the cases have completed more than twenty years since the date of stay order.*
>
> *(b) Roughly 21% of the cases have completed more than ten years.*
>
> *(c) Average pendency per case (counted from the date of stay order till 26-7-2010) works out to be around 7.4 years.*
>
> *(d) Charge-sheet was found to be the most prominent stage where the cases were stayed with almost 32% of the cases falling under this category. The next two*

prominent stages are found to be 'appearance' and 'summons', with each comprising 19% of the total number of cases. If 'appearance' and 'summons' are considered interchangeable, then they would collectively account for the maximum of stay orders."

After noting the above scenario, the Court directed :

"55. Certain directions are given to the High Courts for better maintenance of the rule of law and better administration of justice:

While analysing the data in aggregated form, this Court cannot overlook the most important factor in the administration of justice. The authority of the High Court to order stay of investigation pursuant to lodging of FIR, or trial in deserving cases is unquestionable. But this Court is of the view that the exercise of this authority carries with it the responsibility to expeditiously dispose of the case. The power to grant stay of investigation and trial is a very extraordinary power given to the High Courts and the same power is to be exercised sparingly only to prevent an abuse of the process and to promote the ends of justice. It is therefore clear that:

(i) Such an extraordinary power has to be exercised with due caution and circumspection.

(ii) Once such a power is exercised, the High Court should not lose sight of the case where it has exercised its extraordinary power of staying investigation and trial.

(iii) The High Court should make it a point of finally disposing of such proceedings as early as possible but preferably within six months from the date the stay order is issued.

56. It is true that this Court has no power of superintendence over the High Court as the High Court has over District Courts under Article 227 of the Constitution. Like this Court, the High Court is equally a superior court of record with plenary jurisdiction. Under our Constitution the High Court is not a court subordinate to this Court. This Court, however, enjoys appellate powers over the High Court as also some other incidental powers. But as the last court and in exercise of this Court's power to do complete justice which includes within it the power to improve the administration of justice in public interest, this Court gives the aforesaid guidelines for sustaining common man's faith in the rule of law and the justice delivery system, both being inextricably linked."

35. In view of above, situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy is required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings are held up. At times, proceedings are adjourned *sine die* on account of stay. Even after stay is vacated, intimation is not received and proceedings are not taken up. In an attempt to remedy this, situation, we consider it appropriate to direct that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking

order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized. The trial Court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of stay, proceedings can commence unless order of extension of stay is produced.

36. Thus, we declare the law to be that order framing charge is not purely an interlocutory order nor a final order. Jurisdiction of the High Court is not barred irrespective of the label of a petition, be it under Sections 397 or 482 Cr.P.C. or Article 227 of the Constitution. However, the said jurisdiction is to be exercised consistent with the legislative policy to ensure expeditious disposal of a trial without the same being in any manner hampered. Thus considered, the challenge to an order of charge should be entertained in a rarest of rare case only to correct a patent error of jurisdiction and not to re-appreciate the matter. Even where such challenge is entertained and stay is granted, the matter must be decided on day-to-day basis so that stay does not operate for an unduly long period. Though no mandatory time limit may be fixed, the decision may not exceed two-three months normally. If it remains pending longer, duration of stay should not exceed six months, unless extension is granted by a specific speaking order, as already indicated. Mandate of speedy justice applies to the PC Act cases as well as other cases where at trial stage proceedings are stayed by the higher court i.e. the High Court or a court below the High Court, as the case may be. In all pending matters before the High Courts or other courts relating to PC Act or all other civil or criminal cases, where stay of proceedings in a pending trial is operating, stay will automatically lapse after six months from today unless extended by a speaking order on above parameters. Same course may also be adopted by civil and criminal appellate/revisional courts under the jurisdiction of the High Courts. The trial courts may, on expiry of above period, resume the proceedings without waiting for any other intimation unless express order extending stay is produced.

37. The High Courts may also issue instructions to this effect and monitor the same so that civil or criminal proceedings do not remain pending for unduly period at the trial stage.

38. The question referred stands answered. The matter along with other connected matters, may now be listed before an appropriate Bench as first matter, subject to overnight part-heard, on Wednesday, the 18th April, 2018. A copy of this order be sent to all the High Courts for necessary action.

Date of Judgment : 28.03.2018

JUDGMENT

***R.F. NARIMAN, J.* (*CONCURRING*)**

1. The cancer of corruption has, as we all know, eaten into the vital organs of the State. Cancer is a dreaded disease which, if not nipped in the bud in time, causes death. In British India, the Penal Code dealt with the cancer of corruption by public servants in Chapter IX thereof. Even before independence, these provisions were found to be inadequate to deal with the rapid onset of this disease as a result of which the Prevention of Corruption Act, 1947, was enacted. This Act was amended twice – once by the Criminal Law (Amendment) Act, 1952 and a second time by the Anti-Corruption Laws (Amendment) Act, 1964, based on the recommendations of the Santhanam Committee. A working of the 1947 Act showed that it was found to be inadequate to deal with the disease of corruption effectively enough. For this reason, the Prevention of Corruption Act, 1988 was enacted (hereinafter referred to as "the Act"). The Statement of Objects and Reasons for the Act is revealing and is set out herein below:

> "**STATEMENT OF OBJECTS AND REASONS**
>
> 1. The Bill is intended to make the existing anti-corruption laws more effective by widening their coverage and by strengthening the provisions.
>
> 2. The Prevention of Corruption Act, 1947, was amended in 1964 based on the recommendations of the Santhanam Committee. There are provisions in Chapter IX of the Indian Penal Code to deal with public servants and those who abet them by way of criminal misconduct. There are also provisions in the Criminal Law Amendment Ordinance, 1944, to enable attachment of ill-gotten wealth obtained through corrupt means, including from transferees of such wealth. The Bill seeks to incorporate all these provisions with modifications so as to make the provisions more effective in combating corruption among public servants.
>
> 3. The Bill, inter alia, envisages widening the scope of the definition of the expression "public servant", incorporation of offences under Sections 161 to 165-A of the Indian Penal Code, enhancement of penalties provided for these offences and incorporation of a provision that the order of the trial court upholding the grant of sanction for prosecution would be final if it has not already been challenged and the trial has commenced. In order to expedite the proceedings, provisions for day-to-day trial of cases and prohibitory provisions with regard to grant of stay and exercise of powers of revision on interlocutory orders have also been included.
>
> 4. Since the provisions of Sections 161 to 165-A are incorporated in the proposed legislation with an enhanced punishment, it is not necessary to retain those sections

in the Indian Penal Code. Consequently, it is proposed to delete those sections with the necessary saving provision.

5. The notes on clauses explain in detail the provisions of the Bill."

(Emphasis Supplied)

2. Section 2(c) defines "public servant". The definition is extremely wide and includes within its ken even arbitrators or other persons to whom any cause or matter has been referred for decision or report by a court of justice or by a competent public authority – (See Section 2(c)(vi)). Also included are office bearers of registered co-operative societies engaged in agriculture, industry, trade or banking, who receive financial aid from the Government – (See Section 2(c)(ix)). Office bearers or employees of educational, scientific, social, cultural or other institutions in whatever manner established, receiving financial assistance from the Government or local or other public authorities are also included (see Section 2(c)(xii)). The two explanations to Section 2(c) are also revealing - whereas Explanation 1 states that in order to be a public servant, one need not be appointed by Government, Explanation 2 refers to a *de facto*, as opposed to a *de jure*, public servant, discounting whatever legal defect there may be in his right to hold that "situation".

3. Section 4(4) is of great importance in deciding these appeals, and is set out hereinbelow:

"**4. Cases triable by special Judges.—**

(1) - (3) xxx xxx xxx

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, a special Judge shall, as far as practicable, hold the trial of an offence on day-to-day basis."

Section 22 applies the Code of Criminal Procedure, 1973, subject to modifications which ensure timely disposal of cases, under this special Act. Section 22 reads as under:

"**22. The Code of Criminal Procedure, 1973 to apply subject to certain modifications.—**

The provisions of the Code of Criminal Procedure 1973, shall in their application to any proceeding in relation to an offence punishable under this Act have effect as if,—

(a) in sub-section (1) of Section 243, for the words "The accused shall then be called upon," the words "The accused shall then be required to give in writing at once or within such time as the court may allow, a list of the persons (if any)

whom he proposes to examine as his witnesses and of the documents (if any) on which he proposes to rely and he shall then be called upon" had been substituted;

(b) in sub-section (2) of Section 309, after the third proviso, the following proviso had been inserted, namely: —

"Provided also that the proceeding shall not be adjourned or postponed merely on the ground that an application under Section 397 has been made by a party to the proceeding.";

(c) after sub-section (2) of Section 317, the following sub-section had been inserted, namely:—

"(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), the Judge may, if he thinks fit and for reasons to be recorded by him, proceed with inquiry or trial in the absence of the accused or his pleader and record the evidence of any witness subject to the right of the accused to recall the witness for cross-examination.";

(d) in sub-section (1) of Section 397, before the Explanation, the following proviso had been inserted, namely:—

"Provided that where the powers under this section are exercised by a court on an application made by a party to such proceedings, the court shall not ordinarily call for the record of the proceedings—

(a) without giving the other party an opportunity of showing cause why the record should not be called for; or

(b) if it is satisfied that an examination of the record of the proceedings may be made from the certified copies."

Under Section 27, powers of appeal and revision, conferred by the Code of Criminal Procedure, are to be exercised "subject to the provisions of this Act". Section 27 reads as follows:

"**27. Appeal and revision.**—

Subject to the provisions of this Act, the High Court may exercise, so far as they may be applicable, all the powers of appeal and revision conferred by the Code of Criminal Procedure, 1973, on a High court as if the Court of the special Judge were a Court of Session trying 12 cases within the local limits of the High Court."

4. The bone of contention in these appeals is the true interpretation of Section 19(3)(c) of the Act, and whether superior constitutional courts, namely, the High Courts in this country, are bound to follow Section 19(3)(c) in petitions filed under Articles 226 and 227 of the Constitution of India. An allied question is whether the inherent powers of High Courts are available to stay proceedings under the Act under Section 482 of the Code of Criminal Procedure. Section 19 reads as follows:

"**19. Previous sanction necessary for prosecution**.—

(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction, [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013] —

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any 9 other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 —

(a) no finding, sentence or order passed by a Special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission, irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has, in fact, been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation. — For the purposes of this section, — (a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

5. On a reference made to a 2-Judge Bench in the Delhi High Court, the learned Chief Justice framed, what he described as, "three facets which emanate for consideration", as follows:

> "(a) Whether an order framing charge under the 1988 Act would be treated as an interlocutory order thereby barring the exercise of revisional power of this Court?
>
> (b) Whether the language employed in Section 19 of the 1988 Act which bars the revision would also bar the exercise of power under Section 482 of the Cr.P.C. for all purposes?
>
> (c) Whether the order framing charge can be assailed under Article 227 of the Constitution of India?"

Answers given to the "three facets" are in paragraph 33 as follows:

> "33. In view of our aforesaid discussion, we proceed to answer the reference on following terms:
>
> (a) An order framing charge under the Prevention of Corruption Act, 1988 is an interlocutory order.
>
> (b) As Section 19(3)(c) clearly bars revision against an interlocutory order and framing of charge being an interlocutory order a revision will not be maintainable.
>
> (c) A petition under Section 482 of the Code of Criminal Procedure and a writ petition preferred under Article 227 of the Constitution of India are maintainable.
>
> (d) Even if a petition under Section 482 of the Code of Criminal Procedure or a writ petition under Article 227 of the Constitution of India is entertained by the High Court under no circumstances an order of stay should be passed regard being had to the prohibition contained in Section 19(3)(c) of the 1988 Act.
>
> (e) The exercise of power either under Section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution of India should be sparingly and in exceptional circumstances be exercised keeping in view the law laid down in Siya Ram Singh (supra), Vishesh Kumar (supra), Khalil Ahmed Bashir Ahmed (supra), Kamal Nath & Others (supra) Ranjeet Singh (supra) and similar line of decisions in the field.
>
> (f) It is settled law that jurisdiction under Section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution of India cannot be exercised as a "cloak of an appeal in disguise" or to re- appreciate evidence. The aforesaid proceedings should be used sparingly with great care, caution, circumspection and only to prevent grave miscarriage of justice."

6. The arguments on both sides have been set out in the judgment of brother Goel, J. and need not be reiterated.

7. A perusal of Section 19(3) of the Act would show that the interdict against stay of proceedings under this Act on the ground of any error,

omission or irregularity in the sanction granted by the authority is lifted if the Court is satisfied that the error, omission or irregularity has resulted in a failure of justice. Having said this in clause (b) of Section 19(3), clause (c) says that no Court shall stay proceedings under this Act on any other ground. The contention on behalf of the Appellants before us is that the expression "on any other ground" is referable only to grounds which relate to sanction and not generally to all proceedings under the Act. Whereas learned counsel for the Respondents argues that these are grounds referable to the proceedings under this Act and there is no warrant to add words not found in sub-section (c), namely, that these grounds should be relatable to sanction only.

8. We are of the view that the Respondents are correct in this submission for the following reasons:

(i) Section 19(3)(b) subsumes all grounds which are relatable to sanction granted. This is clear from the word "any" making it clear that whatever be the error, omission or irregularity in sanction granted, all grounds relatable thereto are covered.

(ii) This is further made clear by Explanation (a), which defines an "error" as including competency of the authority to grant sanction.

(iii) The words "in the sanction granted by the authority" contained in sub-clause (b) are conspicuous by their absence in sub-clause(c), showing thereby that it is the proceedings under the Act that are referred to.

(iv) The expression "on any other ground", therefore, refers to and relates to all grounds that are available in proceedings under the Act other than grounds which relate to sanction granted by the authority.

(v) On the assumption that there is an ambiguity, and that there are two views possible, the view which most accords with the object of the Act, and which makes the Act workable, must necessarily be the controlling view. It is settled law that even penal statutes are governed not only by their literal language, but also by the object sought to be achieved by Parliament. (See **Ms. Eera through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) and Anr**., 2017 SCC Online SC 787 at paragraphs 134-140).

(vi) In **Madhu Limaye v. State of Maharashtra**, (1977) 4 SCC 551 at 558, this Court held, "It has been pointed out repeatedly, vide for example, *The River Wear Commissioners v. William Adamson* (1876-77) 2 AC 743 and *R.M.D. Chamarbaugwalla v. The Union of India*, AIR 1957 SC 628, that although the words occurring in a particular statute are plain and unambiguous, they have to be interpreted in a manner which would fit in the context of the other provisions of the statute and bring about the real intention of the Legislature". As the Statement of Objects and Reasons extracted hereinabove makes it clear, Section 19(3)(c) is to be

read with Section 4(4) and Section 22, all of which make it clear that cases under the Act have to be decided with utmost despatch and without any glitches on the way in the form of interlocutory stay orders.[1]

(vii) It has been argued on behalf of the Appellants that sub-section (4) of Section 19 would make it clear that the subject matter of Section 19, including sub-section (3), is sanction and sanction alone. This argument is fallacious for the simple reason that the subject matter of sub-section (4) is only in the nature of a proviso to Section 19(3)(a) and (b), making it clear that the ground for stay qua sanction having occasioned or resulted in a failure of justice should be taken at the earliest, and if not so taken, would be rejected on this ground alone.

(viii) Section 19(3)(c) became necessary to make it clear that proceedings under the Act can be stayed only in the eventuality of an error, omission or irregularity in sanction granted, resulting in failure of justice, and for no other reason. It was for this reason that it was also necessary to reiterate in the language of Section 397(2) of the Code of Criminal Procedure, that in all cases, other than those covered by Section 19(3)(b), no court shall exercise the power of revision in relation to interlocutory orders that may be passed. It is also significant to note that the reach of this part of Section 19(3)(c) is at every stage of the proceeding, that is inquiry, trial, appeal or otherwise, making it clear that, in consonance with the object sought to be achieved, prevention of corruption trials are not only to be heard by courts other than ordinary courts, but disposed of as expeditiously as possible, as otherwise corrupt public servants would continue to remain in office and be cancerous to society at large, eating away at the fabric of the nation.

9. The question as to whether the inherent power of a High Court would be available to stay a trial under the Act necessarily leads us to an inquiry as to whether such inherent power sounds in constitutional, as opposed to statutory law. First and foremost, it must be appreciated that the High Courts are established by the Constitution and are courts of record which will have all powers of such courts, including the power to punish contempt of themselves (See Article 215). The High Court, being a superior court of record, is entitled to consider questions regarding its own jurisdiction when raised before it. In an instructive passage by a Constitution Bench of this Court in **In re Special Reference 1 of 1964**, (1965) 1 SCR 413 at 499, Gajendragadkar, C.J. held:

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1 Under Section 22(a), Section 243(1) of the Code of Criminal Procedure is tightened up by requiring the accused to give in writing, at once or within such time as the Court may allow, a list of persons whom he proposes to examine as witnesses and documents on which he proposes to rely, so as to continue with the trial with utmost despatch. Similarly, in sub-clause (b) of Section 22, under Section 309 a fourth proviso is inserted ensuring that there shall be no adjournment merely on the ground that an application under Section 397 has been made by a party to the proceedings. Under sub-clause (c) of Section 22, a Judge may, notwithstanding anything contained in Section 317(1) and (2), if he thinks fit and for good reason, proceed with the enquiry or trial in the absence of the accused or his pleader and record the evidence of any witness, subject to the right of the accused to recall the witness for cross-examination. This again can be done so that there is no delay in either the enquiry or trial proceedings under the Act. Insofar as sub-clause (d) is concerned, this Court in **Girish Kumar Suneja v. C.B.I., (2017) 14 SCC 809 at 847** has held:

"By adding the proviso to Section 397(1) CrPC, Parliament has made it clear that it would be appropriate not to call for the records of the case before the Special Judge even when the High Court exercises its revision jurisdiction. The reason for this quite clearly is that once the records are called for, the Special Judge cannot proceed with the trial. With a view to ensure that the accused who has invoked the revision jurisdiction of the High Court is not prejudiced and at the same time the trial is not indirectly stayed or otherwise impeded, Parliament has made it clear that the examination of the record of the Special Judge may also be made on the basis of certified copies of the record. Quite clearly, the intention of Parliament is that there should not be any impediment in the trial of a case under the PC Act."

> "Besides, in the case of a superior Court of Record, it is for the court to consider whether any matter falls within its jurisdiction or not. Unlike a Court of limited jurisdiction, the superior Court is entitled to determine for itself questions about its own jurisdiction. "Prima facie", says Halsbury, "no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court" [*Halsbury's Law of England*, Vol. 9, p. 349]."

10. Also, in **Ratilal Bhanji Mithani** v. **Assistant Collector of Customs**, 1967 SCR (3) 926 at 930-931, this Court had occasion to deal with the inherent power of the High Court under Section 561-A of the Code of Criminal Procedure, 1898, which is equivalent to Section 482 of the Code of Criminal Procedure, 1973. It was held that the said Section did not confer any power, but only declared that nothing in the Code shall be deemed to limit or affect the existing inherent powers of the High Court. The Court then went on to hold:

> "The proviso to the article is not material and need not be read. The article enacts that the jurisdiction of the existing High Courts and the powers of the judges thereof in relation to administration of justice "shall be" the same as immediately before the commencement of the Constitution. The Constitution confirmed and re-vested in the High Court all its existing powers and jurisdiction including its inherent powers, and its power to make rules. When the Constitution or any enacted law has embraced and confirmed the inherent powers and jurisdiction of the High Court which previously existed, that power and jurisdiction has the sanction of an enacted "law" within the meaning of Art. 21 as explained in A. K. Gopalan's case (1950 SCR 88). The inherent powers of the High Court preserved by Sec. 561-A of the Code of Criminal Procedure are thus vested in it by "law" within the meaning of Art. 21. The procedure for invoking the inherent powers is regulated by rules framed by the High Court. The power to make such rules is conferred on the High Court by the Constitution. The rules previously in force were continued in force by Article 372 of the Constitution. The order of the High Court canceling the bail and depriving the appellant of his personal liberty is according to procedure established by law and is not violative of Art. 21."

11. It is thus clear that the inherent power of a Court set up by the Constitution is a power that inheres in such Court because it is a superior court of record, and not because it is conferred by the Code of Criminal Procedure. This is a power vested by the Constitution itself, inter alia, under Article 215 as aforestated. Also, as such High Courts have the power, nay, the duty to protect the fundamental rights of citizens under Article 226 of the Constitution, the inherent power to do justice in cases involving the liberty of the citizen would also sound in Article 21 of the Constitution. This being the constitutional position, it is clear that Section 19(3)(c) cannot be read as a ban

on the maintainability of a petition filed before the High Court under Section 482 of the Code of Criminal Procedure, the non-obstante clause in Section 19(3) applying only to the Code of Criminal Procedure. The judgment of this Court in **Satya Narayan Sharma v. State of Rajasthan**, (2001) 8 SCC 607 at paragraphs 14 and 15 does not, therefore, lay down the correct position in law. Equally, in paragraph 17 of the said judgment, despite the clarification that proceedings can be "adapted" in appropriate cases, the Court went on to hold that there is a blanket ban of stay of trials and that, therefore, Section 482, even as adapted, cannot be used for the aforesaid purpose. This again is contrary to the position in law as laid down hereinabove. This case, therefore, stands overruled.

12. At this juncture it is important to consider the 3-Judge bench decision in **Madhu Limaye** (supra). A 3-Judge bench of this Court decided that a Section 482 petition under the Code of Criminal Procedure would be maintainable against a Sessions Judge order framing a charge against the appellant under Section 500 of the Penal Code, despite the prohibition contained in Section 397(2) of the Code of Criminal Procedure. This was held on two grounds. First, that even if Section 397(1) was out of the way because of the prohibition contained in Section 397(2), the inherent power of the Court under Section 482 of the Code of Criminal Procedure would be available. This was held after referring to **Amar Nath v. State of Haryana**, (1977) 4 SCC 137, which was a 2-Judge Bench decision, which decided that the inherent power contained in Section 482 would not be available to defeat the bar contained in Section 397(2). The 3-Judge referred to the judgment in **Amar Nath** (supra) and said:

> "7. For the reasons stated hereinafter we think that the statement of the law apropos Point No. 1 is not quite accurate and needs some modulation. But we are going to reaffirm the decision of the Court on the second point."
>
> (at page 554)

This Court, in an important paragraph, then held:

> "10. As pointed out in *Amar Nath case* the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry, trial or other proceeding, is to bring about expeditious disposal of the cases finally. More often than not, the revisional power of the High Court was resorted to in relation to interlocutory orders delaying the final disposal of the proceedings. The Legislature in its wisdom decided to check this delay by introducing sub-section (2) in Section 397. On the one hand, a bar has been put in the way of the High Court (as also of the Sessions Judge) for exercise of the revisional power in relation to any interlocutory order, on the other, the power has been conferred in almost the same terms as it was in the 1898 Code. On a plain reading of Section 482, however, it

> would follow that nothing in the Code, which would include sub-section (2) of Section 397 also, "shall be deemed to limit or affect the inherent powers of the High Court", But, if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers. In such a situation, what is the harmonious way out? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction. Take for example a case where a prosecution is launched under the Prevention of Corruption Act without a sanction, then the trial of the accused will be without jurisdiction and even after his acquittal a second trial, after proper sanction will not be barred on the doctrine of *autrefois acquit*. Even assuming, although we shall presently show that it is not so, that in such a case an order of the Court taking cognizance or issuing processes is an interlocutory order, does it stand to reason to say that inherent power of the High Court cannot be exercised for stopping the criminal proceeding as early as possible, instead of harassing the accused up to the end? The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible.
>
> (at pages 555-556)

13. The second ground on which this case was decided was that an order framing a charge was not a purely interlocutory order so as to attract the bar of Section 392(2), but would be an "intermediate" class of order, between a final and a purely interlocutory order, on the application of a test laid down by English decisions and followed by our Courts, namely, that if the order in question is reversed, would the action then go on or be terminated. Applying this test, it was held that in an order rejecting the framing of a charge, the action would not go on and would be terminated and for this reason also would not be covered by Section 397(2).

14. This judgment was affirmed by a 4-Judge Bench in **V.C. Shukla v. State through C.B.I.** (1980) Supp. SCC 92 at 128-129, where it was held that under Section 11 of the Special Courts Act, 1979, the scheme being different from the Code of Criminal Procedure, and the Section opening with the words "notwithstanding anything in the Code", the "intermediate" type of order would not obtain, and an order framing a charge would, therefore, not be liable to be appealed against, being purely interlocutory in nature. While holding this, this Court was at pains to point out:

> "On a true construction of Section 11(1) of the Act and taking into consideration the natural meaning of the expression 'interlocutory order', there can be no doubt that the order framing charges against the appellant under the Act was merely an interlocutory order which neither terminated the proceedings nor finally decided the rights of the parties. According to the test laid down in Kuppuswami's case the order impugned was undoubtedly an interlocutory order. Taking into consideration, therefore, the natural meaning of interlocutory order and applying the non obstante clause, the position is that the provisions of the Code of Criminal Procedure are expressly excluded by the non obstante clause and therefore s. 397(2) of the Code cannot be called into aid in order to hold that the order impugned is not an interlocutory order. As the decisions of this Court in the cases of Madhu Limaye v. State of Maharashtra and Amar Nath & v. State of Haryana were given with respect to the provisions of the Code, particularly s. 397(2), they were correctly decided and would have no application to the interpretation of s. 11(1) of the Act, which expressly excludes the provisions of the Code of Criminal Procedure by virtue of the non obstante clause."

In **Poonam Chand Jain and another v. Fazru**, (2004) 13 SCC 269 at 276-279, this Court was at pains to point out that the judgment in **V.C. Shukla** (supra) was rendered in the background of the special statute applicable (See paragraph 13).

15. It is thus clear that **Madhu Limaye** (supra) continues to hold the field, as has been held in **V.C. Shukla** (supra) itself. How **Madhu Limaye** (supra) was understood in a subsequent judgment of this Court is the next bone of contention between the parties.

16. In **Girish Kumar Suneja v. C.B.I.**, (2017) 14 SCC 809, a 3-Judge Bench of this Court was asked to revisit paragraph 10 of its earlier order dated 25th August, 2014, passed in the coal block allocation cases. While transferring cases pending before different courts to the Court of a Special Judge, this Court, in its earlier order dated 25th August, 2014, had stated:

> "10. We also make it clear that any prayer for stay or impeding the progress in the investigation/trial can be made only before this Court and no other Court shall entertain the same."

Several grounds were argued before this Court stating that paragraph 10 ought to be recalled. We are concerned with grounds (i), (ii) and (vii), which are set out hereinbelow:

> "(i) The right to file a revision petition under Section 397 of the Code of Criminal Procedure, 1973 or the Cr.P.C. as well approaching the High Court under Section 482 of the Cr.P.C. has been taken away;
>
> (ii) The order passed by this Court has taken away the right of the appellants to file a petition under Articles 226 and 227 of the Constitution and thereby judicial review, which is a part of the basic structure of the Constitution, has been violated which even Parliament cannot violate;
>
> (vii) The prohibition in granting a stay under Section 19(3)(c) of the PC Act is not absolute and in an appropriate case, a stay of proceedings could be granted in favour of an accused person particularly when there is a failure of justice. Any restrictive reading would entail a fetter on the discretion of the High Court which itself might lead to a failure of justice."

This Court referred to the judgment in **Amar Nath** (supra) and then to the Statement of Objects and Reasons for introducing 397(2) of the Code of Criminal Procedure which, inter alia, stated as follows:

> "(d) the powers of revision against interlocutory orders are being taken away, as it has been found to be one of the main contributing factors in the delay or disposal of criminal cases;"

After referring to **Madhu Limaye** (supra) and the difference between interlocutory and intermediate orders, this Court held in paragraphs 25, 29, 30 and 32 as follows:

> "25. This view was reaffirmed in Madhu Limaye when the following principles were approved in relation to Section 482 of the Cr.P.C. in the context of Section 397(2) thereof. The principles are:
>
> "(1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party;
>
> (2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;
>
> (3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code."
>
> Therefore, it is quite clear that the prohibition in Section 397 of the Cr.P.C. will govern Section 482 thereof. We endorse this view.
>
> xxx xxx xxx
>
> 29. This leads us to another facet of the submission made by learned counsel that even the avenue of proceeding under Section 482 of the Cr.P.C. is barred as far as

the appellants are concerned. As held in Amar Nath and with which conclusion we agree, if an interlocutory order is not revisable due to the prohibition contained in Section 397(2) of the Cr.P.C. that cannot be circumvented by resort to Section 482 of the Cr.P.C. There can hardly be any serious dispute on this proposition.

30. What then is the utility of Section 482 CrPC? This was considered and explained in *Madhu Limaye* [*Madhu Limaye* v. *State of Maharashtra*, (1977) 4 SCC 551 : 1978 SCC (Cri) 10] which noticed the prohibition in Section 397(2) CrPC and at the same time the expansive text of Section 482 CrPC and posed the question: In such a situation, what is the harmonious way out? This Court then proceeded to answer the question in the following manner: (SCC pp. 555-56, para 10)

"*10*. … In such a situation, what is the harmonious way out? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly."

xxx xxx xxx

32. In Satya Narayan Sharma v. State of Rajasthan this Court considered the provisions of the PC Act and held that there could be no stay of a trial under the PC Act. It was clarified that that does not mean that the provisions of Section 482 of the Cr.P.C. cannot be taken recourse to, but even if a litigant approaches the High Court under Section 482 of the Cr.P.C. and that petition is entertained, the trial under the PC Act cannot be stayed. The litigant may convince the court to expedite the hearing of the petition filed, but merely because the court is not in a position to grant an early hearing would not be a ground to stay the trial even temporarily. With respect, we do not agree with the proposition that for the purposes of a stay of proceedings recourse could be had to Section 482 of the Cr.P.C. Our discussion above makes this quite clear." (at pages 832-834)

However, thereafter, this Court stated the law thus in paragraph 38:

"38. The Criminal Procedure Code is undoubtedly a complete code in itself. As has already been discussed by us, the discretionary jurisdiction under Section 397(2) of the Cr.P.C. is to be exercised only in respect of final orders and intermediate orders. The power under Section 482 of the Cr.P.C. is to be exercised only in

> respect of interlocutory orders to give effect to an order passed under the Cr.P.C. or to prevent abuse of the process of any Court or otherwise to serve the ends of justice. As indicated above, this power has to be exercised only in the rarest of rare cases and not otherwise. If that is the position, and we are of the view that it is so, resort to Articles 226 and 227 of the Constitution would be permissible perhaps only in the most extraordinary case. To invoke the constitutional jurisdiction of the High Court when the Cr.P.C. restricts it in the interest of a fair and expeditious trial for the benefit of the accused person, we find it difficult to accept the proposition that since Articles 226 and 227 of the Constitution are available to an accused person, these provisions should be resorted to in cases that are not the rarest of rare but for trifling issues." (at pages 835-836)

17. According to us, despite what is stated in paragraphs 25, 29 and 32 supra, the ratio of the judgment is to be found in paragraph 38, which is an exposition of the law correctly setting out what has been held earlier in **Madhu Limaye** (supra). A judgment has to be read as a whole, and if there are conflicting parts, they have to be reconciled harmoniously in order to yield a result that will accord with an earlier decision of the same bench strength. Indeed, paragraph 30 of the judgment sets out a portion of paragraph 10 of **Madhu Limaye** (supra), showing that the Court was fully aware that **Madhu Limaye** (supra) did not approve **Amar Nath** (supra) without a very important caveat – and the caveat was that nothing in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. We, therefore, read paragraph 38 as the correct ratio of the said judgment not only in terms of the applicability of Section 482 of the Code of Criminal Procedure, but also in terms of how it is to be applied.

18. Insofar as petitions under Articles 226 and 227 are concerned, they form part of the basic structure of the Constitution as has been held in **L. Chandra Kumar v. Union of India and others**, (1997) 3 SCC 261 at 301. Here again, the judgment of a Constitution Bench in **Kartar Singh v. State of Punjab**, (1994) 3 SCC 569 at 714, puts it very well when it says:

> "Though it cannot be said that the High Court has no jurisdiction to entertain an application for bail under Article 226 of the Constitution and pass orders either way, relating to the cases under the Act 1987, that power should be exercised sparingly, that too only in rare and appropriate cases in extreme circumstances. But the judicial discipline and comity of courts require that the High Courts should refrain from exercising the extraordinary jurisdiction in such matters."

This aspect of **Kartar Singh** (supra) has been followed in **Girish Kumar Suneja** (supra) in paragraph 40 thereof and we respectfully concur with the same. In view of the aforesaid discussion, it is clear that the Delhi High Court judgment's conclusions in paragraph 33 (a), (b) and (d) must be set aside.

19. I agree with Goel, J. that the appeals be disposed of in accordance with his judgment.

Date of Order 25.04.2018

ORDER

ADARSH KUMAR GOEL, J. & R.F. NARIMAN,J.

1. Heard learned counsel for the parties.

2. In view of judgment of three Judge Bench dated 28th March, 2018 and after considering the material on record, we do not find any ground to interfere with the order framing charge.

3. Accordingly, the trial court is directed to proceed with the matter pending before it. All contentions of the parties are left open which may be gone into by the trial court. Parties are directed to appear before the trial court on 14th May, 2018.

4. To give effect to directions in judgment of this Court dated 28th March, 2018, noted above, we direct that wherever original record has been summoned by an appellate/Revisional court, photocopy/scanned copy of the same may be kept for its reference and original returned to the trial courts forthwith.

5. We also direct that if in future the trial court record is summoned, the trial courts may send photocopy/scanned copy of the record and retain the original so that the proceedings are not held up. In cases where specifically original record is required by holding that photocopy will not serve the purpose, the appellate/revisional court may call for the record only for perusal and the same be returned while keeping a photocopy/scanned copy of the same.

6. A copy of this order be sent to all the High Courts. The appeals are disposed of.

Appeals disposed of.

2018 (I) ILR - CUT- 692

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

W.P.(C) No. 5728 of 2017

ABHAY KUMAR SAHU .....Petitioner

.Vrs.

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

CONSTITUTION OF INDIA,1950 – Articles 226 and 227 – Writ Petition – Tender matter – Petitioner's bid found to be technically qualified and became L-1 after opening of the Financial bid – No award of tender in his favour – No reason informed – In counter affidavit the reason indicated as to slow progress of work in earlier contract – Held, amounts to blacklisting of the contractor without providing an opportunity of hearing – Reason given in the counter affidavit cannot be accepted – Direction to award tender. (Para 5)

Case Laws Relied on and Referred to :-

1. AIR 1978 SC 851 : Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi.
2. AIR 1952 SC 16 : Commissioner of Police, Bombay v. Gordhandas Bhanji.

For Petitioner : M/s. Ashok Kumar Dash, A.K. Dash, S.S. Kashyap, S.K. Mohanty, A.P. Mishra & S.K. Mishra.

For Opp. Parties : Sri P.K. Muduli, (Addl. Govt. Adv.)
M/s P.K. Rath, R.N. Parija, A.K. Rout, S.K. Pattnaik, A. Behera, P.K. Sahoo & B.K. Dash.

Decided on : 10.04.2018

JUDGMENT

VINEET SARAN, C.J.

In response to a tender call notice dated 20.12.2016 issued by the opposite party no.2, the petitioner as well as opposite party no.3 and others had applied. The technical bids were opened on 30.01.2017 and result of the same was uploaded on the website on 15.02.2017, in which the petitioner as well as opposite party No.3 and two other bidders were found to be qualified. The price bids of all the four qualified bidders were opened on 16.02.2017 and the price offered by the petitioner was found to be the lowest. To clarify here, it may be mentioned that the lowest price of the petitioner was 8.22% less than the estimated value, whereas that of the opposite party no.3 was 7.2% less than the estimated value. The price quoted by the other two bidders was much more than that of the petitioner, and hence they are not relevant for the purpose of this case. The petitioner thereafter waited for the contract being awarded in his favour, but to his surprise, he learnt that on 18.03.2017 the Engineer-in-Chief, Rural Works, Odisha-opposite party no.2 wrote to the opposite party No.3 (who was second lowest bidder) calling him for negotiations. Challenging the same, this writ petition has been filed with the further prayer that the petitioner, being the lowest bidder, should be awarded the contract.

2. We have heard Sri S.K. Mishra, learned counsel for the petitioner, as well as Sri P.K. Muduli, learned Addl. Government Advocate appearing for State opposite parties No.1 and 2 and Sri P.K. Rath, learned counsel for private opposite party No.3 and perused the record. Counter affidavit has been filed by State opposite parties, to which rejoinder affidavit has also been filed. However, despite time having been granted, no counter affidavit has been filed by opposite party no.3.

3. The facts as stated above are not disputed. The question to be decided by this Court is as to whether the second lowest bidder could be called for negotiations in the absence of there being any such provision. It is also to be considered as to whether the lowest bidder, after having been found to be technically qualified, would have a right to be awarded the contract.

4. In the counter affidavit filed by the State opposite parties it has been admitted that the petitioner, who was found to be technically qualified, was the lowest bidder having quoted rate of 8.22% less than the estimated value, but considering the past performance of the petitioner regarding execution of roads under R.W. Division-II, Cuttack and other works, in which it was found that the petitioner was a slow performer, the petitioner was not awarded the contract. It is however not denied that the petitioner was found to be technically qualified.

5. Once a party is found to be technically qualified and his financial bid has been opened, his bid cannot be rejected because of his past performance, which would amount to blacklisting the contractor without passing any order or without providing the contractor an opportunity of hearing. If there was any complaint with regard to slow performance or adverse report against the petitioner, action could have been taken against the petitioner, after giving notice and complying the principles of natural justice. Debarring the petitioner from being awarded the contract, even though he is found to be the lowest bidder after having been found to be technically qualified, cannot be justified in law. We may reiterate that the same would amount to blacklisting the contractor without following principles of natural justice. It may further be stated that no order for not accepting the bid of the petitioner (which was the lowest) has been passed by the opposite party and the reasons as given above have only been given in the counter affidavit, which is also not permissible in law.

6. The apex Court in ***Commissioner of Police, Bombay v. 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."*

7. 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."

8. Further, in the counter affidavit, the opposite parties have not placed any provision of the tender call notice under which the second lowest bidder could be called for negotiations. In the absence of there being any such provision, negotiations with the second lowest bidder would not be permissible in law. As such, we are of the firm opinion that the communication dated 18.03.2017 made by opposite party no.2 with the opposite party no.3 is wholly unjustified and liable to be quashed, and accordingly the same is set aside.

9. In the facts of the present case, since the petitioner was found to be technically qualified and he was the lowest bidder and no order rejecting his bid has been passed, the petitioner ought to have awarded the contract. Accordingly, it is directed that the State opposite parties may pass suitable orders in accordance with law with regard to awarding of contract within 15 days from the date of receipt of a certified copy of this order before the opposite party no.2.

10. The writ petition stands allowed. No order to costs.

Writ petition allowed.

2018 (I) ILR - CUT- 695

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

W.P.(C) NO. 20518 OF 2010

RANJEET KUMAR DAS .....Petitioner

.Vrs.

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

(A) SERVICE – Regularization – Meaning thereof – Regularization in service law connotes official formalization of an appointment, which was made on temporary or ad hoc or stop gap or casual basis or the like, in deviation from the normal rules of applicable norms of appointment – Such formalization makes the appointment regular. (Para 7)

(B) Constitution of India, 1950 – Articles 14 and 16 – Provisions under – Public employment – Filling up of vacancies against sanctioned posts by regularization – Held, the same is against the Constitutional provisions of equality of opportunity. (Para 10)

(C) SERVICE – Prayer for regularization – Petitioner has been working since long 19 years – OA before the SAT – Tribunal's order not in conformity with the relief sought – Held, the order cannot be sustained in the eye of law.

*"The tribunal having failed to give any direction so far as relief claimed in the Original Application for regularization of services of the petitioner, we are of the view that the impugned order, having not been passed in conformity with the relief sought, cannot sustain in the eye of law and the same is liable to be quashed. Accordingly, the order dated 04.10.2010 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A. No.1335 of 2003 is hereby quashed. The opposite parties are directed to take necessary steps in accordance with law for regularization of services of the petitioner treating the same as an irregular appointment as per the exception carved out in the case of **Umadevi (3)** mentioned supra as expeditiously as possible, preferably within a period of four months from the date of communication of this judgment, and also release the legitimate dues as admissible to the petitioner forthwith."* *(Para18).*

Case Laws Relied on and Referred to :-

1. (2006) 4 SCC 1 : State of Karnatak v. Umadevi (3),
2. (2017) 3 SCC 410 : State of Jammu and Kashmir v. District Bar Association, Bandipora.
3. AIR 1979 SC 1676 : (1979) 4 SCC 507 : B.N. Nagarajan, v. State of Karnataka.
4. (2008) 2 SCC 717 : Hindustan Petroleum Corpn. Ltd. v. Ashok Ranghba Ambre.
5. (2007) 6 SCC 207 : Hindustn Aeronautics Ltd. v. Dan Bahadur Singh.
6. (2004) 7 SCC 132 : Secretary, State of Karnatak v. Uma Devi (1)
7. (2006) 4 SCC 44 : Secretary, State of Karnataka v. Uma Devi (2)
8. (2017) 3 SCC 410 : State of Jammu and Kashmir v. District Bar Association, Bandipora.

For Petitioner : M/s. Manoj Kumar Mohanty, M.R. Pradhan and T. Pradhan,

For Opp. Parties : Mr. R.K. Mohapatra, Government Advocate

Decided on : 06.04.2018

JUDGMENT

DR. B.R. SARANGI,J.

The petitioner, who is working as a driver in the office of the CDPO (Child Development Project Officer), ICDS (Integrated Child Development Services) Project, Pattamundai under the Government of Odisha in Women and Child Development Department, has filed this application challenging the order dated 04.10.2010 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A. No. 1335 of 2003, wherein it has been directed that till a regular driver is appointed or till continuation of the project or till the vehicle exists in that office, whichever is earlier, the petitioner may be allowed to continue in accordance with the existing terms and conditions of engagement. Though the petitioner had claimed for regularization of service, but no such direction has been issued by the tribunal, while passing the order impugned.

2. The brief facts, which led to filing of the instant writ petition, are that a sanctioned post of driver was lying vacant in the office of the CDPO, Pattamundai. In order to fill up the vacancy, applications were invited from the locality, pursuant to which the petitioner applied for, and by following due process of selection he was selected and engaged in the said post, having valid driving licence. He was engaged for a period of 44 days w.e.f. 03.04.1999 to 16.05.1999, as per the Collector, Kendrapara office order dated 17.04.1999, on ad hoc basis in the scale of pay of Rs.3050/- to Rs.4590/- with usual DA and other allowances admissible under rule from time to time. Such engagement of 44 days was extended from time to time. But, after the order dated 07.02.2002, the District Office, Kendrapara did not issue any order of engagement on 44 days basis in favour of the petitioner. However, the petitioner was given engagement on daily wage basis apprehending that he may claim regularization of service, if the order of engagement is issued from time to time. At that point of time, the petitioner filed a representation before the authority concerned seeking regularization of his services. But the Collector, Kendrapara, vide order dated 21.11.2003, deployed one B.K. Dhangada Majhi as driver in the ICDS Project Office, Pattamundai. As he did not join in the said post, the petitioner was allowed to continue as driver, as usual, on daily wage basis and was issued with necessary engagement certificates by the CDPO, Pattamundai on 26.08.2003 and 31.03.2010.

2.1 In view of the length of service rendered by the petitioner against the sanctioned post, the petitioner filed O.A. No. 1335 of 2003 before the Orissa Administrative Tribunal, Bhubaneswar praying for regularization of service as driver in Pattamundai ICDS Project and to release his arrear and current salaries with a further prayer to allow the petitioner to participate in regular selection made for the post of driver. The opposite parties filed their counter affidavit stating that Kendrapara district was newly created on 01.04.1993 and the Collector of the district is the appointing and disciplinary authority. During the year 1996-97, UNICEF vehicle was provided to Pattamundai ICDS Project and initially the vehicle was driven by the driver of Pattamundai Block Office, due to non-posting of regular driver, in order to keep the vehicle in running condition. Subsequently, the CDPO, Pattamundai engaged the petitioner as driver on daily wage basis. Thereafter, the petitioner has been engaged on temporary basis, vide order dated 17.02.1997 of the Women and Child Development Department, and on ad hoc basis for 44 days spell w.e.f. 03.04.1999 to 16.05.1999, as per the Collector, Kendrapara office order dated 17.04.1999, and continued as such with one day break in different spells on the basis of exigency of work required for such engagement. But due to imposition of ban, the post of driver of Pattamundai ICDS Project could not be filled up.

2.2 Considering the contention of the parties and having noted down the same in the order dated 04.10.2010, the tribunal disposed of the Original Application directing that till a regular driver is appointed or till continuation of the project or till the vehicle exists in that office, whichever is earlier, the petitioner may be allowed to continue in accordance with the existing terms and conditions of his engagement. It was also directed that if the petitioner has any dues to get, i.e., salary or wages towards the duty rendered by him, that be drawn and paid to him within three months from the date of communication of the order and that too in accordance with the terms and conditions of appointment. Though prayer was made by the petitioner for regularization of his services, but no order has been passed by the tribunal to that extent, hence this application.

3. Mr. Manoj Kumar Mohanty, learned counsel appearing for the petitioner strenuously urged that a perusal of the pleadings made in the O.A. No. 1335 of 2003 would go to show that the petitioner had made a specific prayer for regularization of his services, but the tribunal, instead of issuing direction for regularization, has disposed of the Original Application directing that till regular driver is appointed or till continuation of the project or till the

vehicle exists in the office, whichever is earlier, the petitioner may be allowed to continue in accordance with the existing terms and conditions of his engagement, which was not the relief sought before the tribunal by the petitioner. It is further contended that if there is existing vacancy, against which the petitioner is being allowed to continue in service for a quite long period, his services should be regularized, even if his engagement is an irregular one, keeping in view the exception carved out in ***State of Karnatak v. Umadevi (3)***, (2006) 4 SCC 1.

4. Mr. R.K. Mohapatra, learned Government Advocate appearing for the State opposite parties argued with vehemence justifying the order passed by the tribunal and contended that regularization in service cannot be claimed as a matter of right and, as such, the appointment of the petitioner, being illegal one, cannot be regularized, and thereby the tribunal has not committed any illegality or irregularity in passing the order impugned. It is further contended that the petitioner, by virtue of the order passed by the tribunal, is still continuing in service with the same terms and conditions of his engagement and thereby the order passed by the tribunal has been given due respect by the opposite parties. To substantiate his contention, he has relied upon the judgment of the apex Court in ***State of Jammu and Kashmir v. District Bar Association, Bandipora***, (2017) 3 SCC 410.

5. We have heard Mr. Manoj Kumar Mohanty, learned counsel for the petitioner and Mr. R.K. Mohapatra, learned Government Advocate appearing for the State opposite parties and perused the record including order dated 04.10.2010 passed by Orissa Administrative Tribunal, Bhubaneswar in O.A. No. 1335 of 2003. Pleadings between the parties have been exchanged and with consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. The undisputed fact being that the petitioner had been engaged as a driver in the office of the CDPO, ICDS Project, Pattamundai under Women and Child Development Department and was allowed to continue, initially for a period of 44 days basis, but subsequently on a temporary basis, and continued till today as such by virtue of the order passed by the tribunal. For last 19 years, the petitioner has been continuing on temporary basis. He had approached the tribunal seeking for regularization of service, but the tribunal, instead of passing an order regularizing the services of the petitioner, disposed of the Original Application directing that till a regular driver is appointed or till continuance of the project or till the vehicle exists in that office, whichever is earlier, the petitioner may be allowed to continue in

accordance with existing terms and conditions of his engagement. Paragraphs 6 and 7 of the counter affidavit, wherein it has been admitted that the petitioner is still continuing in service, are extracted hereunder:

> *"6. That in reply to the averments made in Paragraph-3 of the writ application, it is humbly submitted that petitioner temporarily was engaged as Driver for a period of 44 days w.e.f. 3.4.1999 to 16.05.1999 as per order of Collector, Kendrapara by Office Order No. 6989, dtd.17.04.1999. Copy of order No.6989 dtd.17.04.1999 is enclosed herewith and marked as Annexure-A/2 for kind perusal of the Hon'ble Court. Subsequently the engagement was continued in spells from 18.05.1999 – 30.06.1999, 02.07.1999 – 14.08.1999, 16.08.1999 – 28.09.1999, 30.09.1999- 121.11.1999,15.11.1999 – 28.12.1999, 30.12.1999 – 11.02.2000, 19.12.2000 – 31.01.2001, 02.02.2001 – 17.03.2001, 19.03.2001 – 01.05.2001, 03.05.2001 – 15.06.2001, 18.06.2001, 31.07.2001, 02.08.2001 – 14.01.2001, 18.01.2001 – 31.10.2001.*
>
> *7. That in reply to the averments made in paragraph-4 of the writ application, it is humbly submitted that as pr the order of the district office vide letter no. 1843, dtd. 30.06.2008 the applicant has been continuing as Driver till date in daily wages basis."*

So far as payment of salary is concerned, in terms of the direction given by the tribunal since no decision has been taken at the level of District Office, Kendrapara, pursuant to letter dated 05.05.2014, the said salary has not been paid, but he has been continuing in service till date. Needless to say that the petitioner having approached the tribunal for regularization of services, the tribunal ought to have passed an order to that extent. Instead of giving any other reasons, the tribunal should have decided the Original Application on the basis of the relief sought by the petitioner.

7. Before delving into the niceties of the order passed by the tribunal, this Court deems it proper to examine the claims of the petitioner on the basis of the factual matrix available on record itself. On the basis of the pleadings available before this Court, no doubt the petitioner had approached the tribunal seeking regularization of his services. Regularization in service law connotes official formalisation of an appointment, which was made on temporary or ad hoc or stop gap or casual basis or the like, in deviation from the normal rules of applicable norms of appointment. Such formalisation makes the appointment regular. The ordinary meaning of regularisation is "to make regular" according to ***The Shorter Oxford English Dictionary, 3rd Edition***, and according to ***Black's Law Dictionary, 6th Edition***, the word "regular" means:

> *"Conformable to law. Steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation. Usual, customary, normal or*

general. Gerald v. American Cas. Co of Reading, Pa., D.C.N.C., 249 F, Supp. 355, 357. Made according to rule, duly authorised, formed after uniform type; built or arranged according to established plan, law, or principle. Antonym of "casual" or "occasional," Palle v. Industrial Commission, 79 Utah 47, 7 P. 2d. 248, 290."

8. The above being the meaning of "regular", as per the common parlance given in dictionary, in ***B.N. Nagarajan, v. State of Karnataka,*** AIR 1979 SC 1676 : (1979) 4 SCC 507, the apex Court held that the effect of such regularization would depend on the object or purpose for which the regularization is made or the stage at which it is made. Once regularized, the procedural infirmities which attended the appointment are cured. Regularization, however, does not necessarily connote permanence.

9. The word 'regular' or 'regularisation' do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. Relying on the judgments of the apex Court in ***B.N. Nagarajan v. State of Karnataka,*** AIR 1979 SC 1676 : (1979) 4 SCC 507, the Constitution Bench of the apex Court in ***State of Karnataka v. Umadevi (3),*** (2006) 4 SCC 1 has also taken the same view, which has also been followed by the apex Court in ***Hindustan Petroleum Corpn. Ltd. v. Ashok Ranghba Ambre,*** (2008) 2 SCC 717 and also in ***Hindustn Aeronautics Ltd. v. Dan Bahadur Singh,*** (2007) 6 SCC 207**.**

10. Temporary or ad hoc or stop gap or casual basis or the like appointments are made for various reasons. An emergent situation might make it necessary to make such appointments. Since the adoption of the normal method of regular recruitment might involve considerable delay regulating in failure to tackle the emergency. Sometimes such appointments were to be made because although extra hands are required to meet the workload, there are no sanctioned posts against which any regular recruitment could be made. In fact in the case of *ad hoc* or casual appointees, the appointments, are in the majority of cases, not against sanctioned posts and the appointments are made because of the necessity of workload and the constraints of sanctioning such post (mainly on financial consideration) on permanent basis. Needless to say that filling up vacancies against sanctioned posts by regularisation is against the constitutional provisions of equality of opportunity in the matter of public employment violating Articles 14 and 16 of the Constitution by not making the offer of employment to the world at

large and allowing all eligible candidates equality of opportunity to be considered on merits. If that be so, considering the emergent necessity of filling up of vacancies and allowing the petitioner to continue for a quite long period, even if with one day break in service, cannot be stated to be a reasonable one, rather, this is an unfair and unreasonable action of the authority concerned.

11. Keeping this backdrop of the case in view, it is to be examined whether this Court has been able to obtain the benefit of constitutional philosophy of social and economic justice or not. Have the lofty ideals which the founding fathers placed before us any effect in our daily life-the answer cannot however but be in the negative- what happens to the constitutional philosophy as is available in the Constitution itself, which we ourselves have so fondly conferred on to ourselves. The socialistic pattern of society as envisaged in the Constitution has to be attributed its full meaning.

12. In view of above constitutional philosophy, whether courts can remain as mute spectator, is a matter to be considered to achieve the constitutional goal in proper perspective. But all these questions had come up for consideration and decided by the Constitution Bench of the apex Court in ***Umadevi (3)*** mentioned supra. The factual matrix of the case in ***Umadevi (3)*** arose for consideration from a judgment of Karnataka High Court. In some of the cases, the Karnataka High Court rejected the claims of persons, who had been temporarily engaged as daily wagers but were continued for more than 10 years in the Commercial Taxes Department of the State of Karnataka for regularization as permanent employees and their entitlement to all the benefits of regular employees. Another set of civil appeals arose from the order passed by the same High Court on a writ petition challenging the order of the government directing cancellation of appointments of all casual workers/daily rated workers and seeking a further direction for the regularization of all such daily wage earners engaged by the State or local bodies. These claims were rejected by the Division Bench of the Karnataka High Court on appeal from the judgment of the learned Single Judge. The reason for the mater being considered by the Constitution Bench arose because of two earlier orders of reference made by a Bench of two-Judge and subsequently by a Bench of three-Judge- ***Secretary, State of Karnatak v. Uma Devi (1)*** (2004) 7 SCC 132***,*** and ***Secretary, State of Karnataka v. Uma Devi (2)*** (2006) 4 SCC 44***,*** respectively, as they noticed the conflicting opinions expressed by the earlier 3 Bench judgments in relation to regularization.

13. In the case of ***Umadevi (3)***, even though this Court has held that the appointments made against temporary or ad-hoc are not to be regularized, in para 53 of the judgment, it is provided that irregular appointment of duly qualified persons in duly sanctioned posts, who have worked for 10 years or more, can be considered on merits and steps to be taken as a one- time measure to regularize them. In para 53, the Court observed as under:-

> *"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."*

The objective behind the exception carved out in this case was prohibiting regularization of such appointments, appointed persons whose appointments is irregular but not illegal, ensure security of employment of those persons who served the State Government and their instrumentalities for more than ten years.

14. Elaborating upon the principles laid down in the case of ***Umadevi (3)*** (supra) and explaining the difference between irregular and illegal appointments in ***State of Karnataka v. M.L. Kesari***, (2010) 9 SCC 247, this Court held as under:

> *"7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in Umadevi (3), if the following conditions are fulfilled:*
>
> *(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should*

have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

15. Applying the ratio of ***Umadevi (3)*** case, this Court in ***Nihal Singh v. State of Punjab,*** (2013) 14 SCC 65 directed the absorption of the Special Police Officers in the services of the State of Punjab holding as under:

"35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is-the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks."

16. As it appears from the record itself, the case of the petitioner is covered under the exception carved out in paragraph 53 of ***Umadevi (3)*** (supra), which is applicable to the present case. Meaning thereby, against an existing vacancy the petitioner having been engaged by following due procedure of selection and continued for a quite long period and, as admitted by Mr.R.K Mohapatra,learned Government Advocate appearing for the State opposite parties and as is evident from the pleadings in the counter

affidavit, the petitioner is still continuing, the same cannot be treated as an "illegal" appointment rather it may be nomenclature as an "irregular" appointment.

17. Coming to the judgment of the apex Court in ***State of Jammu and Kashmir v. District Bar Association, Bandipora***, (2017) 3 SCC 410, on which reliance has been placed by Mr. R.K. Mohapatra, learned Government Advocate appearing for the State opposite parties, wherein a distinction has been made with regard to "irregular" and "illegal" appointment referring to the exception carved out in ***Umadevi (3)*** (supra), in paragraph 12 of the said judgment it has been stated as follows:

> *"12. The third aspect of Umadevi (3) which bears notice is the distinction between an "irregular" and "illegal" appointment. While answering the question of whether an appointment is irregular or illegal, the Court would have to enquire as to whether the appointment process adopted was tainted by the vice of non-adherence to an essential prerequisite or is liable to be faulted on account of the lack of a fair process of recruitment. There may be varied circumstances in which an ad hoc or temporary appointment may be made. The power of the employer to make a temporary appointment, if the exigencies of the situation so demand, cannot be disputed. The exercise of power however stands vitiated if it is found that the exercise undertaken (a) was not in the exigencies of administration; or (b) where the procedure adopted was volatile of Articles 14 and 16 of the Constitution; and/or (c) where the recruitment process was overridden by the vice of nepotism, bias or mala fides."*

The above noted principle is squarely applicable to the case of the petitioner than opposite parties. If the petitioner has been engaged against an existing vacancy, by following due process of selection, and continued for a quite long period and his engagement is due to the emergent situation, the appointment being "irregular" one, his services are to be regularized in accordance with law.

18. The tribunal having failed to give any direction so far as relief claimed in the Original Application for regularization of services of the petitioner, we are of the view that the impugned order, having not been passed in conformity with the relief sought, cannot sustain in the eye of law and the same is liable to be quashed. Accordingly, the order dated 04.10.2010 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A. No.1335 of 2003 is hereby quashed. The opposite parties are directed to take necessary steps in accordance with law for regularization of services of the petitioner treating the same as an irregular appointment as per the exception carved out in the case of ***Umadevi (3)*** mentioned supra as

expeditiously as possible, preferably within a period of four months from the date of communication of this judgment, and also release the legitimate dues as admissible to the petitioner forthwith.

19. The writ petition is thus allowed. No order as to costs.

Writ petition allowed.

2018 (I) ILR - CUT- 706

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

W.P.(C) NO. 17362 OF 2016

SUBASH CHANDRA BISWAL ……..Petitioner

.Vrs.

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

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition- Petitioner seeks to declare Sub-sections (2)(a), (2)(b-1), (3-a)(i) and (3-a)(ii-a) of Section 16 of the Odisha Panchayat Samiti Act as ultra vires to the Constitution, as well as contrary to the law laid down by the apex Court in the case of *K. Krishna Murthy* as the same provides for reservation for SC, ST and OBC in excess of the upper ceiling limit of 50%. – Plea that the provisions are violative of Articles 14 and 21 of the Constitution and contrary to the judgment of the apex Court and the reservation held in respect of SC, ST and OBC in excess of upper ceiling limit of 50% is bad in law- State's plea that provisions contained in the Act is in existence since several years – Held it cannot be said that the vires of the said provisions cannot be raised subsequently when occasion arises.

*"In view of the above settled position of law, this Court is of the considered view that merely because a particular provisions contained in an Act is in existence since several years, it cannot be said that the vires of the said provision cannot be raised subsequently when occasion would arise. Applying the said analogy, even though Section 16 of the Orissa Panchayat Samiti Act, 1959 is in existence prior to the judgment in **K. Krishna Murthy**, in view of the law laid down by the apex Court in **Motor General Traders**, this Court is of the considered view that vires of the provisions contained under Section 16 can also be challenged when necessity arises and as such, limitation is not a bar to challenge the same."*

(Para 19)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227– Writ petition– Prayer for a direction to State Govt. to implement the judgment of the apex court rendered in *K. Krishna Murthy*, in the matter of reservation during election to the various local bodies – Court directives.

"*In view of the foregoing discussions, this Court is of the considered opinion that as per the provisions of Article 141 and 143 of the Constitution of India, the Constitution Bench judgment of the apex Court rendered in* ***K. Krishna Murthy*** *is binding on all concerned and the same, having been considered to be the law of the land, should be implemented in letter and spirit. In case the State Government is allowed to breach the upper limit of 50% in the vertical reservations, so far as SC, ST and OBC are concerned, the said action would be unconstitutional. In the above view of the matter, the State Government is directed to act upon in compliance of the judgment of the Constitution Bench of the Supreme Court in* ***K. Krishna Murthy*** *in letter and spirit and see that the upper limit of reservation of seats in respect of SC, ST and OBC should not exceed 50%, of course subject to the exception provided in PESA Act and other similar provisions applicable to the case."*

(Paras 25 & 26)

Case Laws Relied on and Referred to :-

1. (2010) 7 SCC 202 : K. Krishna Murthy v. Union of India.
2. 2012 (6) ALD 329 : Nimmaka Jaya Raj v. Govt. of A.P.
3. (2017) 10 SCC 800 : Independent Thought v. Union of India.
4. AIR 1991 SC 101 : Delhi Transport Corporation v. D.T.C. Mazdoor Congress.
5. (2015) 5 SCC 1 : Shreya Singhal v. Union of India.
6. AIR 1984 SC 121 : Motor General Traders v. State of Andhra Pradesh.
7. (2007) 5 SCC 428 : Oriental Insurance Co. Ltd v. Meena Variyal.
8. AIR 1975 SC 1087: Municipal Committee, Amritsar v. Hazara Singh.

For petitioner : M/s. Gautam Mishra, D.K. Patra, A.S. Behera, A. Dash, J. Biswal.

For opp. parties : Mr. S.P. Mishra, Advocate General, M/s. B.K. Dash, Raja Bhusan Dash, Smruti Ranjan Dash, & Saswat Jena,

Date of Hearing: 09.04.2018 : Date of Judgment: 18.04.2018

JUDGMENT

DR. B.R. SARANGI, J.

By means of this writ petition, which has been followed by a series of writ petitions, indulgence of this Court has been sought for in the matter of ratio of reservation adopted by the State Government for conducting election to the local self-Government under the various provisions, namely, Section 10 of the Orissa Grama Panchayats Act, 1964, Section 16 of the Orissa Panchayat Samiti Act, 1959, Section 6 of the Orissa Zilla Parishad Act, 1991 and Section 11 of the Orissa Municipal Act, 1950, wherein the thumb rule laid down by the apex Court in ***K. Krishna Murthy v. Union of India***, (2010) 7 SCC 202, so far as reservation of seats is concerned, has exceeded 50%, thereby violating Articles 14 and 21 of the Constitution of India. The instant

writ petition, along the connected matters, had been filed at a point of time when election was imminent. Even though this Court initially passed an interim order, the same was subsequently vacated allowing the election to proceed, subject to the condition that applicability of the judgment in ***K. Krishna Murthy*** (supra) would be considered at the time of final adjudication of the matter. Hence, this writ application was heard together with the connected matters and is being disposed of, with the consent of the parties, by this judgment which will govern in connected matters also.

2. For just and proper adjudication, the facts of the instant case, in which pleadings have been completed, have been referred to.

The petitioner, in the instant writ petition, who claims to be a permanent resident of district Sambalpur, has challenged the ratio of reservation in the matter of election to the post of Panchayat Samiti Members under Rengali Panchayat Samiti in the district of Sambalpur fixed by the Collector, Sambalpur, vide notification dated 08.09.2016 in Annexure-1, on the ground that the same is violative of Articles 14 and 21 of the Constitution of India and in contravention of the judgment dated 11.05.2010 in ***K. Krishna Murthy*** (supra). He further seeks to declare Section 16 of the Odisha Panchayat Samiti Act, 1959, more particularly Sub-sections (2)(a), (2)(b-1), (3-a)(i) and (3-a)(ii-a) thereof, as ultra vires to the Constitution, as well as contrary to the law laid down by the apex Court in ***K. Krishna Murthy*** (supra), as the same provides for reservation for SC, ST and OBC in excess of the upper ceiling limit of 50%. In some of the local bodies reservation for SC, ST and OBC candidates exceeds 50% and the same is in violation of the dictum of the apex Court laid down in the case of ***K.Krishna Murthy*** (supra). The exercise to determine the extent of proportionate reservation in consonance with the aforesaid judgment having not been undertaken, it is asserted that the recommendation of the Collector notified on 08.09.2016 in Annnexure-1 is liable to be set aside and the entire exercise be done afresh keeping in view the ratio laid down by the apex Court in ***K.Krishna Murthy*** (supra), so far as reservation is concerned. It is further averred that Sub-Sections (2)(a), (2)(b-1), (3-a)(i) and (3-a)(ii-a) of Section 16 of the Odisha Panchayat Samiti Act, 1959, being violative of Articles 14 and 21 of the Constitution and contrary to the judgment of the apex Court in the case of ***K.Krishna Murthy*** (supra), the reservation held in respect of SC, ST and OBC in excess of upper ceiling limit of 50% is bad in law, hence this application.

3. Mr. G. Mishra, learned counsel for the petitioner strenuously urged before this Court that as the law laid down by the Constitution Bench of the Supreme Court in ***K. Krishna Murthy*** (supra), so far as upper ceiling limit of 50% for reservation of SC, ST and OBC is concerned, has not been followed, the notification dated 08.09.2016 issued in Annexure-1 de horse the said judgment should be quashed and accordingly the provisions of Section 16 of the Odisha Panchayat Samiti Act, 1959 are required to be amended making room for all categories of people keeping the reservation up to the upper ceiling limit of 50%. It is further contended that a perusal of the reservation list dated 08.09.2016 in Annexure-1 would indicate that out of 16, reservation for SC, ST and OBC has been made in respect of 15 Gram Panchayats, and thereby the percentage of reservation would be to the extent of 93.75%, which is much more beyond the ceiling limit of 50%, as fixed by the Constitution Bench of the apex Court in the case of ***K. Krishna Murthy*** (supra).

It is further contended that the provisions of Section 16 of the Orissa Panchayat Samiti Act, 1959 have to be read down to the extent that the upper ceiling limit of 50% vertical reservations in favour of SC, ST and OBC should not be breached in the context of local self- Government and, as such, the said provisions should co-exist with the judgment of ***K. Krishna Murthy*** (supra) which is binding by virtue of Article 142 of the Constitution of India so as to make Section 16 constitutionally valid. Therefore, it is contended that the judgment of the apex Court in ***K. Krishna Murthy*** (supra) has to be implemented in its letter and spirit keeping the upper ceiling limit of reservation up to 50% so far as it relates to SC, ST and OBC in local self-Government, and that even though the judgment in ***K. Krishna Murthy*** (supra) came into force in 2010, because of the cause of action arose in the year 2017, no delay can be attributable in challenging the vires of the provisions.

It is further contended that the law laid down by the apex Court in ***K. Krishna Murthy*** (supra) has already been implemented so far as the States of Karnataka and West Bengal are concerned. Therefore, he seeks for implementation of the said judgment in relation to local self- Government by the State authorities under the various provisions confining the upper ceiling limit of reservation up to 50% of seats so far as SC, ST and OBC are concerned. To substantiate his contentions, reliance has been placed on ***K. Krishna Murthy v. Union of India***, (2010) 7 SCC 202; ***Nimmaka Jaya Raj v. Govt. of A.P.,*** 2012 (6) ALD 329; ***Independent Thought v. Union of***

India, (2017) 10 SCC 800; ***Delhi Transport Corporation v. D.T.C. Mazdoor Congress,*** AIR 1991 SC 101; ***Shreya Singhal v. Union of India,*** (2015) 5 SCC 1; ***Motor General Traders v. State of Andhra Pradesh***, AIR 1984 SC 121; ***Oriental Insurance Co. Ltd v. Meena Variyal***, (2007) 5 SCC 428; and ***Municipal Committee, Amritsar v. Hazara Singh***, AIR 1975 SC 1087.

4. Mr. S.P. Mishra, learned Advocate General of the State appearing for opposite parties no.1 to 3 sought to justify the reservation by stating that if statute prescribes a specific ratio of reservation, and adhering to the same if any action has been taken by the competent authority, no illegality or irregularity can be said to have been committed. In the instant case, in order to comply with the statutory formality in time to conduct the election, steps have been taken on the basis of the provisions contained in the statute. He, however, emphatically contended that the State never intends to violate the ratio laid down in ***K.Krishna Murthy*** (supra), but when the statute prescribes a particular mode to have the reservation, the action has been taken in consonance with the same.

It is further contended that reservation of seats for the purpose of Panchayat Samiti Members under Rengali Panchayat Samiti for the general election to Panchayati Raj Institutions, 2017 has been made in strict adherence of the Government of Odisha in Panchayat Raj Department Guidelines issued vide letter no.14319 dated 12.08.2016. The said guidelines were issued on the basis of Section 10 of Odisha Grama Panchayat Act, 1964. As such, the said guidelines are based upon the 2011 census for the purpose of computation of number of seats/offices to be reserved for SC or ST category. Similarly, for the purpose of reservation in respect of backward class citizens, not less than 27 per centum of total seats were reserved. As the State of Odisha comprises of both schedule and normal areas, such guidelines have played a pivotal role for determination of reservation. If any action has been taken in consonance with the statute, it cannot be said that the State Government has committed any illegality or irregularity so as to call for interference with the same.

It is further contended that the provisions of Sub-sections (2)(a), (2)(b-1), (3-a)(i) and (3-a)(ii-a) of Section-16 the Orissa Panchayat Samiti Act, 1959 are existing and operating since long, whereas the judgment of the apex Court in ***K. Krishna Murthy*** (supra) was rendered on 11.05.2010, in which the apex Court held that each and every State Legislature which breaches the upper ceiling of 50% vertical reservations in favour of SC, ST and OBC should be treated as invalid and unconstitutional. But, however,

liberty has been granted to the aggrieved parties to challenge the State Legislations by adducing necessary contemporaneous empirical data. As the provisions of Orissa Panchayat Samiti Act, 1959 are in consonance with the mandate of Articles 243-D and 243-T of the Constitution, the same cannot be quashed. As the petitioner has not proved his case by providing contemporaneous empirical data justifying the reservation as bad in law, the same cannot be interfered with.

It is further contended that no direction can be issued to the Legislature for amending the Act or Rules. Article 243-D and 243-T form a distinct and independent constitutional basis for reservation in local self-Government institutions, as has been held by the apex Court that the barriers to political participation are not of the same character as barriers that limit access to education and employment. Reservation in local self-Government is a measure of protective discrimination to afford them adequate representation in local self-Government and to get a chance to play leadership roles. Therefore, various provisions mentioned in Section 16 of the Orissa Panchayat Samiti Act, 1959 is well within its limit and the same cannot be interfered with and more particularly Article 15(3) of the Constitution of India provides that nothing in this Article shall prevent the State from making any special provision for women and children. Therefore, when the State has enacted any law keeping in view various provisions of the Constitution, the same cannot be interfered with, but the normal rule of 50% reservation for all categories is subject to exceptions. It is further contended that the reservation, as prescribed in various provisions of Section 16 of the Orissa Panchayat Samiti Act, 1959, cannot be treated as violative of Articles 14 and 21 of the Constitution of India and as such the figure arrived at by the petitioner to indicate excessive reservation for the seats of Panchayat Samiti members is erroneous. More particularly, the reservation of seats in Panchayat Samiti has to be considered taking the entire State into account and also the fact that the Panchayat Extension to Scheduled Areas (PESA) Act, which provides for cent percent reservation for Scheduled Tribes in scheduled areas.

It is further contended that the reservation in political representation is well identified as a mode of affirmative action and is in consonance with and in furtherance of constitutional mandate, i.e., Article 243-D of the Constitution of India. To substantiate his contentions, he has relied upon the judgments in ***Union of India v. Association for Democratic Reforms,*** AIR 2002 SC 2112; ***Suresh Seth v. Commissioner, Indore Municipal***

Corporation, AIR 2006 SC 767; ***Indra Sawhney v. Union of India***, AIR 1993 SC 477; ***State of Kerala v. NM Thomas***, (1976) 2 SCC 310; ***Union of India v. Rakesh Kumar***, (2010) 4 SCC 50; ***Ram Kishore Sen v. Union of India***, AIR 1966 SC 644; ***Ashutosh Gupta v. State of Rajasthan*** (2002) 4 SCC 34; ***Sanjeev Coke Mgd. Co. v. Bharat Coking Coal Ltd***, (1983) 1 SCC 147; ***Secy., Ministry of Chemicals and Fertilizers, Govt. of India v. Cipla Ltd***., (2003) 7 SCC 1; ***Ashok Kumar Thakur v. Union of India***, (2008) 6 SCC 1; and ***Jyoti Basu v. Debi Ghosal***, (1982) 1 SCC 691.

5. Mr. B.K. Dash, learned counsel appearing for the State Election Commission, Odisha contended that since it is the matter between the petitioner and the opposite party-State, State Election Commission has no role to play at this point of time. But initially, when the writ petition was filed on the teeth of election, the State Election Commission had a role to play in order to bring to the notice of this Court that when the election is 'imminent' the Court should refrain from passing any interim order stalling the election process. As the election has already been over and the petitioner has now confined his relief with regard to applicability of the judgment in ***K. Krishna Murthy*** (supra), which mandates that upper ceiling limit for reservation seats in case of SC, ST and OBC should not exceed 50%, is a matter between the petitioner and the State, in which the State Election Commission has no role to play.

6. We have heard Mr. G. Mishra, learned counsel for the petitioner; Mr. S.P. Mishra, learned Advocate General of the State-opposite parties no.1 to 3; and Mr. B.K. Dash, learned counsel appearing for the State Election Commission-opposite party no.4. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties, the matter is being disposed finally at the stage of admission.

7. For just and proper adjudication of the case, the relevant provisions of the Constitution of India are quoted below:-

xx *xx* *xx*

"14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. ***Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.***

xx *xx* *xx*

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

xx xx xx

> *21. No person shall be deprived of his life or personal liberty except according to procedure established by law."*

8. Part-IX containing Articles 243 and 243A to 243-O has been inserted by the Constitution (Seventy-third Amendment) Act, 1992 with effect from 24.04.1993. Article 243(d) defines "Panchayat" to mean an institution (by whatever name called) of self-government constituted under Article 243B, for the rural areas. Article 243B deals with constitution of Panchayats. Under Article 243B(1) it is provided that there shall be constituted in every State, Panchayats at the village, intermediate at district levels in accordance with the provisions of this Part. By virtue of this provision, there is 3-tier Panchayat Bodies in the State, namely, Grama Panchayat, Panchayat Samiti and Zilla Parishad. Article 243C deals with composition of Panchayats. It provides that subject to the provisions of this Part, the Legislature of a State may, by law, make provisions with respect to the composition of Panchayats. Provided that the ratio between the population of the territorial area of Panchayat at any level and the number of seats in such Panchayat to be filled by election shall, so far as is practicable, be the same throughout the State. In view of such power, Odisha Gram Panchayat Act, 1964, Odisha Panchayat Samiti Act, 1959 and Odisha Zilla Parishad Act, 1991 have come into force for composition of respective bodies.

9. Article 243D deals with reservation of seats where mandate has been put that reservation has to be followed on the basis of ratio of population. Under Article 243D(6) it is provided that nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens. Article 243E states about duration of Panchayats, etc. Article 243E(1) states:

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

The pari materia provisions with regard to duration of State Legislature have been prescribed in Article 172 of the Constitution with the same language and with same terms. Similarly, so far as Municipal Bodies are concerned, same language has been employed in Article 243U. Article 243O puts a bar on interference by Courts in electoral matters. Similar provisions, so far as Municipality is concerned, have been specified in Article 243ZG.

Article 329 of the Constitution provides for General Elections. Article 243K deals with elections to the Panchayats, where power has been vested in the State Election Commission for superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats. Pari materia provisions, so far as Municipalities are concerned, have been prescribed in Article 243ZA and for General Elections under Article 324.

10. Since the instant writ application is dealing with election to Panchayat Samitis, as per the Odisha Panchayat Samiti Act, 1959 under Section 16B power has been vested with the State Election Commission for superintendence, direction and control of the preparation of electoral roll and the conduct of all elections to the Samitis and under Section 16B(iv) the general power of conducting free and fair election is vested with the Commission. Section 16 deals with constitution of Panchayat Samiti. For better appreciation, Sub-sections (2)(a), (2)(b-1), (2-A), (3)(a-1) and (a-ii) of Section-16 are quoted below:

> *" **16. Constitution of the Panchayat Samiti –***
>
> *xx xx xx*
>
> ***(2) (a)** Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Samiti and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election under Clause(b) of Sub-section (1) in that Samiti as the population of the Scheduled Castes and the Scheduled Tribes in that Samiti area bears to the total population of that area and such seats shall be allotted by the rotation to different constituencies in the Samiti area:*
>
> *Provided that where the population of the Scheduled Caste or, as the case may be the Scheduled Tribes in a Samiti area is not sufficient for reservation of any seat, and seat for the Scheduled Caste, or as the case may be, one seat for the Scheduled Tribes shall be reserved in that Samiti area.*
>
> *Provided further that in the Scheduled Areas, not less than one-half of the total number of seats to be filled up by direct election shall be reserved for the Scheduled Tribes.*
>
> ***(b-1)** As nearly as may be, but not less than, twenty seven per centum of the total number of seats to be filled up by direct election in every Samiti shall be reserved in favour of backward class of citizens as referred to in Clause (6) of Article 243-D of the Constitution in the prescribed manner [and shall be allotted by rotation to different constituencies thereof]:*
>
> *Provided that where, after reservation of the required number of seats for the Scheduled Castes and the Scheduled Tribes in a Samiti. the remaining seats are found to be insufficient for the purpose of reservation in favour of backward class*

of citizens, as nearly as may be, but not less than, twenty seven per centum of the remaining seats shall be reserved in favour of such citizens in that Samiti.

xx xx xx

***(2-A)** The manner in which the Samiti area shall be divided into constituencies for the purpose of Clause (b) of Sub-section (1) and the seats therein shall be reserved for the purposes of Clauses (a), (b) [(b-1), (b-2)] and (c) of Sub-section (2), shall be as follows :*

(a) The Collector shall divide the Samiti area into constituencies in such a manner that-

(i) every constituency shall, as far as practicable, have a population of not less than two thousand and more than ten thousand; and

(ii) the territorial area of a Grama is not bifurcated.

(b) The constituencies in which the density of population of the Scheduled Castes and the Scheduled Tribes is higher shall be reserved for the Scheduled Castes and the Scheduled Tribes respectively and shall rotate in descending order at every general election [and in case of backward class of citizens such reservation and rotation shall be in the prescribed manner.]

(c) Every constituency shall bear the same name as of the Grama and the names of the constituencies shall be arranged serially in Oriya alphabetical order :

Provided that where a constituency comprises more than one Grama, the constituency shall bear the name of the Grama of which the population is higher or, as the case may be, the highest.

(d) After the names of the constituencies are so arranged, the Collector shall reserve the required number of constituencies for women in the following manner :

(i) reservation of constituencies for women shall be made for the Scheduled Castes at the first instance. [then for the Scheduled Tribes and thereafter for the backward class of citizens] and, in computing one-third of the total number of constituencies, the constituencies, reserved for women belonging to the Scheduled Castes [the Scheduled Tribes and backward class of citizens] shall be taken into account;

(ii) out of the constituencies left in the list of the Oriya alphabetical order for candidates other than the Scheduled Castes, the Schedule id Tribes and the backward class of citizens the constituency which appears second and, thereafter, every third constituency shall be reserved for women, until the required quota is completed; and

(iii) as nearly as may be, but not less than, one-third of the constituencies reserved for the members of the Scheduled Castes, the Scheduled Tribes and the backward class of citizens shall be reserved for women belonging to the Scheduled Castes, the Scheduled Tribes and backward class of citizens in the manner hereinbefore provided.

(e) The Collector shall, after previous publication in the prescribed manner inviting, objections and suggestions from all persons interested within the

prescribed period, and after considering all such objections and suggestions, publish a statement showing, the division of the Samiti area into constituencies and the seats to be reserved therein, in his notice board, which shall be final;]

(3-a) *Notwithstanding anything to the contrary in Sub-section (1)-*

(i) officers of Chairman in Samitis shall be reserved for the Scheduled Castes and the Scheduled Tribes and the number of the offices so reserved for the Scheduled Castes and the Scheduled Tribes shall bear, as nearly as may be, the same proportion to the total number of such officers as the population of the Scheduled Castes and the Scheduled Tribes respectively in the State bears to the total population of the State:

(ii-a) as nearly as may be, twenty-seven percentum of the offices of Chairman in Samitis shall also be reserved in favour of backward class of citizens as referred to in Clause (6) of Article 243-D of the Constitution;

11. On perusal of the above mentioned provisions, it is made crystal clear that Sub-section (2)(a) of Section 16 deals with reservation of SC and ST, whereas Sub-section (2)(b-1) states that as nearly as may be, but not less than 27 per centum of the total number of seats to be filled up by direct election in every Samiti, shall be reserved in favour of backward class of citizens. Sub-section (2-A) thereof deals with the manner in which the Samiti area shall be divided into constituencies for the purpose of clause (b) of sub-section (1) and the seats therein shall be reserved for the purpose of clauses (a), (b) and (c) of sub-section (2). As per the provisions contained in clause (a) of Section 16(2-A), the Collector shall divide the Samiti area into constituencies in such manner that every constituency shall, as far as practicable, have a population of not less than two thousand and more than ten thousand and territorial area of a Grama is not bifurcated. Clause (b) of Section 16(2-A) states the constituencies in which the density of population of the SC and ST is higher shall be reserved for the SC and ST respectively and shall rotate in descending order at every general election.

12. In consonance with the provisions contained in the Constitution as well as Odisha Panchayat Samiti Act, 1959, as discussed above, the Collector considering the population in the local area has issued the notification on 08.09.2016, and in prescribed Form-19 under Rules 7-B, 7-D and 8-F published the Final Statement of Constituencies in respect of the Panchayat Samitis under Rengali Block in the district of Sambalpur, wherein total number of constituencies has been carved out as 16 and of the same reservation has been made for SC-3, ST-7, BC-6, UR-1. As the reservation exceeds upper limit of 50% of the total seats, the petitioner has filed this application on the ground that it is contrary to law laid down by the apex

Court in **K.Krishna Murthy** (supra). In this backdrop of the case, this Court on 06.10.2016 granted time to learned Addl. Govt. Advocate to obtain instruction or to file counter affidavit and further directed to list the matter on 31.10.2016 considering the eminence of the election, but passed an interim order to the following effect:

> *".....Considering the facts of the case and in view of the submission made by learned counsel for the petitioner recorded in the order dated 12.9.2016 passed in W.P.(C) No. 15614 of 2016, it is provided that till the next date of listing, no order shall be passed in pursuance of the recommendation made by the Collector, Sambalpur dated 8.9.2016 (Annexure-1)."*

13. The aforesaid interim order was extended from time to time, but finally this Court, taking into consideration the Constitution Bench judgments of the apex Court in ***Kishansing Tomar v. Municipal Corporation of the City of Ahmedabad***, (2006) 8 SCC 352, ***Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman***, AIR 1985 SC 1233 and ***Anugrah Narain Singh v. State of U.P.,*** (1996) 6 SCC 303, vide order dated 25.01.2017, vacated the interim order 21.12.2016 and passed an order granting liberty to the State authorities, as well as the State Election Commission, Odisha to proceed further with the election process in respect of the areas in question so as to complete the same as per the mandate fixed in the Constitution, as well as Orissa Panchayat Samiti Act, 1959. However, this Court has clarified that Section 16 of the Panchayat Samiti Act provides comprehensive procedure as to how the seats shall be reserved for Scheduled Castes and Scheduled Tribes, as well as for backward class of citizens. Sub-Section 2-A of Section 16 is a self contained code, which lays down various stages for delimitation of constituencies and reservation of seats in respect of various categories of reserved candidates. Even though the Collector-opposite party no.3 has recommended, by notification dated 19.08.2016, with regard to reservation of seats exceeding 50% of the upper ceiling limit, but the stage at which the petitioner has assailed the same, being "imminent" to the election process, the same can be considered after the election process is over. Therefore, after the interim order was vacated on 25.01.2017, the election process has been over and thereafter this matter has been taken up for consideration.

14. On perusal of the instant writ petition, it appears that the petitioner has filed this application with the following prayers:-

> *"(a) Quash the notification issued by the Collector, Sambalpur under Annexure-1 as the same is far in excess of the upper ceiling limit of 50%;*

(b) Direct the opposite parties to conduct elections after preparing fresh reservation lists keeping in mind the judgment of the Hon'ble Supreme Court dated 11.05.2010 in the case of K. Krishna Murthy v. Union of India (2010) 7 SCC 202;

(c) Declare Section 16 [more particularly Section 16(2)(a), Section 16(2)(b-1), Section 16(3-a)(i) and Section 16 (3-a) (ii-a)] of the Orissa Panchayat Samit Act, 1959 as violative of Articles 14 and 21 of the Constitution and contrary to the Constitution Bench judgment in the case of K. Krishnamurthy v. Union of India, (2010) 7 SCC 202 as the same provies for reservations for SCs, STs and OBCs in excess of the upper ceiling limit of 50%."

Mr. G. Mishra, learned counsel for the petitioner when confronted with the prayers, very fairly stated that so far as prayer no.(a) is concerned, it has become infructuous, as the election has already been taken place. But he confined the writ petition to prayers no.(b) and (c), as mentioned above, and gave emphasis with regard to implementation of the Constitution Bench judgment of the apex Court rendered in the case of ***K. Krishna Murthy*** (supra), which provides that reservation for SC, ST and OBC should not exceed the upper ceiling limit of 50%. The relevant paragraphs of the judgment of the apex Court in ***K. Krishna Murthy*** (supra) are quoted below:-

*"**9.** In light of the submissions that have been paraphrased in the subsequent paragraphs, the contentious issues in this case can be framed in the following manner:*

(i) Whether Article 243-D(6) and Article 243-T(6) are constitutionally valid since they enable reservations in favour of backward classes for the purpose of occupying seats and chairperson positions in panchayats and municipalities respectively?

(ii) Whether Article 243-D(4) and Article 243-T(4) are constitutionally valid since they enable the reservation of chairperson positions in panchayats and municipalities respectively?

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14. It was urged that the reservation policy contained in the Karnataka Panchayat Raj Act, 1993 provides for the aggregate reservation of nearly 84% of the seats in panchayats, which is excessive and violative of the equality clause. Especially with regard to reservations in favour of backward classes, it was argued that the same does not meet the test of "reasonable classification", thereby falling foul of Article 14.

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22. *We were also alerted to the possibility that the State Governments could confer reservation benefits in favour of particular OBC groups as a means of garnering political support from these groups, instead of ameliorating backwardness in the social and economic sense. In support of this contention, it was pointed out that the Karnataka Panchayat Raj Act had provided for reservations that were in excess of the 50% upper ceiling prescribed for communal reservations in past judicial*

decisions. (See M.R. Balaji v. State of Mysore and Indra Sawhney v. Union of India.)

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61. *It is also incumbent upon the executive to ensure that reservation policies are reviewed from time to time so as to guard against overbreadth. In respect of the objections against the Karnataka Panchayat Raj Act, 1993, all that we can refer to is the Chinnappa Reddy Commission Report (1990) which reflects the position as it existed twenty years ago. In the absence of updated empirical data, it is well-nigh impossible for the courts to decide whether the reservations in favour of OBC groups are proportionate or not.*

62. *Similarly, in the case of the State of Uttar Pradesh, the claims about the extent of the OBC population are based on the 1991 census. Reluctant as we are to leave these questions open, it goes without saying that the petitioners are at liberty to raise specific challenges against the State legislations if they can point out flaws in the identification of backward classes with the help of updated empirical data.*

63. *As noted earlier, social and economic backwardness does not necessarily coincide with political backwardness. In this respect, the State Governments are well advised to reconfigure their reservation policies, wherein the beneficiaries under Articles 243-D(6) and 243-T(6) need not necessarily be coterminous with the Socially and Educationally Backward Classes (SEBCs) [for the purpose of Article 15(4)] or even the backward classes that are underrepresented in government jobs [for the purpose of Article 16(4)]. It would be safe to say that not all of the groups which have been given reservation benefits in the domain of education and employment need reservations in the sphere of local self-government. This is because the barriers to political participation are not of the same character as barriers that limit access to education and employment. This calls for some fresh thinking and policy-making with regard to reservations in local self-government.*

64. *In the absence of explicit constitutional guidance as to the quantum of reservation in favour of backward classes in local self-government, the rule of thumb is that of proportionate reservation. However, we must lay stress on the fact that the upper ceiling of 50% (quantitative limitation) with respect to vertical reservations in favour of SCs/STs/OBCs should not be breached. On the question of breaching this upper ceiling, the arguments made by the petitioners were a little misconceived since they had accounted for vertical reservations in favour of SCs/STs/OBCs as well as horizontal reservations in favour of women to assert that the 50% ceiling had been breached in some of the States. This was clearly a misunderstanding of the position since the horizontal reservations in favour of women are meant to intersect with the vertical reservations in favour of SCs/STs/OBCs, since one-third of the seats reserved for the latter categories are to be reserved for women belonging to the same. This means that seats earmarked for women belonging to the general category are not accounted for if one has to gauge whether the upper ceiling of 50% has been breached.*

65. *Shri Rajeev Dhavan has contended that since the context of local self-government is different from education and employment, the 50% ceiling for vertical reservations which was prescribed in Indra Sawhney cannot be blindly*

imported since that case dealt with reservations in government jobs. It was further contended that the same decision had recognised the need for exceptional treatment in some circumstances, which is evident from the following words: (SCC p. 735, paras 809-10)

"809. From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%.

810. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

66. *Admittedly, reservations in excess of 50% do exist in some exceptional cases, when it comes to the domain of political representation. For instance, the Legislative Assemblies of the States of Arunachal Pradesh, Nagaland, Meghalaya, Mizoram and Sikkim have reservations that are far in excess of the 50% limit. However, such a position is the outcome of exceptional considerations in relation to these areas. Similarly, vertical reservations in excess of 50% are permissible in the composition of local self-government institutions located in the Fifth Schedule Areas.*

67. *In the recent decision reported as Union of India v. Rakesh Kumar this Court has explained why it may be necessary to provide reservations in favour of the Scheduled Tribes that exceed 50% of the seats in panchayats located in the Scheduled Areas. However, such exceptional considerations cannot be invoked when we are examining the quantum of reservations in favour of backward classes for the purpose of local bodies located in general areas. In such circumstances, the vertical reservations in favour of SCs/STs/OBCs cannot exceed the upper limit of 50% when taken together. It is obvious that in order to adhere to this upper ceiling, some of the States may have to modify their legislations so as to reduce the quantum of the existing quotas in favour of OBCs.*

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82. *In view of the above, our conclusions are:*

(i) The nature and purpose of reservations in the context of local self-government is considerably different from that of higher education and public employment. In this sense, Article 243-D and Article 243-T form a distinct and independent constitutional basis for affirmative action and the principles that have been evolved in relation to the reservation policies enabled by Articles 15(4) and 16(4) cannot be readily applied in the context of local self-government. Even when made, they need not be for a period corresponding to the period of reservation for the purposes of Articles 15(4) and 16(4), but can be much shorter.

(ii) Article 243-D(6) and Article 243-T(6) are constitutionally valid since they are in the nature of provisions which merely enable the State Legislatures to reserve

seats and chairperson posts in favour of backward classes. Concerns about disproportionate reservations should be raised by way of specific challenges against the State legislations.

(iii) We are not in a position to examine the claims about overbreadth in the quantum of reservations provided for OBCs under the impugned State legislations since there is no contemporaneous empirical data. The onus is on the executive to conduct a rigorous investigation into the patterns of backwardness that act as barriers to political participation which are indeed quite different from the patterns of disadvantages in the matter of access to education and employment. As we have considered and decided only the constitutional validity of Articles 243-D(6) and 243-T(6), it will be open to the petitioners or any aggrieved party to challenge any State legislation enacted in pursuance of the said constitutional provisions before the High Court. We are of the view that the identification of "backward classes" under Article 243-D(6) and Article 243-T(6) should be distinct from the identification of SEBCs for the purpose of Article 15(4) and that of backward classes for the purpose of Article 16(4).

(iv) The upper ceiling of 50% vertical reservations in favour of SCs/STs/OBCs should not be breached in the context of local self-government. Exceptions can only be made in order to safeguard the interests of the Scheduled Tribes in the matter of their representation in panchayats located in the Scheduled Areas.

(v) The reservation of chairperson posts in the manner contemplated by Articles 243-D(4) and 243-T(4) is constitutionally valid. These chairperson posts cannot be equated with solitary posts in the context of public employment."

15. In ***Nimmaka Jaya Raja*** (supra), the Andhra Pradesh High Court, on consideration of the similar question, held as follows:-

"12. This writ petition has been filed seeking a writ of mandamus declaring Sections 9, 15, 152(1A), 153(2A), 180(1A) and 181(2)(b) of the Act and the Reservation Rules issued vide G.O. Ms. No.220, Panchayat Raj and Rural Development (Elec. & Rules) Department, dated 25.5.2006 and G.O.Ms.No.128, Panchayat Raj and Rural Development (Elec. & Rules) Department, dated 8.6.2011 as ultra vires and violative of Article 14 of the Constitution of India and contrary to the judgment of the Supreme Court in K. Krishna Murthy v. Union of India (2010) 7 SCC 202 and to direct the first respondent to fix reservations by fixing upper ceiling limit of 50% for the elections to the local bodies.

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44. On behalf of the State, the learned Advocate General submitted that the percentage of backward classes in the State is 39.39% according to the data collected in the socio-economic survey conducted by the Andhra Pradesh Backward Classes Finance Corporation Ltd. The Government decided to adopt the vertical reservation policy for the elections to be conducted to the Panchayat Raj bodies at 60.55% which had been done during the third ordinary elections held in the year 2006. Accordingly, orders have been issued in G.O. Ms.No128, dated 8.6.2001 in exercise of the power conferred under Section 268(1) read with Sections 9, 15, 152, 153, 180 and 181 of the Act and Article 243D(6) of the

Constitution. He submitted that that the reservation of 34% in favour of backward classes is impugned with the provisions of Article 243D(6) of the Constitution. As the 2011 Census has not been published and as the Act limits the reservation for backward classes at 34%, the impugned G.O. has been issued. He submitted that since the operation of the impugned G.O. has been stayed by this Court, it would not be possible to conduct elections before the expiry of the term of the elected members, therefore, the Government promulgated Ordinance No.5 of 2011 enabling appointment of Special Officers to run the administration of the local bodies.

xx xx xx

56. It is argued on behalf of the State that the reservation of 34% is being followed since 1994 and even during the Elections held in the year 2006, the same percentage of reservation was adopted, therefore, it is acceptable. But, we are not inclined to accept the submission on behalf of the State for the reasons that in the State there is no empirical data and the reservation is based on unpublished data. The State Government is required to conduct a detailed investigation with regard to backwardness of the population, collect data, invite objections from the general public, analyse the same and fix the reservation in accordance with the constitutional scheme. Further, limit of reservation, as ruled by the Supreme Court in Krishna Murthy, was not available in 2006.

xx xx xx

58. As noticed above, this Court, while admitting Writ Petition Nos.16560 and 16473 of 2011, granted interim stay of G.O.Ms.No.128, dated 8.6.2011 including elections. Thereafter, the government promulgated Ordinance No.5 of 2011 on 21.7.2011 making transitional arrangements for administration of local bodies till the ordinary elections are held. Consequent to the promulgation of the Ordinance, the government issued orders appointing Special Officers to the local bodies. It is the case of the State that the said Ordinance was promulgated only to fill the vacuum in extraneous circumstances as the Act did not provide for the said contingency and all necessary steps had been taken for conducting elections to the Panchayat Raj institutions within time, but in view of the interim stay granted by this Court, further steps could not be taken for holding elections. In view of this, it cannot be said that the appointment of Special Officers is illegal. In view of the above discussion, the Writ Petitions and the public interest litigation petitions are disposed of with the following directions:

(i) For the purpose present elections, the State shall fix the reservation in favour of Backward Classes at such percentage so that it comes within 50% when the aggregate reservation in favour of Scheduled Castes, Scheduled Tribes and Backward Classes put together;

(ii) The State shall conduct a detailed investigation with regard to backwardness of the population, collect data, invite objections from the general public, analyse the same and then fix the reservation in favour of Backward Classes in accordance with the constitutional scheme. It shall also review the reservation from time to time;

(iii) The State Election Commission shall commence the process of elections to the local bodies in the State of Andhra Pradesh immediately and shall complete the elections within a period of three months from the date of finalization of the reservation percentage by the State.

(iv) All the writ petitions challenging the validity of amending Acts, providing for appointment of Special Officers for local bodies shall stand dismissed.
(v) No costs."

16. In view of the law laid down by the apex Court in ***K. Krishna Murty*** (supra) which has also been followed by the Andhra Pradesh High Court in ***Nimmaka Jaya Raja*** (supra), the same should be applicable so far it relates to the State of Orissa in respect of reservation of seats which should not exceed 50%. But at the same time, it cannot be lost sight of that it has got its own exception considering the interest of scheduled tribe in the matter of panchayats located in the schedule area. As such, we are not examining which of the areas requires a special treatment as exception carved out by the judgment of the apex Court, and it is within the complete domain of the State authority to decide the same in accordance with law.

17. No doubt, the Constitution Bench judgment rendered by the apex Court in **K.Krishna Murthy** (supra) is binding by virtue of the Article 142 of the Constitution of India. Therefore, Section 16 of the Orissa Panchayat Samiti Act, 1959 should be read down so as to give effect to the judgment in **K.Krishna Murthy** (supra), meaning thereby Section 16 of the Panchayat Samiti Act, 1959 should co-exits with the judgment of **K.Krishna Murthy** (supra) and as such the provisions contained in Section 16 has to be read down to make it constitutionally valid.

18. In ***Independent Thought*** (supra), the apex Court held as follows:-

*"**166.** I am conscious of the self-imposed limitations laid down by this Court while deciding the issue whether a law is constitutional or not. However, if the law is discriminatory, arbitrary or violative of the fundamental rights or is beyond the legislative competence of the legislature then the court is duty-bound to invalidate such a law.*

***167.** H.R. Khanna, J. in State of Punjab v. Khan Chand held that when courts strike down laws they are only doing their duty and no element of judicial arrogance should be attributed to the courts when they do their duty under the Constitution and determine whether the law made by the legislature is in conformity with the provisions of the Constitution or not. The relevant observations are as follows: (SCC p. 558, para 12)*

"12. It would be wrong to assume that there is an element of judicial arrogance in the act of the courts in striking down an enactment. The Constitution has assigned

to the courts the function of determining as to whether the laws made by the legislature are in conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the courts discharge an obligation which has been imposed upon them by the Constitution. The courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the Articles of the Constitution. Articles 32 and 226 are an integral part of the Constitution and provide remedies for enforcement of fundamental rights and other rights conferred by the Constitution. Hesitation or refusal on the part of the courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution. Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others against measures which are violative of the Constitution is fraught with serious consequences. It is as much the duty of the courts to declare a provision of an enactment to be unconstitutional if it contravenes any Article of the Constitution as it is theirs to uphold its validity in case it is found to suffer from no such infirmity."

168. ***Therefore, the principle is that normally the courts should raise a presumption in favour of the impugned law; however, if the law under challenge violates the fundamental rights of the citizens, the law is arbitrary, or is discriminatory, the courts can either hold the law to be totally unconstitutional and strike down the law or the court may read down the law in such a manner that the law when read down does not violate the Constitution.*** *While the courts must show restraint while dealing with such issues, the court cannot shut its eyes to the violations of the fundamental rights of the citizens. Therefore, if the legislature enacts a law which is violative of the fundamental rights of the citizens, is arbitrary and discriminatory, then the court would be failing in its duty if it does not either strike down the law or read down the law in such a manner that it falls within the four corners of the Constitution."* *[Emphasis Supplied]*

Similar view has also been taken in ***Delhi Transport Corporation*** and ***Shreya Singhal*** mentioned supra.

19. Mr. S.P. Mishra, learned Advocate General appearing for the State contended that Orissa Panchayat Samiti Act, 1959 under Section 16 envisages with regard to mode of reservation much prior to the judgment in ***K. Krishna Murthy*** (supra). Therefore, the validity of such provision cannot be negatived by implementation of the judgment of apex Court in ***K. Krishna Murthy*** (supra). It is well settled principle of law laid down by the apex Court in ***Motor General Traders*** (supra) that there is no limitation challenging the vires of the provisions of the Act. The relevant paragraph-24 is quoted below:

> *"**24**. It is argued that since the impugned provision has been in existence for over twenty three years and its validity has once been upheld by the High Court, this Court should not pronounce upon its validity at this late stage. There are two answers to this proposition. First, the very fact that nearly twenty three years are over from the date of the enactment of the impugned provision and the discrimination is allowed to be continued unjustifiably for such a long time is a ground of attack in these cases. As already observed, the landlords of the buildings constructed subsequent to Aug. 26, 1957 are given undue preference over the landlords of buildings constructed prior to that date in that the former are free from the shackles of the Act while the later are subjected to the restrictions imposed by it. What should have been just an incentive has become a permanent bonanza in favour of those who constructed buildings subsequent to Aug. 26, 1957. There being no justification for the continuance of the benefit to a class of persons without any rational basis whatsoever, the evil effects flowing from the impugned exemption have caused more harm to the society than one could anticipate. What was justifiable during a short period has turned out to be a case of hostile discrimination by lapse of nearly a quarter of century. The second answer to the above contention is that mere lapse of time does not lend constitutionality to a provision which is otherwise bad. "Time does not run in favour of legislation. If it is ultra vires, it cannot gain legal strength from long failure on the part of lawyers to perceive and set up its invalidity. Albeit, lateness in an attack upon the constitutionality of a stature is but a reason for exercising special caution in examining the arguments by which the attack is supported". (See W. A. Wynes : 'Legislative, Executive and Judicial Powers in Australia', Fifth Edition p. 33). We are constrained to pronounce upon the validity of the impugned provision at this late stage because the garb of constitutionality which it may have possessed earlier has become worn out and its unconstitutionality is now brought to a successful challenge."*

In view of the law above settled position of law, this Court is of the considered view that merely because a particular provisions contained in an Act is in existence since several years, it cannot be said that the vires of the said provision cannot be raised subsequently when occasion would arise. Applying the said analogy, even though Section 16 of the Orissa Panchayat Samiti Act, 1959 is in existence prior to the judgment in ***K. Krishna Murthy*** (supra), in view of the law laid down by the apex Court in ***Motor General Traders*** (supra), this Court is of the considered view that vires of the provisions contained under Section 16 can also be challenged when necessity arises and as such, limitation is not a bar to challenge the same.

20. As to the contention raised on behalf of the petitioner that judgment of ***K. Krishna Murthy*** (supra), having already been given effect to by the State of Karnataka as well as State of West Bengal, there would be no bar to give effect to the said judgment, Mr. S.P. Mishra, learned Advocate General has contended that paragraphs 64, 67 and 82(iv) of the case of ***K. Krishna***

Murthy (supra) are obiter because the same were passed in consideration of the issues that were raised in the judgment more particularly in paragraphs 1, 3, 6, 8, 9, 10, 12, 14, 22, 23, 27, 28, 43, 44, 59, 60.

It is well settled principle of law laid down by the Constitution Bench of the apex Court in ***State of Orissa v. Sudhansu Sekhar Misra,*** AIR 1968 647 that:-

> *"... A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it."*

Applying the said principle to the present context, since the decision which has been rendered by the Constitution Bench in ***K. Krishna Murthy*** (supra) has been enumerated in paragraph 82 of the judgment itself, it cannot be construed at any stretch of imagination that the finding arrived at by the Constitution Bench of the apex Court in paragraphs 64, 67 and 82(iv) is obiter in any manner.

21. In ***Oriental Insurance Co. Ltd.*** (supra) and ***Municipal Committee, Amritsar*** (supra), the apex Court has also gone a step further stating that even if some findings are considered to be obiter, they may be also binding on the courts bellow.

22. Mr. S.P. Mishra, learned Advocate General emphatically argued that percentage of reservation should be considered taking the entire State into account and also the fact that the PESA Act, provides for cent percent reservation for Scheduled Tribes in scheduled areas and, therefore, the normal rule of 50% reservation of all categories is subject to exceptions. In view of the law laid down by the apex Court in ***Indra Sawhney*** (supra) it is further contended that the exception is that reservation can be made proportionately having regard to the large population of SEBC in a State in order to secure adequate representation for them in excess of the 50% norm. Therefore, in absence of any empirical data, the contention which has been raised in the writ application to give effect to the judgment of the apex Court in ***K. Krishna Murthy*** (supra) has no basis at all.

In the above context, reliance has been placed on ***Ram Kishore Sen***, ***Ashutosh Gupra***, ***Sanjeev Coke Mgd. Co.*** and ***Secy. Ministry of Chemicals and Fertilizers GoI*** (supra) to assert that the reservation in political representation is well identified as a mode of affirmative action and is in consonance with and in furtherance of constitutional mandate i.e. Article 243D of the Constitution of India. Reservation which has been done in

accordance with the statute, cannot be construed to be arbitrary, unreasonable and violative of Articles 14 and 21 of the Constitution of India so as to warrant interference of this Court.

Relying upon the cases of ***Jyoti Basu*** and ***Rakesh Kumar*** (supra), it is further contended by learned Advocate General that political participation by a citizen is neither constitutional nor a fundamental right, but at best, can be statutory right which will be subject to the reservation policy of the Government.

23. There is no dispute with regard to the provisions and the law laid down by the apex Court in the aforementioned judgments. But then, when this Court reiterated the question with regard to the relief sought by the petitioner, Mr. G. Mishra, learned counsel for the petitioner asserted in affirmative that the judgment rendered by the apex Court in ***K. Krishna Murthy*** (supra) is to be implemented in letter and spirit by the State Government so far as fixing the upper ceiling limit of 50% for reservation in respect of SC, ST and OBC in the State for election to the various local bodies.

24. Mr. S.P. Mishra, learned Advocate General contended that the judgment of the apex Court in ***K. Krishna Murthy*** (supra), being binding on the State, there is no difficulty to implement the same, but the State Government has to workout the methodology to give full effect to the judgment of the apex Court and taking into consideration the exception to the PESA Act and other similar provisions applicable to the case.

25. In view of the foregoing discussions, this Court is of the considered opinion that as per the provisions of Article 141 and 143 of the Constitution of India, the Constitution Bench judgment of the apex Court rendered in ***K. Krishna Murthy*** (supra) is binding on all concerned and the same, having been considered to be the law of the land, should be implemented in letter and spirit. In case the State Government is allowed to breach the upper limit of 50% in the vertical reservations, so far as SC, ST and OBC are concerned, the said action would be unconstitutional.

26. In the above view of the matter, the State Government is directed to act upon in compliance of the judgment of the Constitution Bench of the Supreme Court in ***K. Krishna Murthy*** (supra) in letter and spirit and see that the upper limit of reservation of seats in respect of SC, ST and OBC should not exceed 50%, of course subject to the exception provided in PESA Act and other similar provisions applicable to the case.

27. The writ petition is thus allowed. No order to costs. (Writ Petitiion allowed.)

2018 (I) ILR - CUT- 728

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

GCRLA NO.63 OF 2003

STATE OF ORISSA ……..Appellant

.Vrs.

BULA @ NARENDRA DAS & ORS. ……Respondents

CRIMINAL TRIAL – Acquittal by Trial Judge holding that the prosecution has not come of with a true case – Appeal by Govt. against the order of acquittal – Held, P.Ws. 1, 2 and 8 are the eye witnesses to occurrence – Trial Court has disbelieved their statements on a flimsy ground – Evidence of the ocular witnesses so also the medical evidence regarding the homicidal death of the deceased clearly prove the prosecution case beyond all reasonable doubt – Order of acquittal set aside – The respondents are found guilty for the offences under Sections 302/34 I.P.C. and they are sentenced to undergo imprisonment for life. (Paras 15 & 16)

For Appellant : Mr. S. S. Mohapatra, Addl. Standing Counsel

For Respondent : M/s. Devashis Panda, S. Pattnaik,S. Panda, D. Biswal and G. Mohanty.

Date of Judgment : 04.04.2018

JUDGMENT

S. PANDA, J.

This Government Criminal Appeal has been filed by the State of Orissa as the appellant challenging the judgment dated 12.09.2002 passed by the learned Addl. Sessions Judge, Jagatsinghpur in S.T. Case No.427 of 2000 acquitting all the three respondents from the charges under Sections 302/34 I.P.C.

2. The case of the prosecution is that on 14.01.1999 at about 0.15 A.M., one Pratima Behera (P.W.6), W/o. Birabar Behera lodged an F.I.R before the O.I.C, Biridi Out Post stating that on 13.1.1999 at about 9 P.M. while her husband was going to bring medicine, in front of the market complex one Sukadev Behera, Basudev Behera, Umesh @ Hipi, Gouranga, Narendra, Gola Das and others assaulted her husband. At first Sukadev Behera gave a push to the belly of her husband by means of a sword. Others also assaulted her husband from front side and also back side by means of sword. The occurrence was seen by Pratap Behera. She had also alleged that accused persons and their supporters had threatened the deceased Birabar in the last evening. Bhagabat Majhi, Damadar Sahoo and Babu Das have seen the

above occurrence. On the report of the informant Jagatsinghpur P.S. Case No.13/99 was registered. The matter was investigated and after completion of the investigation the I.O. submitted charge sheet against the accused persons and two other absconded persons under Sections 302/34 I.P.C.

3. The plea of the accused persons is one of complete denial. Their further plea was that the deceased along with others being armed with pistols set fire to the shop of one Keshaba Chandra Behera (D.W.1), as a result of which the villagers assaulted the deceased and murdered him.

4. The prosecution in order to establish the charges examined as many as ten witnesses, which includes P.W.6-the informant, P. Ws. 1, 2 and 8, the eyewitnesses to the occurrence, P.W.9 the Doctor, who conducted autopsy over the dead body and P.W.10 the I.O. to the case. The Prosecution also exhibited many documents including the FIR under Ext.3, Post Mortem Report under Ext.5 and Chemical Examination report under Ext.9. On the other hand the defence examined one Keshaba Chandra Behera as D.W.1 and proved two exhibits under Ext.A and Ext.B.

5. The learned Addl. Sessions Judge came to a conclusion that the prosecution has not come up with a true case and has miserably failed to bring home the charges against the accused persons beyond all reasonable doubt and as such the accused persons are entitled to acquittal. Accordingly the Court below held the accused persons not guilty of the offences punishable under Sections 302/34 IPC and acquitted them under Section 235 Cr.P.C. having given them the benefit of doubt and set them at liberty.

6. Learned Additional Standing Counsel submitted that the order of acquittal is against the weight of materials available on record and contrary to the proposition of law and rulings. When the evidence of all the eyewitnesses are consistent with regard to assault made by respondent no.3 by sword to the belly of the deceased and the same was also corroborated with the medical evidence, the findings of the court below is erroneous and not sustainable in the eye of law. P.Ws. 1, 2 and 8 are the eyewitnesses to the occurrence. They corroborate the material facts regarding the commission of offence by the assailants. However, the Trial Court on the basis of minor discrepancies in the statements of P.Ws. 1 and 2 with regard to the presence of P.W.8, though P.W.2 had disclosed the presence of P.W.8 as well as on an erroneous appreciation discarded the evidence adduced by the prosecution. Thus, the impugned judgment needs to be interfered with. He further submits that P.W.6 (the wife of the deceased) is the post occurrence witness and she had

stated that P.W.8 had disclosed the fact to her immediately after the assault and accordingly she rushed to the spot of occurrence. However, by that time the injured was shifted to the hospital. She also corroborates the evidence of P.W.8. The Trial Court also discarded their evidence and recorded the finding on surmises and conjectures. Therefore, the impugned order is liable to be set aside.

7. Learned counsel appearing for the respondents supported the judgment passed by the Trial Court and submitted that the evidences of witnesses as submitted by the learned Additional Standing Counsel are doubtful and they have not disclosed the truth. The defence had examined one witness. Considering the evidence in totality and also material discrepancies in the evidences of P.Ws. 1 and 2 who have shifted the injured to the hospital, the Court below has passed the order of acquittal, which need not be interfered with.

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

9. P.W.1 in his examination in chief has stated that he along with one Bhagabat Majhi was going to attend the call of nature. Hearing the *hulla* they went to the spot and by focus of their torch light they saw Uda Behera holding a gun and Kailash Bhoi holding an iron rod threatened them to murder if they come to the spot. Sukadev Behera (respondent no.3) brought out a sword and pierced in the belly of the deceased. Bula (respondent no.1) and Hipi (respondent no.2) assaulted by means of sword on his face and one Gouranga was assaulting by iron rod. The assailants left the place when people started gathering. They took the deceased to the hospital where the doctor declared him dead. In his cross-examination on recall, he told that the deceased was standing in front of him and assault was made from the front side. There were 10 to 20 blows by the sword on the face. There were also assaults from leg to head by iron rod. Bhagabat, Murali and he took the deceased to the hospital.

10. P.W.2 in his examination-in-chief has also corroborated the statements made by the P.W.1.

11. P.W.6 in his examination-in-chief stated that on the day of occurrence at about 7.00 P.M. the accused persons came to their village and threatened to kill her husband. Her husband was not in the house at that point of time and he had been to Cuttack. After he came from Cuttack, since there was pain in the belly of her son, her husband went to bring medicine from Biridi *hat*.

After some time, P.W.8 came and informed her that Suka Behera, Hipi Behera, Basudev Behera, Bula Das, Gauranga Mohanty, Kailash Bhoi, Udhaba Behera murdered her husband. P.W.8 and she came running to the spot and found her husband in the hospital. P.Ws.1, 2 and one Basu Das told her that the above noted persons murdered her husband and they have seen the murder.

12. P.W. 8, who is the other eyewitness to the occurrence, has stated that when he was in the house of the deceased, the deceased called him to go to bring medicine for his son. They both went to Biridi *hat* to bring medicine. He saw accused Sukadev Behera pushed a sword on the belly of the deceased. Hipi Behera and Bula Das were standing holding swords. Batua also standing holding a sword. Kailash Bhoi and Gouranga Mohanty were standing holding iron rods. Udhaba was holding a gun. Seeing such incident he ran to the house of his uncle and told the fact to Niranjan Behera and Minati Behera

13. The Doctor, P.W.9, who examined the deceased found the external injuries and internal injuries as follows:-
External injuries:-

Average body built. There was lacerated wound size 5”x5”x4” covering front and lower portion of the face, involving both the lips with blood clots. There was communicated fracture of both mandible and maxilla. There was an incised wound on right parietal region size 3”x2”x2” with fracture of the underlying partial bone. There was punctured wound on right lumbar size 2”x1”x6” and another on hypogastric 2”x1”x6”.
Internal Injuries:-

On dissection the lower portion of small intestine was punctured with blood cots. The right kidney was lacerated with blood cots. The bladder was punctured. The other internal organs like liver, spleen left kidney lungs were intact but pale. Heart was intact and empty. Stomach was intact and empty. The brain matter on the right parietal region was lacerated. And time since death-18 to 36 hours.

According to him the cause of death was due to shock and hemorrhage as a result of injury to the vital organs. The death is homicidal one. The injuries are ante-mortem in nature.

14. In view of the discussions made in the foregoing paragraphs, it is apparent that P.Ws. 1, 2 and 8 are the eye witnesses to occurrence. However,

while P.W.8 was with the deceased, P.Ws. 1 and 2 were at a visible distance from the spot where assault was made by the accused persons. The Court below discarded the evidence of P.Ws. 1 and 2 as their wearing apparels do not contain any bloodstain, even though they have shifted the deceased to the hospital. It is not necessary that a person, who shifts an injured to the hospital, his wearing apparel will be stained with blood. The Trial Court disbelieved their statements on a flimsy ground, thus the same is not sustainable.

15. P.W.8 also very much present at the place of occurrence along with the deceased when the assault was made by accused persons. Looking into such manner of assault, this witness rushed to the house of deceased to inform the same and to make arrangement to shift the injured to hospital. He has not disclosed the presence of P.Ws. 1 and 2 in such a grave situation, however, on that score his evidence is not to be discarded as made by the Trial Court. Accordingly, such finding of the Trial Court so far as P.W.8 is concerned is also set aside. P.W.6 before whom P.W.8 has immediately disclosed the fact also corroborates the evidence of P.W.8.

16. Taking into consideration all the above material facts along with the evidence of the ocular witnesses so also the medical evidence regarding the homicidal death of the deceased, this Court is of the opinion that the prosecution has proved the commission of crime by the respondents beyond all reasonable doubt. Hence, this Court sets aside the impugned order of acquittal. The Government Criminal Appeal is accordingly allowed. The respondents are found guilty for the offences under Sections 302/34 I.P.C. and they are sentenced to undergo imprisonment for life. They shall be apprehended to undergo the rest of the sentence accordingly. The LCR be sent forthwith.

Appeal allowed.

2018 (I) ILR - CUT- 732

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

OJC NO. 1241 OF 1995

MANAGEMENT OF S.A I.L., R.S.P. ROURKELA ……..Petitioner

.Vrs.

P.O, INDUSTRIAL TRIBUNAL, ODISHA, BHUBANESWAR & ORS. ……..Opp. Parties

INDUSTRIAL DISPUTE ACT, 1947 – Section 9A – Provision under – Notice of change – Whether payment made by the Workmen towards electricity charges in respect of Company's quarters under their occupation can be held to be a customary concession or privilege or charge in usage and if so, whether the petitioner-Management is required to give prior notice under Section 9-A of the I.D. Act to the workman likely to be affected by such withdrawal of concession or privilege or usage – Held, no, Tribunal has committed an error of law in holding that enhancement of electricity charges adversely affects the service condition and/or wages of the Workmen – Order set aside.

"Fourth Schedule of the I.D. Act provides for a notice under Section 9-A of the I.D. Act before effecting any change in wages or withdrawal of customary concession, privilege or charge in usage. The terms and conditions of service are described in the appointment order itself. Violation of any service condition entails disciplinary action against a Workman. Allotment of quarter cannot be said to be a service condition inasmuch as it is not provided to all the employees of the Management. Allotment of quarter is governed by a set of Rules of the Management. It primarily depends upon availability as well as entitlement of the Workman as per the established procedure under the Rules for such allotment. Thus, charges on the heads of allotment and use of the quarter, like rent, electricity, water or conservancy charges etc. cannot be said to be a service condition of a Workman/employee. Non-compliance of the conditions of allotment order of a quarter by an employee does not entail any disciplinary proceeding against him. It is optional for the Workman to occupy a quarter, if allotted by the Management. Thus, by no stretch of imagination, the electricity charges can ever be said to be customary concession or privilege or usage. Consequently, the provisions of Section 9-A of the I.D. Act is not attracted in the present case."

(Paras 13 & 16)

For Petitioner : Mr. Jagannath Patnaik, Senior Advocate
M/s. S.B. Nanda, B.K. Patnaik, A.K. Mishra, S.K. Mishra, A.K. Panda, A.K. Mishra-2, & P.K. Mishra.

For Opp. Parties : M/s. S.K. Nayak-1, A.K. Baral, K. Ray & S.K. Nayak-2.
Mr. M.S. Sahoo, Addl. Govt. Adv.

Date of Order : 03.04.2018

K.R. MOHAPATRA, J.

The petitioner-Management in this writ petition seeks to assail the award dated 22.12.1994 (Annexure-1) passed by learned Presiding Officer, Industrial Tribunal, Bhubaneswar (for short 'the Tribunal) in I.D. Case No. 27 of 1985.

2. The term of reference for adjudication before learned Tribunal was as follows:

"Whether the enhancement of electric charges for domestic consumption of the Workmen employed by the SAIL, Rourkela Steel Plant, Rourkela on and from 1.4.1982 is legal and/or justified? If not, to what relief, the Workmen are entitled to?"

3. Learned Tribunal upon consideration of the materials on record answered the reference in favour of second party-Workmen holding that the issue of circulars and realization of the energy charges at a higher rate and not providing subsidy is a change in condition of service and when the Management has not complied with the provisions under Section 9-A of the Industrial Disputes Act, 1947 (for short 'the I.D. Act') before enhancing the electricity chargers, the aforesaid action of the Management is neither legal nor justified. Learned Tribunal further held that the circulars vide Ext.1/T and subsequent circulars in the same line are neither valid nor enforceable and the energy charges are to be realized at the rate which was being realized from the workers/occupiers of the quarters prior to issue of the impugned circulars. It may be stated here that the date mentioned in the schedule of reference should be '01.04.1981' in place of '01.04.1982', as the impugned circular was issued on 31.03.1981 and the enhanced rate of electricity charges was made applicable with effect from 01.04.1981.

4. Although by efflux of time as well as the change in policy of the Management in the interregnum, the issue involved in this case has lost its importance, but in view of the submission of learned counsel for the opposite party no.3-Union that some beneficiaries of the impugned award are still in service and are entitled to the benefit of the impugned award, we feel it necessary to delve into the issue and test the legality and propriety of the impugned award under Annexure-1.

5. Briefly stated, on 12.9.1960, the Hindustan Steel Ltd. (for short 'HSL') entered into an agreement (Annexure-3) with the State Government in respect of supply of electricity for operation of the Steel Plant at Rourkela. The said agreement was for a period of 10 years with a deeming provision of renewal for a further period of 10 years at a time. The price of supply of electricity was fixed at 2np (Naya Paise) per K.Wt. along with other terms and conditions. On 2.12.1960, the HSL issued a circular to all its employees occupying quarters provided by HSL that electricity supply to all the residential accommodation shall be done at the rate of 7np per unit with effect from 1.1.1961 (Annexure-4). On 29.6.1961, permission under Section 28 of the Indian Electricity Act, 1910 was granted to HSL for distribution of its power from its own Captive Power Plant to the quarters of employees. As such, supply of electricity to the residential accommodation of the employees

was made at a price of Rs.7np per unit. In the offer of appointment (sample copy at Annexure-8), it has been provided in Clause-6 that:

"You may be allotted a quarter for your residence in your due turn in accordance with the House Allotment Rules of the Company as applicable from time to time. In the event of a quarter having been allotted to you, you will be liable to pay rent, electricity charges, conservancy charges and other charges or damages in respect of the quarter according to the Rules of the Company in force from time to time. Your acceptance of this Offer of Appointment would be treated as your authorization for deduction of the above rents, charges and damages." (emphasis supplied)

6. In the year, 1964, i.e. on 25.5.1964, the State Government issued a letter for levy of duty under the Orissa Electricity Duty Act, 1961, wherein it has been provided that such duty shall be recovered basing upon the price charged by HSL to its consumers and accordingly, the HSL charged its employees in occupation of quarters at the rate of Rs.8.05 paise per unit, which included 7 paise towards electricity charges and 15% thereof, i.e. Rs.1.05 paise, as duty levied under (Annexure-11).

7. It is the case of the petitioner-Management that the Workmen of SAIL/HSL in occupation of the quarters were always paying energy charges higher than that being paid by SAIL to OSEB (the supplier) till 1979. On 17.10.1979, the State Government by virtue of the gazette notifications vide Exts. P and N enhanced the energy supply charges to 75 paise for its own domestic consumers and also enhanced the rate for supply of energy to RSP up to 25.5 paise inclusive of duty. Accordingly, the HSL/SAIL vide circular dated 30/31.3.1981 (Annexure-16) (Ext.1/T) enhanced the energy charges for its employees occupying Company's quarters. The opposite party no. 3-Union protested the same under Annexure-17 (Ext.2). On failure of conciliation, the matter was referred to learned Tribunal and the impugned award under Annexure-1 has been passed.

8. Learned counsel for the petitioner argued that payment of electricity charges is not a condition of service and accordingly, enhancement of charges and change in mode of calculation of charges levied upon the occupants of the quarters does not attract rigours of Section 9-A of the I.D. Act. In an identical matter i.e. in respect of Management of Barsuan Iron Ore Mines, which was also under the administrative control of said RSP, Rourkela, the very same circular dated 31.3.1981 (Ext.1/T) was in question and the learned Tribunal in its award dated 30.3.1993 held that payment of

electricity charges is not a condition of service. Such award remained un-assailed and reached its finality. Allotment of quarter to an employee does not come within the purview of conditions of service of a Workman. The allottee (Workman) is a licensee vis-à-vis such allotment and governed under the House Allotment Rules of the Company. The quarter is allotted to an employee subject to its availability and turn of the employee/workman for allotment. Allotment of quarter and the conditions thereof are governed under provisions of House Allotment Rules of RSP. As such, it can never said to be a condition of service of a workman. When the electricity charges are revised basing upon the enhancement of charges by the supplier, the same cannot be termed as an adverse change in condition of employment, inasmuch as on and from the very first day of allotment of the quarters, no subsidy was allowed to any workman. The quarter allotment rules does not provide for any subsidy in energy charges to be granted to the employees. Further, the electricity charges on a licensee (Workman allotted with a quarter) cannot be said to form a part of the "Wages" defined under Section 2(rr) of the I.D. Act and any revision on the same cannot be called as wage revision adversely affecting the employee. When all the employees of Rourkela Steel Plant have not been allotted with quarters, neither allotment of quarter nor the electricity charges meant for the said quarter can be treated to be a service condition or wages under the provisions of the I.D. Act. Accordingly, learned counsel for the petitioner-Management submitted that learned Tribunal although passed an exhaustive award, has misconstrued the provisions of Section 9-A as well as Section 2(rr) of the I.D. Act, which renders the impugned award under Annexure-1, not sustainable in law. Hence, he prays for setting aside the impugned award under Annexure-1.

9. Learned counsel for the opposite party no. 3, on the other hand, submits that learned Tribunal on the basis of the evidence adduced and the materials available on record as well as the submissions made by the parties to the reference passed the impugned award, which is not open to be challenged in exercise of power under Article 227 of the Constitution of India. There is neither any error apparent on the face of the record nor there is any material irregularity or patent illegality in the impugned award. As such, this writ petition is liable to be dismissed. The workmen occupying the Company's quarters were being charged at a concessional rate of 8.05 paise per unit towards electricity charges for long 20 years, commencing form 1961 to 1981, when the Company purchased the electricity from OSEB at a much higher rate. All on a sudden, the petitioner-Management vide circular

dated 31.03.1981 enhanced the electricity charges unilaterally from 8.05 paise to 32 paise per unit without complying with the provisions of Section 9-A of the I.D. Act. The electricity charges was further enhanced vide another circular dated 1.4.1983. The electricity charges were being deducted from the wages of the Workmen. Thus, deduction of electricity charges at a higher rate amounts to reduction in the wages of the Workmen, which affects the workmen adversely. It is a privilege/subsidy, which was being granted for more than two decades and was withdrawn without complying with the provisions of Section 9-A of the I.D. Act, which renders the issuance of circular under Annexure-16 (Ext.1/T) illegal and unjustified. It is further contended that the award passed in the case of Barsuan Iron Ore Mines in I.D. Case No.2/82(C) was on a different consideration and that relates to the issue regarding change of electricity charges from point basis to unit basis. Thus, the award passed in the case of Barsuan Iron Ore Mines has no application to the present case.

10. Learned counsel for the opposite party no.3-Union also referring to the cross-examination of M.W.1 submits that the said witness, who was none other than the Superintendent of Power Distribution Department in Rourkela Steel Plant, has categorically deposed in his evidence that though tariff rate of OSEB from 1961 to 1981 had gradually gone up, but the petitioner-Management till the end of March, 1981, was charging at a rate of 8.05np from its employee. The OSEB was collecting 50.23 paise from the Management of Rourkela Steel Plant till the end of March, 1981. Thus, he submitted that in view of their own admission (of the Management) through their witness that the employees of RSP were required to pay electricity charges at a concessional rate, the contention of the petitioner cannot be accepted. Hence, he contended that learned Tribunal has committed no error either on fact or law holding that the circular for enhancement of the electricity charges as per Ext.1/T is not legal or justified and prayed for dismissal of the writ petition.

11. Heard Mr. J. Pattnaik, learned Senior Advocate along with D.P. Nanda, learned counsel appearing for the petitioner and Mr. Nayak, learned counsel for the opposite party no.3-Rourkeal Mazdoor Sabha representing Workmen of Rourkela Steel Plant and perused the materials on record including the pleadings of the parties.

12. The statement of M.W.1 as relied upon by the opposite party no. 3-Union, is neither based on any pleadings nor material on record. Hence, the same cannot be accepted to be an admission by the petitioner-Management.

13. The sole issue that requires for consideration by this Court is whether payment made by the Workmen towards electricity charges in respect of Company's quarters under their occupation can be held to be a customary concession or privilege or charge in usage and if so, whether the petitioner-Management is required to give prior notice under Section 9-A of the I.D. Act to the workman likely to be affected by such withdrawal of concession or privilege or usage.

Section 9-A of the I.D. Act reads as follows:

> *"**9A. Notice of change**- No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change,-*
>
> *(a) without giving to the workmen likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or*
>
> *(b) within twenty-one days of giving such notice: Provided that no notice shall be required for effecting any such change—*
>
> *(a) where the change is effected in pursuance of any settlement or award; or*
>
> *(b) where the workmen likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification,Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defence Services (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette, apply."*

'Conditions of service' has not been defined under I.D. Act. However, Fourth Schedule of the I.D. Act, provides the instances of conditions of service, change of which requires a prior notice under Section 9-A of I.D. Act. Relevant portion of Fourth Schedule reads as follows:

"**FOURTH SCHEDULE**
(See Section 9-A)
CONDITIONS OF SERVICE FOR CHANGE OF WHICH NOTICE IS TO BE GIVEN.

1. Wages, including the period and mode of payment;

2 to 7. xxx xxx xxx

8. Withdrawal of any customary concession or privilege or change in usage;

9 to 11. xxx xxx xxx"

Fourth Schedule of the I.D. Act provides for a notice under Section 9-A of the I.D. Act before effecting any change in wages or withdrawal of customary concession, privilege or charge in usage. The terms and conditions of service are described in the appointment order itself. Violation of any service condition entails disciplinary action against a Workman. Allotment of quarter cannot be said to be a service condition inasmuch as it is not provided to all the employees of the Management. Allotment of quarter is governed by a set of Rules of the Management. It primarily depends upon availability as well as entitlement of the Workman as per the established procedure under the Rules for such allotment. Thus, charges on the heads of allotment and use of the quarter, like rent, electricity, water or conservancy charges etc. cannot be said to be a service condition of a Workman/employee. Non-compliance of the conditions of allotment order of a quarter by an employee does not entail any disciplinary proceeding against him. It is optional for the Workman to occupy a quarter, if allotted by the Management.

14. Learned counsel for the opposite party no.3 referring to Clause (1) of Fourth Schedule of I.D. Act submitted that enhancement of electricity charges amounts to reduction of wages as the electricity charges in respect of the quarters in occupation of a workman, is deducted from his wages at the end of the month. Thus, notice under Section 9-A of the I.D. Act was inevitable before such change in the wages was given effect to.

> The "wages" as defined under Section 2(rr) is as follows:
>
> *"2(rr). "**wages**" means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes-*
>
> *(i) such allowances (including dearness allowance) as the workman is for the time being entitled to;*
>
> (ii) *the value of any house accommodation, or of supply of light, water, medical attendance or other amenity* or of any service or of any *concessional supply of food-grains or other articles*……". (emphasis supplied)

15. As discussed earlier, allotment of quarter is always subject to availability and entitlement of a Workman. The charges for such occupation including the electricity charges are governed under the House Allotment Rules of the Management. Allotment of a quarter by the Management is neither expressly or impliedly provided in the terms and conditions of appointment. Thus, house rent, electricity charges etc. cannot form a part of wages. It has also been made clear in the letter of appointment that in the

event of a quarter having been allotted to the Workman, he would be liable to pay rent and electricity charges etc. in respect of the quarter according to the Rules of the company in force from time to time. As opted for, the electricity charges are being deducted from the wages of a Workman in terms of the order of allotment of the quarter, who can only assume the status of a licensee to occupy the quarter. The Workman allotted with a quarter being a licensee cannot claim such charges to be part of wages even if, house rent and electricity charges deducted from his wages.

16. On perusal of the oral as well as documentary evidence on record, it is clear that the Workmen of RSP were required to pay electricity charges at a higher rate than the rate of supply of electricity by OSEB. It is only for two years, i.e. in between 1979 to 1981, the charges for supply of electricity become equal or higher than the rate of electricity charges imposed upon the workmen of RSP. Further, the petitioner-Management in its written statement has clearly provided that details of the electricity duty being paid by the Management to OSEB. Documentary evidence in support of the same has also been filed, which reveals a clear picture that the Workmen were never supplied electricity at a concessional rate. This vital aspect has been completely brushed aside by learned Tribunal. The Workmen although claimed that the electricity to their quarters was being supplied at a concessional rate, no document/material in support of the same has been filed by the Workmen. Thus, by no stretch of imagination, the electricity charges can ever be said to be customary concession or privilege or usage. Consequently, the provisions of Section 9-A of the I.D. Act is not attracted in the present case.

17. In that view of the matter, learned Tribunal has committed an error of law in holding that enhancement of electricity charges adversely affects the service condition and/or wages of the Workmen.

18. In the result, this writ petition succeeds. The impugned award under Annexure-1 is set aside.

2018 (I) ILR - CUT- 740

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

W.P.(C) NO. 15392 OF 2011

AJAY KUMAR BEHERA ……..Petitioner

.Vrs.

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

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227– Writ petition – Delay and Latches – The petitioner challenges the selection of the year 1988 in 2008 and prays for extension of the benefit of the judgment passed in OA No.206 of 1989 which was confirmed by Supreme Court in 2002 – The petitioner thereafter only made representations and lastly filed OA in 2008 – The issue of limitation raised by state not properly dealt with – Direction of Tribunal in OA cannot be a fresh cause of action for the petitioner to agitate his grievance which has become stale by the time of filing of the Original Application – As such, entertaining an application after two decades after the initial cause of action shows the latches on the part of the petitioner – Tribunal's order set aside. (Para 8)

(B) Service – Direction for disposal of representation after two decades – Effect of – held, Law is well-settled in the case of *C. Jacob Vs. Director of Geology Min.Indus.Est. & Anr.,* reported in (2008) 10 SCC 115 that direction for disposal of representation will not give rise to a fresh cause of action to maintain an Original Application before the Tribunal seeking for a relief which has become stale.

(Para 8)

For Petitioner : M/s. Ashok Ku. Mohanty, Mr. Biswal, N.R. Mohanty & P.K. Dalai

For Opp. Parties : Mr. M.S. Sahu, Addl. Govt. Adv.

Date of Judgment : 06.04.2018

JUDGMENT

K.R. MOHAPATRA, J.

One Sri Ajay Kumar Behera as well as the State of Odisha have filed W.P.(C) No.15392 of 2011 and W.P.(C) No.17011 of 2012 respectively, assailing the legality and propriety of order dated 08.04.2011 passed by the learned Tribunal in O.A. No.211 of 2010.

2. Since both the writ petitions involve similar facts and law, these are taken up together for hearing and disposal. For the sake of convenience, Sri Ajay Kumar Behera is hereinafter referred to as petitioner and the functionaries of State Government are referred to as opposite parties.

3. Grievance of the petitioner in O.A. No.211 of 2011 was that pursuant to a recruitment test held on 21.08.1984 for the post of Junior Assistant in the office of the Director General of Police Orissa, (DGPO), petitioner-Ajay Kumar Behera was duly selected and was appointed as Junior Assistant on 29.09.1984 on *ad hoc* basis. While continuing as such, another recruitment

test was conducted to fill up 56 posts of Junior Assistant on regular basis on 25.06.1985. The petitioner although qualified in the written test, but was not called to appear in the *viva voce* conducted in November, 1986. Consequently, the petitioner along with other Junior Assistants, who were continuing on *ad hoc* basis, were discharged from service with effect from 06.12.1986 pursuant to order dated 03.12.1986. Being aggrieved, some of the retrenched employees (not the petitioner) filed O.A. Nos. 246 of 1986 and 96 of 1987 praying *inter alia* to quash the termination order. The said Original Applications were disposed of vide order dated 25.08.1987 with a direction to allow the applicants therein to continue as such till the posts are filled up through regular recruitment test to be held in conformity with the procedure/instructions governing the field. The said order of learned Tribunal was challenged by the State of Odisha before the Hon'ble Supreme Court, which was dismissed vide order dated 19.01.1988 and the order of learned Tribunal was confirmed. It is apt to note that earlier recruitment to the post of Junior Assistant of Ministerial Cadre in the Police Head Quarters and in other Departments of Government of Odisha was governed by the Orissa Ministerial Service (Method of Recruitment) of Junior Assistant in office of the Heads of Departments Rules, 1975. In the year 1980, the Director General of Police requested the Government to exempt his office from application of the said Rules. Thus, the State Government desired the DGPO to submit draft Rules for consideration and in the interregnum, some appointments like the petitioner was made during 1981 to 1988. Subsequently, Orissa Ministerial Officers of the Office of the Director-General and Inspector-General of Police and Certain other Offices (Method of Recruitment and Conditions of Service) Rules, 1988 (for short, 'the Rules, 1988') came into force. Recruitment test was held in the year 1988 in terms of the Rules, 1988. The petitioner along with other employees who were continuing on *ad hoc* basis also faced the selection process. Some of the unsuccessful employees (not the petitioner) challenged their termination in O.A. No. 1179 of 1988 and O.A. No.206 of 1989 and similar other Original Applications. When O.A.No.206 of 1989 was pending, O.A.No.1179 of 1988 was disposed of vide order dated 22.10.1990 quashing the termination order and treating the applicants therein (12 in numbers) deemed to be continuing in service from their initial date of appointment, i.e., 20.12.1986 without any break. Similar other Original Applications were also disposed of along with the same. The State-opposite parties assailed those orders in different Special Leave Petitions, which were dismissed on the ground of delay. After dismissal of the Special Leave Petitions, the applicants in O.A No.1179 of 1988 were issued with

appointment orders on 27.11.1991. Subsequently, O.A. No.206 of 1989 was taken up for hearing. Although the applicants in OA No.206 of 1989 stood in a similar footing with applicants in O.A. No.1179 of 1988, learned Tribunal took a different view in OA No.206 of 1989 and disposed of the same vide order dated 03.01.1997 directing as under:-

> "(i) Candidates who have been appointed by the Director General and Inspector General of Police between the years 1981 and 1988 before the rules came into force are to continue on ad hoc basis and cannot be treated to have been validly recruited to be appointed on regular basis when State Government did not approve the proposal of the Director General and Inspector General of Police to regularize them.
>
> (ii) Decision of the Tribunal treating those appointments to be on regular basis without taking note of pendency of this application and incorrectly distinguishing the decision of the Supreme Court would not be binding on the Respondents and thus, the decision cannot give any benefit to the successful parties.
>
> (iii) Result of the recruitment examination held in which the applicants and many others appeared has to be verified again. Those who satisfy the requirement of the rules are to be considered to have been selected and shall be given appointments. They will be senior to the candidates who have been allowed to continue on ad hoc basis.
>
> (iv) In respect of others, a special test under the statutory rules shall be held for their regular appointment.
>
> (v) Since applicants have suffered for about eight years and irregular appointees are continuing for about 15 years, I direct that the entire process as directed shall be completed within six months from the date of receipt of this order by the Director General and Inspector General of Police (Respondent No.2).Respondent No.1 shall regulate the implementation of this order within the time stipulated."

4. Being not satisfied, one Ajay Kumar Bhuyan and four others (respondent Nos.10, 11,14,15 and 24 in OA No.206 of 1989) filed a Review Petition bearing R.P. No.17 of 1997, which was dismissed vide order dated 01.03.1997. Being aggrieved, said Ajay Kumar Bhuyan and others as well as the State-Opposite parties moved the Hon'ble Supreme Court against the orders passed in OA No.206 of 1989 as well as in Review Petition bearing RP No.17 of 1997, by filing separate Civil Appeals, which were dismissed vide order dated 03.12.2002 by Hon'ble Supreme Court. Hon'ble Supreme Court while dismissing the Civil Appeals also deprecated the earlier orders passed in OA No.1179 of 1988 and similar other Original Applications disposed of in terms of OA No.1179 of 1988. Due to non-compliance of the order passed in O.A. No. 206 of 1989, Contempt Petition in C.P. No. 49 (C) of 2003 was filed. In the contempt proceeding, State-opposite parties took a stand that pursuant to the direction in O.A. No. 206 of 1989, the authorities

have verified the result of recruitment in between 1981 to 1988 and had implemented the order of learned Tribunal in its letter and spirit. On the basis of the submissions made by learned State Counsel, the contempt proceeding was dropped. W.P.(C) No.8076 of 2005 filed assailing the order passed in contempt proceeding was dismissed vide order dated 18.04.2006. It may be appropriate at this place to note that after disposal of O.A. No.206 of 1989, which was confirmed by Hon'ble Supreme Court, the petitioner filed several representations, which remained un-attended. Hence,he filed O.A. No.377(C) of 2008, which was disposed of on 27.03.2008 with a direction to send the paper book in the said Original Application to the authorities to consider his grievance. Consequently, the representation of the petitioner was rejected on 03.02.2009, which was assailed in O.A. No.211 of 2010. Learned Tribunal considering the rival contentions of the parties, disposed of the Original Application, vide order dated 08.04.2011 with direction as under:-

> "19. We therefore, hold that the applicant stands selected in the recruitment and direct that he be given appointment to the post of junior assistant.
>
> It appears that the seniority list of such recruited candidates has been prepared, whether they were ad hoc appointed candidates or open market candidates. So, the applicant be placed below the persons, who have been appointed/recruited pursuant to the recruitment test held on 22.06.88. So, the applicant is entitled to get his service seniority accordingly, except the pay and allowances.
>
> We make it clear that this order is passed for and is applicable to the present applicant only.
>
> The O.A. is disposed of accordingly.
> No order as to cost."

The same has been assailed by both the petitioner and State of Odisha in W.P.(C) No.15392 of 2011 and W.P.(C) No. 17011 of 2012 respectively.

5. It is submitted by learned counsel for the petitioner (Sri Ajay Kumar Behera) that learned Tribunal on consideration of rival contentions of the parties, came to a categorical conclusion that persons, who secured nominal marks both in individual papers and in aggregate without being called for viva voce test, were given appointment. Likewise, many candidates who secured less than 33% mark (after relaxation) in individual papers were called for viva voce test and were given appointment, whereas many candidates like that of the petitioner, who secured more than pass marks in each paper and more than 40% of marks in aggregate have been denied appointment. Learned Tribunal, on consideration of materials on record, although found that the Director General of Police had wrongly interpreted the Rules in an

arbitrary manner giving rise to appointment of less qualified and less meritorious candidates, but most erroneously directed to place the petitioner below the persons appointed pursuant to the recruitment test dated 22.06.1988. In fact, the petitioner is entitled to be placed above the candidates, who secured less marks. Such a finding is not sustainable in the eyes of law and the petitioner is entitled to be placed above the persons who have been recruited on 22.06.1988.

6. Learned State Counsel referring to the contentions raised in W.P.(C) No.17011 of 2012, assailed the order in O.A. No.211 of 2010 stating that the Original Application was hopelessly barred by time. The Original Application was also hit by principles of *res judicata* as the contentions raised by learned counsel for the petitioner had already been agitated and decided in Original Application in O.A. No.206 of 1989 and subsequently confirmed byHon'ble Supreme Court. Appointment pursuant to recruitment test dated 22.06.1988 has been challenged in O.A. No.211 of 2010, after more than 12 years. Even if the petitioner claims similar benefit as that of the candidates selected pursuant to the selection test dated 22.06.1988, he should have approached learned Tribunal within a reasonable time. Having not done so, the Original Application is barred by limitation. Even otherwise, learned Tribunal could not have reopened the issue settled pursuant to the direction in OA No.206 of 1989 and subsequent proceedings. The petitioner has never challenged his termination order at any point of time before 2008. Hence, he prayed for dismissal of the Original Application.

7. We have heard learned counsel for the parties and perused the materials on record including the impugned judgment. Pursuant to directions made in OA No.206 of 1989, disposed of on 03.01.1997, Ajay Kumar Bhuyan and others including State of Odisha filed two separate Civil Appeals before the Hon'ble Supreme Court and the Hon'ble Supreme Court, vide order dated 03.12.2002, rejected the said Civil Appeals and confirmed the order passed in OA No.206 of 1989. The petitioner (Sri Behera) had never challenged his order of termination at any time. It is only after disposal of the SLPs in Supreme Court on 03.12.2002, he woke from his great slumber and filed representations for extending the benefit of said judgment in his favour. For non-disposal of his representations, the petitioner had approached the learned Tribunal in OA No.377(C) of 2008, which was disposed of on 27.03.2008 with an innocuous direction to send the paper book in the said Original Application to the authorities to consider his grievance. Subsequently, the representation of Sri Behera was rejected on 03.02.2009.

Assailing the same, the petitioner had filed Original Application bearing O.A. No.512(C) of 2009 before the Cuttack Bench of learned Tribunal, which was subsequently transferred to the Principal Bench at Bhubaneswar of the learned Tribunal and renumbered as OA No.211 of 2010.

8. Be that as it may, the petitioner essentially seeks to challenge the selection of the year 1988 and for extension of the benefit of the judgment passed in OA No.206 of 1989, in his favour, which was subsequently confirmed by Hon'ble Supreme Court by judgment dated 03.12.2002. On perusal of record, it appears that the petitioner thereafter had only made representations to the authorities for redressal of his grievance and lastly filed OA No.377(C) of 2008. Direction of learned Tribunal in OA No.377(C) of 2008 cannot be a fresh cause of action for the petitioner to agitate his grievance, which has become stale by the time of filing of the said Original Application.

Law is well-settled in the case of ***C.Jacob Vs. Director of Geology Min.Indus.Est. & Anr.,*** **reported in (2008) 10 SCC 115** that direction for disposal of representation will not give rise to a fresh cause of action to maintain an Original Application before the learned Tribunal seeking for a relief which has become stale. It appears that the State authorities raised the issue of limitation before the learned Tribunal, which has not been properly dealt with. Learned Tribunal holding that the cause of action of the petitioner arose after disposal of his representation only on 03.02.2009, directed for reinstatement of the petitioner. The finding of the learned Tribunal to the effect that the Original Application in OA No.211 of 2010 is in time, is erroneous, inasmuch as the same is hopelessly barred by time. As held by learned Tribunal more than two decades have passed by the time the selection of 1988 was challenged. As such, entertaining an application after two decades after the initial cause of action shows the latches on the part of the petitioner. As such, the order passed in OA No.211 of 2010 is not sustainable in the eyes of law and is liable to be set aside.

9. Accordingly, the impugned order dated 08.04.2011 passed by learned Tribunal in OA No.211 of 2010 is set aside. Consequently, W.P.(C) No.17011 of 2012 filed by the State of Odisha succeeds and W.P.(C) No.15392 of 2011 filed by Sri Ajay Kumar Behera is dismissed holding that OA No.211 of 2010 was barred by limitation. Ordered accordingly.

2018 (I) ILR - CUT- 747

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

W.P. (C) NO. 203 OF 2017 WITH BATCH

PRAFULLA BHAISAL & ORS. ……..Petitioner

.Vrs.

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

(A) LAND ACQUISITION ACT, 1894 – Section 4(1) – Notification – Proceeding under – Rejection of the claim of the petitioners for providing employment to one member of each displaced family – Challenge thereof – Decisions of the Rehabilitation & Periphery Development Advisory Committee to provide one-time cash benefit in lieu of employment for the displaced families, as there is no scope for employment – Some of the displaced persons have already accepted the cash benefit and the benefit of a model resettlement colony having required infrastructure and amenities – Rejecting the claim of employment not interfered. (Paras 16,17 &18)

(B) LAND ACQUISITION ACT, 1894 – Section 4(1) – Notification – Proceeding initiated in 2010 – None of the petitioner had ever objected to such acquisition and all of them have already accepted the compensation amount awarded in respect of their acquired lands without any protest – Held, the petitioners cannot be now permitted to raise the plea with regard to the legality and validity of the acquisition proceeding at this highly belated stage.

"There is no dispute that the land acquisition proceeding in respect of village Manoharpur had been initiated way back in March 2010. None of the petitioner had ever objected to such acquisition and all of them have already accepted the compensation amount awarded in respect of their acquired lands without any protest except in 2 cases, where the awarded compensation amount has been deposited in the Civil Court due to *inter se* dispute between the claimants. Even in the earlier 46 writ petitions filed by the petitioners and others, no challenge was made to the acquisition proceeding and the only prayer of the petitioners in those writ petitions was to direct OPGC (opposite party no.5) to extend all the benefits of rehabilitation and resettlement to the petitioners, including employment to at least one member of the displaced family, as provided for mining projects under R & R Policy, 2006. Therefore, the petitioners cannot be now permitted to raise the plea with regard to the legality and validity of the acquisition proceeding at this highly belated stage." (Para 21)

Case Laws Relied on and Referred to :-

1. (2014) 9 SCC 516 : Manohar Lal Sharma v. Principal Secretary & Ors.
2. AIR 2009 Madhya Pradesh 26 : Naresh Singh & Ors. etc. v. Union of India & Ors.

For Petitioners : M/s. U.K. Samal, C.D. Sahoo, S.P. Patra, S.Naik and M.R. Mohapatra,

For Opp. Parties : Addl. Govt. Advocate

Mr. Sanjit Mohanty, Sr. Advocate & N. Panda-1, M.K. Panda,

Date of Order: 02.04.2018

ORDER

S.C. PARIJA, J.

This batch of writ petitions has been filed by the villagers of Manoharpur in the district of Sundargarh, praying for quashing of the letter of Odisha Power Generation Corporation Ltd. (opposite party no.5), dated 26.7.2016 (Annexure-3), rejecting the claim of the petitioners for providing employment to one member of each displaced family and the decisions of the Rehabilitation & Periphery Development Advisory Committee (opposite party no.2), dated 19.1.2016 (Annexure-4), deciding to provide one-time cash benefit in lieu of employment for the displaced families, as there is no scope for employment. Alternatively, the petitioners have prayed for quashing of the land acquisition proceeding initiated under the notification dated 02.3.2010, as per Annexure-1.

2. Learned counsel for the petitioners submitted that as the petitioners have lost their cultivable as well as homestead lands in the process of acquisition and they come within the definition of 'displaced family', one member of each family is entitled to employment as per the Odisha Resettlement and Rehabilitation Policy, 2006 ("the R & R Policy, 2006" for short). It was submitted that the lands of the petitioners having been acquired for coal mining, which was initially allotted in favour of Odisha Power Generation Corporation Ltd ("OPGC" for short) and subsequently has been allotted to Odisha Coal and Power Corporation Ltd. ("OCPL" for short), the project proponent cannot decline to provide employment to the member of displaced family on the plea that such employment is not possible, as the entire mining activity is to be carried out through a Mine Developer & Operator/Mine Operator ("MDO/MO" for short). It was submitted that the allotment of the coal blocks initially made in favour of OPGC and now allotted to OCPL is regulated through Coal Mines (Special Provisions) Act, 2015 and the basic/primary function of the allottee cannot be entrusted to a third party, so as to deny employment to the petitioners. It was submitted that the petitioners having lost all their lands, both agriculture and homestead in the acquisition proceeding, they are left with no source of livelihood and therefore, they are entitled to employment in the mining operation under the project proponent, who cannot be permitted to avoid their legal liability by offering cash compensation in lieu of such employment, on the plea that providing employment is not possible.

3. In the alternate, learned counsel for the petitioners submitted that the acquisition of the petitioners' lands as per the notification dated 02.3.2010, under Annexure-1, is illegal and without jurisdiction, as the same is not permissible in law. It was submitted that as the lands of the petitioners contain coal deposits, the same can only be acquired through the provisions of Coal Bearing Areas (Acquisition and Development) Act, 1957 ("1957 Act" for short). It was submitted that in the instant case, the acquisition of the petitioners' lands in village Manoharpur by the State Government under the Land Acquisition Act, 1894 ("L.A. Act" for short), is wholly illegal and without jurisdiction. It is reiterated that once the land in question is found to have deposits of coal, the same can only be acquired under the provisions of 1957 Act. In this regard, learned counsel for the petitioners has relied upon a decision of the Division Bench of Madhya Pradesh High Court in ***Naresh Singh & Ors. etc. v. Union of India & Ors.,*** AIR 2009 Madhya Pradesh 26, wherein it has been held that acquisition by the State of unworked land containing or likely to contain coal deposits or of rights in or over such land comes within the ambit of the 1957 Act and the provisions of the L.A. Act will not apply.

4. Accordingly, it was submitted that if the project proponent is not in a position to provide employment to the petitioners as per the R & R Policy, 2006, the acquisition proceeding initiated in respect of the petitioners' lands be quashed and fresh proceeding under the 1957 Act be initiated, providing all benefits to the land losers, as has been prescribed therein.

5. Learned counsel for the State with reference to the averments made in the counter affidavit submitted that all the benefits provided under the R & R Policy, 2006, have been duly extended to the petitioners. As regard the claim of the petitioners for providing employment to one member of each "displaced family", it was submitted that the R & R Policy, 2006 itself provides that where such employment cannot be provided because of reason to be explained in writing, cash compensation, as has been prescribed, shall be provided to such families. In the instant case, the project proponent (OCPL) having given in writing that it has decided to engage MDO/MO for carrying out mining work and therefore, there is no scope to provide direct employment to the displaced persons. Be that as it may, as per the R & R Policy, 2006, the project proponent has decided to provide double the compensation amount provided under the R & R Policy, 2006, in lieu of employment. In this regard, it was submitted that the R & R Policy, 2006, provides for cash compensation of Rs.7,47,000/-, whereas OCPL has offered

to pay Rs.15,00,000/- as compensation in lieu of employment. It was submitted that in view of such fact that OCPL will not be undertaking any mining activity and the entire mining work is to be executed by engaging MDO/MO, there is no scope to provide employment to the displaced persons, the Rehabilitation & Periphery Development Advisory Committee ("RPDAC" for short), in its 4th meeting held on 19.01.2016, for Manoharpur Coal Mine Project, Hemgir, decided that there being no scope for employment, one-time cash benefit in lieu of employment be provided for the displaced families, which cannot be faulted.

6. Coming to the challenge of the petitioners to the land acquisition initiated under the L.A. Act, learned counsel for the State submitted that the petitioners had never challenged the land acquisition proceeding which had been initiated way back in March, 2010. Moreover, all the petitioners have already received the awarded compensation amount in respect of their acquired land without any objection since long. Further, many of the co-villagers have also received the rehabilitation and resettlement benefits under the R & R Policy, 2006, and have vacated their lands and shifted to the resettlement colony. It was submitted that some of the present petitioners and other villagers of Manoharpur had approached this Court earlier by way of 46 nos. of writ petitions, praying for a direction to the OPGC (opposite party no. 5), to extend the benefits under the R & R Policy, 2006, and this Court vide common order dated 18.3.2016, disposed of all the 46 writ petitions granting liberty to the petitioners therein to approach OPGC (opposite party no.5), regarding grant of benefits under the R & R Policy, 2006. No challenge has ever been made to the land acquisition proceeding. Therefore, the petitioners cannot be now permitted to raise a plea regarding the validity of the acquisition proceeding at this belated stage.

7. As regard the plea of the petitioners regarding application of the 1957 Act for the purpose of acquiring coal bearing land, learned counsel for the State submitted that the Manoharpur and Dip-side of Manoharpur coal blocks in the district of Sundargarh had been initially allotted by the Central Government in favour of OPGC under the provisions of the Coal Mines (Nationalisation) Act 1973 ("CMN Act" for short), as the OPGC was a Government Company. The said allocation had been made under Government Company dispensation as per the provisions of section 3 (3)(a)(i) of the CMN Act and the mining lease was required to be executed by the State Government and OPGC under the Mines and Minerals (Development and Regulation) Act, 1957 ("MMDR Act" for short) and the

mining operation was required to be carried out under the provisions of section 4 of the MMDR Act 1957, upon execution of the mining lease under the said Act. It was accordingly submitted that when a coal mine is allotted in favour of an allottee under the CMN Act, who is required to apply for lease before the State Government under the MMDR Act 1957, the private land within the leasehold area has to be acquired under the L.A. Act and not under the 1957 Act. It is submitted that private land in village Manoharpur was acquired by the State Government for OPGC under the provisions of the L.A. Act, after disbursement of the compensation as per the award made and the possession of the land was taken over and the same vested absolutely in the State Government, free from all encumbrances, as per Section 16 of the L.A. Act, 1894.

8. Learned counsel for the State submitted that the 1957 Act provides for acquisition of land bearing coal by the Central Government or Government Company authorized under Section 11 of the said Act. In the present case, the allotment of coal mines having been made under the CMN Act, the provisions of 1957 Act is not applicable.

9. Learned counsel for the State submitted that initially allotment of the coal mines in favour of OPGC along with other similar allotments were challenged before the Hon'ble Supreme Court in W.P.(Crl.) No.120 of 2012 and the Hon'ble Supreme Court vide its judgment dated 24.8.2014, in ***Manohar Lal Sharma v. Principal Secretary and others,*** (2014) 9 SCC 516, cancelled the allocation of coal blocks and issued directions with regard to fresh allotment of such coal blocks, holding that no State Government or public sector undertakings of the State Government are eligible for mining coal for commercial use. In view of such cancellation of coal blocks by the Hon'ble Supreme Court, the Central Government promulgated Coal Mines (Special Provisions) Ordinance, 2014 and Coal Mines (Special Provisions) Rules, 2014, under which, the auction and allotment of the coal blocks, which had been cancelled by the Hon'ble Supreme Court, were put up for allotment. OCPL, which is a Company, wholly owned by the State Government, submitted its application in respect of the Manoharpur and Dip-side of Manoharpur coal blocks and the Nominated Authority under the Coal Mines (Special Provisions) Ordinance, 2014, declared OCPL as the allottee of Manoharpur and Dip-side of Manoharpur coal blocks. Pursuant to such allotment, Allotment Agreement was executed between the Nominated Authority and OCPL and subsequently allotment order was issued in favour of OCPL on 31.8.2015. It is submitted that as the entire coal mining activity

is to be carried out by the MDO/MO, the OCPL intimated the RPDAC of the same and after due consideration of the matter, RPDAC in its 4th meeting held on 19.01.2016, approved the payment of compensation to the petitioners in lieu of employment as per the R & R Policy, 2006. Therefore, the plea of the petitioners that the mining activities of OCPL cannot be handed over to an outside agency and that the OCPL is bound to provide employment to the petitioners cannot be sustained either in law or fact, as there is no legal bar for the allottee to engage outside agency for mining work under the Coal Mines (Special Provisions) Act, 2015.

10. Learned counsel for opposite party no.6 (OCPL), reiterating the stand taken by the State counsel submitted that until the amendment was brought in Section 3(3) of the CMN Act w.e.f. 9.6.1993, the Central Government alone was permitted to mine coal through its companies with the limited exception of private companies engaged in the production of iron and steel. By virtue of the bar contained in Section 3(3) of the CMN Act, between 1976 and 1993, no private company (other than the company engaged in the production of iron and steel) could have carried out coal mining operations in India. He next submitted that Section 3(3) of the CMN Act, which was amended on 09.6.1993, keeping in view the need for industrial development and economic growth permitted private sector's entry in coal mining operations for captive use. Thus the power for grant of captive coal block coming to be governed by Section 3(3)(a) of the CMN Act, allowed only two kind of entities, namely, (a) the Central Government or undertakings/corporations owned by the Central Government; or (b) companies having end-use plants in iron and steel, power, washing of coal or cement to can carry out coal mining operations.

11. He further submitted that in terms of the Coal Mining Policy of the Government of India, Ministry of Coal, dated 12.12.2001, the OPGC (opposite party no.5) vide its application dated 18.1.2007, applied for allotment of the Manoharpur and Dip-side of Manoharpur coal blocks for meeting the coal requirements of its 2400 MW Thermal Power Plant expansion project. Accordingly, on 25.7.2007, the Government of India in the Ministry of Coal, allocated Manoharpur and Dip-side of Manoharpur coal blocks in favour of OPGC under the Government Company dispensation route, in terms of the provision of Section 3 (3)(a)(i) of the CMN Act. It was submitted that OPGC after obtaining necessary administrative approval filed requisition for acquisition of land for operating the coal blocks. After following due process of law as provided under the

L.A. Act, the land acquisition proceeding was completed, on payment of compensation to the land-losers. It was submitted that in the meantime, a PIL was filed before the Apex Court bearing W.P.(Crl.) No.120 of 2012 in *Manohar Lal* (supra), challenging the illegal and irregular allotment of coal blocks. The Hon'ble Supreme Court vide its judgment dated 25.8.2014, reported in (2014) 9 SCC 516, cancelled all the allotments and issued directions with regard to fresh allotment of coal blocks.

12. It was further submitted that pursuant to the directions contained in the judgment of the Hon'ble Supreme Court in *Manohar Lal* (supra), the Central Government promulgated Coal Mines (Special Provisions) Ordinance, 2014 and subsequently framed Coal Mines (Special Provisions) Rules, 2014, for regulating allotment of coal mines. On 18.12.2014, the Nominated Authority appointed by the Central Government under the aforesaid Ordinance, 2014, issued order for allotment of coal blocks in terms of section 5(1) of the said Ordinance 2014, in which, Manoharpur and Dip-side of Manoharpur coal blocks were listed at serial nos.174 and 175. On 18.2.2015, the Nominated Authority issued allotment documents for allotment of coal blocks. On 21.2.2015, OCPL (opposite party no.6), being eligible under the Coal Mines (Special Provisions) Ordinance, 2014, submitted application in respect of Manoharpur and Dip-side of Manoharpur coal blocks. On 24.3.2015, the Nominated Authority, Ministry of Coal, Government of India, declared OCPL as the successful allottee in respect of the Manoharpur and Dip-side of Manoharpur coal Mines. On 30.3.2015, the Central Government enacted the Coal Mines (Special Provisions) Act, 2015, substituting the Coal Mines (Special Provisions) Ordinance, 2014, saving all actions taken under Ordinance, 2014. On 30.3.2015 Allotment Agreement in respect of the Manoharpur and Dip-side of Manoharpur coal mines was executed between the Nominated Authority and OCPL. After execution of agreement, Nominated Authority, Ministry of Coal, Government of India, issued allotment order dated 31.8.2015 in favour of OCPL, in respect of Manoharpur and Dip-side of Manoharpur coal mines for utilization of coal in the end-use Thermal Power Plant expansion project of OCPL.

13. Learned counsel for the OCPL submitted that entire village of Manoharpur has been acquired for coal mining project, covering an area of Ac.538.01 dec., vide notification dated 14.2.2010. After following due process, award was passed under Section 11 of the L.A. Act. For resettlement and rehabilitation of the 'displaced families' of village Manoharpur, the RPDAC in its 4th meeting held on 19.01.2016 decided that

all decisions, approvals and permissions etc. already accorded in various RPDAC meetings of Manoharpur Coal Mines Project shall be applicable to OCPL.

14. It was submitted that as per the provisions of R & R Policy, 2006, the OCPL extended the resettlement and rehabilitation benefits to the displaced families, as detailed under:

"A. Resettlement Benefits:

SL. NO.	Resettlement Benefit	Provision of Odisha R&R Policy	Benefits Provided by OCPL
1	House Plot in R&R Colony	Ac.0.10 of homestead land to each DFs in R&R colony	Ac.0.10 of homestead land to each DFs in Sukhabandh R&R colony
2	Cash compensation in-lieu of house plot	Rs.85,000/- to DFs opted for self-relocation	Rs.85,000/- to DFs opted for self-relocation
3	House or House Building Assistance (HBA)	Constructed House in the R&R Colony to each DFs or Rs.255000/- to DFs opted for self relocation	Constructed house (RCC building) of 1060 sqft in the R&R colony with the provision of toilet, bathroom, cowshed and electricity and water connections. The cost of each constructed house is Rs.15.0 lakh. Rs.6.0 lakh is paid to 6 DFs each opted for self-relocation.
4	Temporary shed	Rs.17000/- to DFs	Rs.17,000/- to displaced families opted for self-relocation
5	Transportation Allowance	Rs.3400/- or Free transportation	Rs.3400/- per family as well as Free transportation facility for all families. Required support is being provided for demolition of stricture,salvaging of materials, staking, loading and unloading etc.
6	Subsistence Allowance	Rs.3400/- per months per DFs for a period of 12 months from the date of physical displacement.	Rs.3400/- per months to each DFs for a period of 12 months from the date of physical displacement.
7	Cooked Food	No provision	Cooked food is being supplied to DFs and his family members for 5 days from the date of shifting. Such facility has already been provided to 91 families who have shifted to R&R colony.
8	Groceries	No provision	Groceries (Rice, Dal, cooking Oil, Species, Potato, Onion, Sugar, Tea, Amul Powder, Salt etc) for 25 days is being supplied to 97 DFs who have shifted to R&R colony.
9	Housewarming	No provision	Housewarming (Griha Pratista Puja) of each newly constructed house in R&R colony is being organized before formal handover and shifting of DFs. All arrangement (puja items, Prasad, Brahman etc.) is being made by the project authority and bearing entire cost. Housewarming ceremony of 91 houses is being completed.

B. Rehabilitation Benefits:

No.	Rehabilitation Benefit	Provision of Odisha R&R Policy	Benefits Provided by OCPL
1	Cash Compensation in-lieu of employment	Category Rs. In Lakh I 7.47 II 4.48 III 2.99 IV,V &VI 1.50	Category Rs. In Lakh I 15.0 II 9.0 III 6.0 IV,V &VI 3.0
2	Annuity	No Provision	Annuity Scheme to all DFs for sustenance and social security. An amount of Rs.3000/- for month is to be paid to each for a period of 30 years with enhancement of Rs.500/- per month in each two years.
3	Training for Self-employment	Project authority under the guidance of the Collector concerned will make adequate arrangement to provide vocational training to at least one member of each displaced family so as to equip him/her to start his/her own small enterprise and refine his/her skills to take advantage of new job opportunities. For those engaged in traditional occupations/handicrafts/handlooms, suitable training shall be organized at the cost of project authority to upgrade their existing skills	The Company has set-up an ITI at Hemgir since 2014. The institute is affiliated to SCVT and offering course in Electrician Trade with 21 nos. of seat. Four batches of students have already been enrolled. Priority has been given to enrole candidates from project displaced and affected families. Till date 27 nos of candidates from project displaced families has been enrolled and imparted ITI training. Besides, the Company has engaged MART an expert agency for promotion of sustainable livelihood among the displaced families. The project aimed at to impart required skill development and capacity building training to members of displaced families on various livelihood activities, provide handholding support to establish individual or group entrepreneurial activities. The expenditure on sustainable livelihood project is Rs.2.58 Crores. In a span of five years "

15. It was submitted that apart from the above mentioned resettlement and rehabilitation benefits, OCPL created a model resettlement colony having required infrastructure and amenities, which are beyond the R & R Policy, 2006, for greater sustainable development of all the displaced families as detailed herein:

"Amenities & Infrastructure Created in the R&R Colony

Sl. No.	Amenities & Infrastructure	Description
1	Water Supply System	All the houses and common facilities in the R&R colony have been supplied with filtered drinking water with overhead tank facility in each house. A overhead tank of 1.5 lakh litre capacity and a underground reservoir of 2.5 lakh capacity is being created in the R&R colony for storage of water for round the clock supply.
2	Electricity	R&R colony is provided with electricity. 7 numbers of transformers having capacity of 25 KVA (4 nos.), 100 KVA (2 nos.) and 63 KVA (1 nos.) respectively has been installed and connection has been provided to all houses and common infrastructure. The colony is provided with street light facility. The company will bear the electricity charges of common facilities.
3	Road	The R&R colony is provided with blacktop approach and internal road.
4	School	A upper Primary school with a built up area of around 21500 sqft has been constructed in the R&R colony having all the facilities
5	Anganwadi	An Anganwadi Centre has been constructed in the R&R colony
6	Dispensary	A dispensary is provided in the R&R colony
7	Community Centre	A community centre has been constructed in the R&R colony
8	Veterinary Centre	A veterinary centre is provided in the R&R colony
9	Women Training Centre	2 numbers of women training centres has been created in the R&R colony to impart skill training to promote self employment and sustainable livelihood
10	PDS Centre & Market Building (Weekly Haat)	The R&R colony is provided with PDS centre and Market building (Weekly Haat)

Besides, OCPL has also provided for other major basic amenities and facilities like drainage, sewage treatment plant (STP), kiosk, pond, children park, temple, rahas mandap, gram devi pitha, jatra maidan, play ground, crematorium, gochar land, orchard, outer trench with barbed-wire fencing, etc. for the inhabitants of the resettlement colony.

16. Coming to the claim of the petitioners for employment under the OCPL, it was submitted that as per the R & R Policy, 2006, Type-B deals with mining project, which provides that as far as practicable, the objective shall be to provide one member of each displaced/project affected family with employment in the project. However, where such employment cannot be provided because of reason to be explained in writing, cash compensation as detailed therein, shall be provided to such displaced families. As the OCPL will not carry out mining operation and all such mining activity is to be carried out through a MDO/MO, the Company offered one-time cash benefit and monthly cash benefit scheme in lieu of employment, which are as follows:

a) Rs.15,00,000/- per eligible displaced family as one-time cash compensation in-lieu of employment.
b) Monthly cash benefit of Rs.3,000/- to each displaced family in lieu of employment under an Annuity Scheme for 30 years. Provision for bi-annually increase of Rs.500/-
c) Imparting skill and capacity building training to enhance their emplolyability so that they can be engaged under the MDO/MO or elsewhere gainfully.

17. Accordingly, the RPDAC in its 4th meeting held on 19.01.2016, decided that since the coal mines will be operated through MDO/MO, there is little scope for employment and the rehabilitation and resettlement package offered by OCPL to the project affected families is considered to be the best in the present scenario.

18. It was submitted that after establishment of the rehabilitation habitat (colony) and after certification of full-fledged operation by the District Collector, the process of shifting of displaced families of the village Manoharpur to the rehabilitation habitat at Sukhaband has already commenced and out of 244 numbers of displaced families, 99 numbers have already been shifted to the rehabilitation habitat by availing all the aforementioned rehabilitation benefits. It was submitted that all the petitioners are entitled to the aforementioned benefits applicable to displaced family for category-1 and will be provided with all such benefits from the date of actual vacation of the acquired land.

19. Coming to the challenge to the acquisition proceeding initiated under the L.A. Act, learned counsel for the opposite party no.6 (OCPL) submitted that the 1957 Act provide for acquisition of coal bearing land for coal mining by the Central Government or Government Company authorized under Section 11 of the said Act. In the present case, the allotment being made under Section 3 (3)(a)(i) of the CMN Act and the mining lease deed having been executed and registered under the provisions of the MMDR Act 1957, the provisions of 1957 Act has no application. It was further submitted that pursuant to the judgment of the Hon'ble Supreme Court in *Manohar Lal* (supra), the coal mines of Manoharpur and Dip-side of Manoharpur coal mines having allotted by the Central Government in favour of OCPL under the Coal Mines (Special Provisions) Act, 2015, the plea of the petitioners that the acquisition of the land bearing coal deposits cannot be acquired under the L.A. Act and that the acquisition can only be made under the provisions of 1957 Act is wholly erroneous and misconceived.

20. It was further submitted that as petitioners have never raised any objection to the notification under Section 4(1) of the L.A. Act and having accepted the compensation awarded in respect of their acquired land, they are estopped from challenging the acquisition at this belated stage. In this regard, it was submitted that all the petitioners had earlier approached this Court in various writ petitions and their only prayer was for extending the benefits of R & R Policy, 2006, and providing them with employment under the project. This Court had permitted the petitioners to file representation before the OPGC (opposite party no.5), who has rejected the same vide letter dated 26.7.2016 (Annexure-3), the present challenge to the acquisition proceeding initiated under the L.A. Act cannot be sustained in law.

21. There is no dispute that the land acquisition proceeding in respect of village Manoharpur had been initiated way back in March 2010. None of the petitioner had ever objected to such acquisition and all of them have already accepted the compensation amount awarded in respect of their acquired lands without any protest except in 2 cases, where the awarded compensation amount has been deposited in the Civil Court due to *inter se* dispute between the claimants. Even in the earlier 46 writ petitions filed by the petitioners and others, no challenge was made to the acquisition proceeding and the only prayer of the petitioners in those writ petitions was to direct OPGC (opposite party no.5) to extend all the benefits of rehabilitation and resettlement to the petitioners, including employment to at least one member of the displaced family, as provided for mining projects under R & R Policy, 2006. Therefore, the petitioners cannot be now permitted to raise the plea with regard to the legality and validity of the acquisition proceeding at this highly belated stage.

22. Even otherwise, as the Manoharpur and Dip-side of Manoharpur coal blocks have been allocated by the Government of India, in the Ministry of Coal under Government Company dispensation route in terms of the provisions of Section 3 (3)(a)(i) of the CMN Act, the plea of the petitioners with regard to the application of the 1957 Act for acquisition of coal bearing land cannot be accepted. In this regard, it is worthwhile to refer to the judgment of the Apex Court in *Manohar Lal* (supra), wherein the Hon'ble Supreme Court while dealing with the power of the Central Government under the 1957 Act and CMN Act, has proceeded to hold as under:

> "59. The 1957 Act provides for general restrictions on undertaking prospecting and mining operations, the procedure for obtaining reconnaissance permits, prospecting licences and mining leases and the rule-making power of regulating the grant of

> reconnaissance permits, prospecting licences and mining leases. Clause (a) of sub-section (3) of Section 3 of the CMN Act enables persons specified therein only to carry on coal mining operation. In clause (c), it is provided that no lease for winning or mining coal should be granted in favour of any person other than the Government, government company or corporation referred to in clause (a). Under clause (b) of sub-section (3), excepting the mining leases granted before 1976 in favour of the Government, government company or corporation referred to in clause (a) and any sub-lease(s) granted by any such Government, government company or corporation, all other mining leases and sub-leases in force immediately before such commencement insofar as they relate to the winning or mining of coal, stand terminated. When a sub-lease stands terminated under sub-section (3), sub-section (4) of Section 3 provides that it shall be lawful for the Central Government or the government company or corporation owned or controlled by the Central Government to obtain a prospecting licence or a mining lease in respect of whole or part of the land covered by mining lease which stands so terminated. The above provisions in the CMN Act, as inserted in 1976, clearly show that the target of these provisions in the CMN Act is coal mines, pure and simple. The CMN Act effectively places embargo on granting the leases for winning or mining of coal to persons other than those mentioned in Section 3(3)(a). Does the CMN Act for the purposes of regulation and development of mines to the extent provided therein alter the legal regime incorporated in the 1957 Act ? We do not think so. What the CMN Act does is that in regard to the matters falling under the Act, the legal regime in the 1957 Act is made subject to the prescription under Sections 3(3)(a) and (c) of the CMN Act. The 1957 Act continues to apply in full rigour for effecting prescription of Sections 3(3)(a) and (c) of the CMN Act. For grant of reconnaissance permit, prospecting licence or mining lease in respect of coal mines, the MMDR regime has to be mandatorily followed. The 1957 Act and so also the 1960 Rules do not provide for allocation of coal blocks nor do they provide any mechanism, mode or manner of such allocation."

23. In case of *Naresh Singh* (supra), the Central Government in exercise of powers under Section 4(1) of the 1957 Act gave notice of its intention to acquire the rights to mine, quarry, bore, dig and search for, win, work and carry away minerals in the lands measuring 3407.408 hectares by notification dated 6th February, 1996. After considering the objections received and report of the Competent Authority and after consulting the State Government, the Central Government issued notification dated 4th February, 1997, that it was satisfied that the rights to mine, quarry, bore, dig and search for, win, work and carry away minerals in the lands measuring 3407. 408 hectares approximately should be acquired. Accordingly, vide notification dated 24th June, 1998, issued under Section 9(1) of the 1957 Act, the rights to mine, quarry, bore, dig and search for, win, work and carry away minerals in the lands measuring 3407.408 hectares were acquired. Thereafter, the rights in and over the said land acquired by the Central Government vested in

South Eastern Coal-fields Ltd. ('SECL' for short), by order of the Central Government issued under Section 11(1) of the 1957 Act.

However the Central Government instead of proceeding with the acquisition of the land in question under the provisions of 1957 Act, directed the concerned Collector to issue necessary notification under the L.A. Act to acquire 699.698 hectares of tenancy land and to take possession of the same under Section 17 of the said Act immediately. Pursuant to such direction, the State Government initiated the process of acquisition of land under L.A. Act and the Collector passed the award determining compensation under Section 11 of the said Act. Therefore, the land-owners, whose lands were so acquired were deprived of their right for determination of just and fair compensation under Section 14 of the 1957 Act.

In the aforesaid factual settings, the Division Bench of Madhya Pradesh High Court, ultimately directed the Central Government to issue notifications under the 1957 Act for acquisition of the land and take possession of the land and get the compensation determined in accordance with Section 14 of the 1957 Act, for onward payment to the land-losers, after adjustment of the compensation already received.

24. In the instant case, there is no dispute that the allotment of the coal blocks have been made by the Central Government in favour of OPGC under Section 3 (3)(a)(i) of the CMN Act. Furthermore, the initial allotment of the coal mines made in favour of OPGC was cancelled by the Hon'ble Supreme Court in *Manohar Lal* (supra). Subsequent thereto, fresh allotment of the coal mines has been made by the Central Government in favour of OCPL (opposite party no.6), as per the provisions of Coal Mines (Special Provisions) Act, 2015. Therefore, the ratio laid down in the decision of the Madhya Pradesh High Court in *Naresh Singh* (supra), rendered under the factual settings of that case, has no application to the facts of the present case. For the reasons as aforestated, we do not find any merits in the writ petitions, which are accordingly dismissed.

Writ petition dismissed.

2018 (I) ILR - CUT- 760

S.K.MISHRA, J.

W.P.(C). 25878 OF 2017

SUBRAT RANJAN DASH .....Petitioner

.Vrs.

ACC LTD., BHUBANESWAR .....Opposite Party

ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 and 36 read with Order 41 Rule 5 of the Code of Civil Procedure, 1908 – Provisions under – Application filed challenging the award with a prayer for interim stay – Award holder's plea was to impose reasonable condition as per the provisions under Order 41 Rule 5 while granting stay of award – Stay granted without imposing any condition by the learned court below – Question raised as to the applicability of the provision of Order 41 Rule 5 of CPC – Held, the learned District Judge has reached an erroneous conclusion that the provisions of Rule 5 of Order XLI of the Code, especially with respect to the imposition of condition will not be applicable to the present case – Order set aside – Matter remanded.

(Paras 6,7,8 & 9)

Case Laws Relied on and Referred to :-

1. (2015) 5 SCC 267 : Kanpur Jal Sansthan and others vs. Bapu Constructions.
2. AIR 2015 SC 620 : Associate Builders vs. Delhi Development Authority.
3. (2012) 1 SCC 594 : P.R. Shah Shares and Stock Brokers Pvt. Ltd. vs. B.H.H. Securities Pvt. Ltd.,
4. 2016 SCC : Rendezvous Sports World vs. Board of Control for Cricket in India.

For Petitioners : M/s Avijit pal, P.Sinha

For Opposite Party : M/s. Saswat Kumar Acharya S.Kashyap & S.Pholgu

Date of Judgment : 12.04.2018

JUDGMENT

S.K.MISHRA, J.

The petitioner, being the opposite party in Arbitration Petition No.156 of 2017 of the court of learned District Judge, Dhenkanal assails the order passed by the learned Judge on 30.10.2017 allowing an application filed by the sole opposite party-petitioner, thereby passing an order of stay of the award made by the sole arbitrator in favour of the present petitioner. The impugned award has been delivered on 30.10.2017 directing the present opposite party to pay sum of Rs.48,60,891/- along with interest @ 9% p.a. w.e.f. 15.12.2010. As against that award, the sole opposite party i.e. ACC Ltd filed an application under Section 34 of the Arbitration & Conciliation Act, 1996, hereinafter referred to as the 'Act' for brevity. In that application, it also filed an application under Section 36 of the Act for stay of the award. In his order, the learned District Judge has directed himself to consider the only and short question that arose before him that is whether the provision of Order XLI Rule 5 of the Code of Civil Procedure, 1908, hereinafter referred to as the 'CPC' for brevity, is applicable to a proceeding filed under Section

34 of the Act. The learned District Judge took into consideration the reported cases of ***Associate Builders vs. Delhi Development Authority***, AIR 2015 SC 620, ***P.R. Shah Shares and Stock Brokers Pvt. Ltd. vs. B.H.H. Securities Pvt. Ltd.,*** (2012) 1 SCC 594, wherein the Hon'ble Supreme Court has held that while dealing with a petition under Section 34 of the Act, the Court does not sit in appeal over the award of Arbitral Tribunal and the award can be challenged under Section 34 of the Act only on the grounds mentioned in Section 34(2) of the Act. The learned District Judge also took into consideration the reported case of ***Kanpur Jal Sansthan and others vs. Bapu Constructions,*** (2015) 5 SCC 267, wherein the Hon'ble Supreme Court has held that provision of Order XLI, Rule 5 of the CPC applies to proceeding before the learned District Judge but the learned District Judge did not follow the judgment passed in the Kanpur Jal Sansthan (Supra). But, having regard to the ratio decided in P.R. Shah Shares and Stock Brokers Pvt. Ltd. (supra), the learned District Judge held that a petition under Section 34 of the Act is not an appeal. Hence, the provision of Order XLI Rule-1(3) and Rule-5 of the CPC will not be applicable. Without imposing any condition, the learned District Judge has stayed the award of the sole arbitrator. In advancing argument, Mr. Acharya, learned counsel for the opposite party would argue that application under Section 34 of the Act not being an appeal imposing the condition available in Order XLI, Rule-1 (3) and Rule-5 of the CPC would be illegal. He relies upon the case of the ***Rendezvous Sports World vs. Board of Control for Cricket in India,*** 2016 SCC Online Bombay 6064. It is appropriate to take note of the said paragraph, which reads as follows:

> " **62.** I find that, the two decisions cited by Mr. Khambhata are perfectly applicable to the facts of the case on hand. The remedy available to an aggrieved award-debtor is under Section 34 of the Arbitration Act. This remedy has not been taken away by the Amending Act. A vested right available to the award-debtor would be only in the matter of challenge to the arbitral award which has remained intact. Section 36 of the Arbitration Act pertains only to the enforcement of an award and its executability. The original Section 34, imposed a disability on the award-holder in executing the award during pendency of the challenge to the award. This disability provided only an interim relief against execution of the award to the award-debtor, until his challenge to the award was decided. The right to interim relief cannot be a vested or accrued substantive right. In any case, even this interim advantage is not completely taken away. The disability imposed on the award-holder under original Section 36 was absolute. The award was simply not executable during pendency of the challenge to it. Under the amended Section 36, this disability has been only made relative. Firstly, what was available earlier on a platter has to be now asked for. Secondly, grant of it can be conditional."

3. A plain reading of this paragraph leaves no doubt in the mind of the Court that after amendment of Section 36 of the Act, the situation has changed. Previously, the provision, as it stood, only on filing an application under Section 34 of the Act would stay further proceeding of the execution of the award passed by the Arbitral Tribunal. Section 36 of the Act, prior to and after amendment, reads as follows:

Pre-amendment.

"36 ENFORCEMENT:-

Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

Post-amendment

36.ENFORCEMENET:

(1) Where the time for making an application to set aside arbitral award under Section 34 has expired, then, subject to provisions of Sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the Court.

(2) Where an application to set aside the arbitral award has been filed in the Court under Section 34, the filing of such application shall not by itself render the award unenforceable, unless the Court grants an order of stay of operation of said arbitral award in accordance with the provisions of sub-section (3), on separate application made for that purpose.

(3) Upon filing of an application, under subsection(2) for stay of operation of the arbitral award, the Court may subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing :

Providing that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of Code of Civil Procedure, 1908.

4. A plain reading of this proviso leads to the conclusion that the Court, while granting stay in the case of arbitral award for payment of money, have due regard to the provisions of grant of stay money degree under the provisions of Code of Civil Procedure, 1908.

5. In this connection, it is appropriate to take into consideration the provision of Rules 1(3) and Rule 5 of the CPC of Order XLI of the Code. It is appropriate to take note of the exact words.****

" **Order XLI**
Rule 1(1). xxx……xxx
(2). xxx……xxx
(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit."

Rule 5. Stay by Appellate Court – (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order; nor shall execution of a decree be stayed by reason only of appeal having been preferred from the decree; but the appellate Court may, for sufficient cause, order stay of execution of such decree…

(2) Stay by court which passed the decree :—Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing there from, the court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(C) that security has been given by the applicant for the due performance of such decree of or as may ultimately be binding upon him.

(4) Subject to the provisions of sub-rule (3), the court may make an ex parte order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the court shall not make an order staying the execution of the decree."

6. Interpreting the aforesaid provision, this Court is of the opinion that if an application of stay of execution of the decree of an award is sought, then the aforesaid provision has to be complied with and it shall be within the jurisdiction of the court in seisin of the matter to impose any reasonable conditions that may be deemed just and proper. My view gets support from the judgment rendered by the Hon'ble Supreme Court in the case of Board of Control for Cricket in India vs. Kochi Cricket Private Ltd and Etc., which has been decided in Civil Appeal Nos.2879-2880 of 2018 on dated 18.03.2018. At paragraph 41 of the said judgment, the Hon'ble Supreme Court has held has follows.

" 41. This brings us to the manner of enforcement of a decree under the Code of Civil Procedure. A decree is enforced under the Code of Civil Procedure only

> through the execution process- see Order XXI of the Code of Civil Procedure. Also, Section 36(3), as amended, refers to the provisions of the Code of Civil Procedure for grant of stay of a money decree. This, in turn, has reference to Order LXI, Rule 5 of the Code of Civil Procedure, which appears under the Chapter heading, "Stay of Proceedings and of Execution". This being so, it is clear that Section 36 refers to the execution of an award as if it were a decree, attracting the provisions of Order XXI and Order LXI, Rule 5 of the Code of Civil Procedure and would, therefore, be a provision dealing with the execution of arbitral awards…..xxx"

Thereafter, the Hon'ble Supreme Court has gone into dismiss the appeal preferred by the BCCI.

8. Thus, in view of the aforesaid discussions, this Court is of the opinion that the learned District Judge has reached an erroneous conclusion that the provisions of Rule 5 of Order XLI of the Code, especially with respect to the imposition of condition will not be applicable to the present case is to be set aside.

9. Hence, the writ petition is allowed. The order dated 30.10.2017 passed in Arbitration Petition No.156/217 of the court of learned District Judge, Dhenkanal is set aside. The matter is remanded back to the court of learned District Judge, Dhenkanal for fresh adjudication, hearing and disposal of the application of stay. The parties are directed to appear before the said court on 15.05.2018. The Writ Petition is disposed of accordingly

Writ Petition disposed of .

2018 (I) ILR - CUT- 765

S.K.MISHRA, J.

CRIMINAL MISC CASE NO. 403 OF 2018

SAPUA DAS AND ORS. …….Petitioners

.Vrs.

STATE OF ORISSA …….Opposite Party

(A) CRIMINAL TRIAL – What should be the duty of the court when it is confronted with a situation where the conducting counsel duly engaged as per the procedure laid down pleads "no instructions" on the date of posting of a Session's Case wherein witnesses were in attendance – Indicated.

(B) CRIMINAL TRIAL – Witnesses present – How are to be dealt with – Held, witnesses are guest of the court and they should be treated humanely. (Para 5)

(C) ADVOCATES ACT, 1961 – Section 49 – Power of Bar Council to make rules – Preamble – Duties and responsibilities of Advocate – Discussed. (Paras 5 to 11)

(D) CRIMINAL TRIAL– Sessions's trial posted for hearing – Witnesses present – Advocate for accused persons report 'no instruction' without any prior notice – Court issued NBW – Held, not proper.

"I hold that for the fault of the counsel who is not conducting himself professionally with proper etiquette and in not discharging his duties towards the court as well as this client, the client should not suffer and therefore, the order dated 18.12.2017 passed by the learned Additional Sessions Judge, Chatrapur in S.T. Case No.13 of 2013 so far as it relates to N.B.W. issued against the petitioners is hereby quashed." *(Para 12)*

For petitioners : M/s. Soubhagya Ku. Dash, S.K. Tripathy, & S.M. Sahoo

For oppo. party : Miss Sabitri Ratho, Addl.Govt Adv.

Date of hearing 26.03.2018 Judgment: 20.04.2018

JUDGMENT

S.K.MISHRA, J.

The petitioners, being the accused for the alleged commission of offences under Sections 147, 148, 323, 307, 294, 506, 427 and 341/149 of the IPC in G.R. Case No.112 of 2014 of the court of learned J.M.F.C., Purushottampur, arising out of Purushottampur P.S. Case No.113 of 2014, assails the order dated 18.12.2017 passed by the learned Additional Sessions Judge, Chatrapur in S.T. Case No.13 of 2013 cancelling the Vakalatnama and issuing non-bailable warrant of arrest against the accused persons.

2. What should be the duty of the court when it is confronted with a situation where the conducting counsel duly engaged as per the procedure laid down pleds "no instructions" on the date of posting of a Sessions Case wherein witnesses were in attendance is to be addressed in this case.

3. Briefly stated on the basis of an FIR submitted by Ganesh Nahak before the I.I.C., Purushottampur Police Station registered as P.S. Case No.113 of 2014 for the alleged commission of offence under Sections 147, 148, 323, 307, 294, 506, 427 and 341/149 of the IPC, giving rise to G.R. Case No.112/2014 of the court of learned J.M.F.C., Purushottampur. The petitioners were granted bail, charge-sheet was submitted against them. After taking cognizance, the learned Magistrate committed the case to the court of the learned Additional Sessions Judge, Chatrapur and has been registered as

S.T. Case No.13 of 2013. The case was posted for hearing to 18.12.2017, on that date, the accused persons were absent. The learned counsel engaged by them, who has executed Vakalatnama duly stamped, and presented to the court, which forms part of the record stated in a memo before the trial court that the accused persons are not turning up, and hence, he is not interested to conduct the case on behalf of the accused persons. Hence, Vakalatnama was cancelled. The accused persons were found absent on call. The learned A.P.P produces attendance of four witnesses for the prosecution. Thereafter, on repeated call as the accused persons did not turn up, the court issued N.B.W.(A) against the present accused persons, for absence of petitioners before this Court. Obviously, as the witnesses could not be examined, they were discharged.

4. The learned counsel for the petitioners assails the order submitting that non appearance of the petitioners was not deliberate and in such situations, the learned court should not be issued warrant of arrest. The learned Additional Government Advocate on the other hand submits that the procedure adopted by the court is not erroneous stating that when the accused persons were under a bond and they did not appear, the court issued NBW (A) against them.

5. The Hon'ble Supreme Court has time and again reiterated that witnesses are guests of the court and they should be treated humanely. This Court has also maintained utmost consistently that once witnesses are in attendance, they should not be sent back without being examined and cross-examined. In other words, repeated attendance of witnesses is against public policy and the tenor of judicial pronouncement in this country. So, on the nick of the moment when witnesses were present and the learned counsel knew that he was not going to appear for the accused persons what should be the duty of the advocate and what should be the duty of the court in such situation are the rhetorics. The Bar Council of India Rules, Chapter-II of Part-VII provides for the standards of professional conduct and etiquette of an advocate. The Bar Council Rules is a delegated legislation duly formulated by the Bar Council of India in exercise of its law making power under the Advocates Act, 1961. In Chapter-II as aforesaid the standards of professional conduct and etiquette has been provided. This standards of professional conduct and etiquette is in conformity with section 49 (1)(c) of the Act read with the proviso thereto. It is important to take note of the aforesaid section.

> "49. General power of the Bar Council of India to make rules.-(1) The Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe-
> XX
> (c) the standard of professional conduct and etiquette to be observed by advocates.

XX"

6. A plain reading of the said section leaves no doubt in the mind of the reader that the parliament in his wisdom has given the Bar Council of India Authority to formulate law to monitor the conduct of and etiquette of advocates. In exercise of such power Chapter-II have been framed. The preamble of the Rules itself speaks a lot. I find it appropriate and also rather interesting to quote the same is appearing page-62.

> "An advocate shall, at all times, conduct himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawfu l and a moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an Advocate. Without prejudice to the generality of the forgoing obligation, an Advocate shall fearlessly uphold the interests of his client and in his conduct conform to the rules hereinafter mentioned both in letter and in spirit. The rules hereinafter mentioned contain canons of conduct and etiquette adopted as general guides; yet the specific mention thereof shall not be construed as a denial of the existence of other equally imperative though not specifically mentioned".

7. A plain reading of the preamble leaves no doubt in the mind of the court that the Bar Council Rules provide that the conduct of Advocates should be in a manner befitting his status as an officer of the Court. An officer of the Court is a privileged member of the community. So, he has certain duties and obligations. Section-I of the said Chapter provides for the duty of advocates to the court. For the purpose of this case, I will quote only a few. Clause 1 provides that an advocate shall, during the presentation of his case and while otherwise acting before a Court, conduct himself with dignity and self-respect. He shall not be servile and whenever there is a proper ground for serious complaint against a judicial officer, it shall be his right and duty to submit his grievance to proper authorities.

8. Clause 2 provides that an advocate shall maintain towards the Courts a respectful attitude, bearing in mind that the dignity of the judicial office is essential for the survival of a free community. An advocate shall also not allow his client to resort to sharp or unfair practices or from doing anything in relation to the Court, opposing counsel or parties. This proviso is at clause 4, there are some other provisions but for the present case those are not relevant.

9. Section-II provides for duties to the clients. Clause 11 provides that an advocate is bound to accept any brief in the Courts or Tribunals at a fee consistent with his standing at the Bar and the nature of the case. In special cases, circumstances he may refuse to accept a particular brief. Clause 12 provides that an advocate should not ordinarily withdraw from engagements,

once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client. Upon his withdrawal from a case, he shall refund such part of the fee as has not been earned. These two provisions are important for this particular case.

10. It was the duty of the court to examine the witnesses when they were present and it also duty of the court to make a pragmatic attempt to examine the witnesses and to see that the case is not adjourned unnecessarily.

11. It is the duty of the counsel appearing for the accused to assist the court in conducting the case. This aspect is very much seen in the provisions discussed above. The Bar Council of India Rules provides that an advocate is an officer of the Court and a privileged member of the community, and he should act himself with dignity and self-respect. So, it was duty of the counsel appearing for the accused persons to represent the accused persons. Even if, the accused persons were absent it was the duty of the learned counsel towards the Courts, being lawfully engaged and not prevented by sufficient cause from appearing in a court, in which the case of his client is pending and is called on for hearing. Otherwise, it will be dereliction of duty. This is plainly visible from a plain reading of clause 11 and 12 of the Bar Council Rules appearing Section-II of Chapter II of Part-VI. So, in such cases an advocate before pleading no instructions or before refusing to take steps should have given sufficient notice and that notice should be supported by sufficiency cause. In absence of such sufficient cause and a reasonable notice it was improper on the part of the learned Additional Sessions Judge to cancelled Vakalatnama executed in favour of the learned counsel. He should have requested the counsel to conduct case properly as per the rules and examine the witnesses. He could even dispense with the presence of the accused persons for the day only for the purpose of examination of the witnesses, even without any application. It is not necessary that in order to dispense with presence of the accused persons under Section 317 of Cr.P.C and allow representation by their counsel of choice the court, in seisin, require a petition. The provision itself does not say that a motion should be made but it recognizes the power of the court to dispense with the presence of the accused. Generally, the court practise and the procedure of insisting of a petition in order to avoid any possible denial, on a future date, but in appropriate cases, as in this case, it was open for the learned Additional Sessions Judge to allow the representation, even without application and he should have reminded the learned counsel in a dignified and polite manner, the duties cast upon him.

12. For the aforesaid reasons, I hold that for the fault of the counsel is not conducting himself professionally with proper etiquette and in not discharging his duties towards the court as well as this client, the client should not suffer and therefore, the order dated 18.12.2017 passed by the learned Additional Sessions Judge, Chatrapur in S.T. Case No.13 of 2013 so far as it relates to N.B.W. issued against the petitioners is hereby quashed. They are directed to appear themselves to the jurisdiction of the learned Additional Sessions Judge, Chatrapur in the aforesaid case within seven days of reopening of the District Courts, failing which the order of quashing shall not take effect. With such observation, the CRLMC is disposed of.

CRLMC disposed of.

2018 (I) ILR - CUT-770

DR. A.K. RATH, J.

S.A.No.316 of 1988

STATE OF ORISSA AND ORS. ……..Appellants

.Vrs.

JAYKRUSHNA BRAHMACHARI ……Respondent

ORISSA MOTOR SPIRIT (TAXATION ON SALES) Act, 1946 – Section 3(2) read with Section 28 – Demand raised – Not paid – Certificate case initiated under Orissa Public Demands Recovery Act for realization of the dues – Suit filed challenging the demand – Whether maintainable? – Held No, Section 28(1) of the Act provides that any person aggrieved by any order under sub-section (2) of Section 3 or under section 8 may file appeal within thirty days – Sub-section (2) of Section 28 provides that every order passed in appeal under sub-section (2) shall subject to the provisions of sub-section (3), be final – Where a special statute provides for an appeal, jurisdiction of the Civil Court is impliedly barred – Since the statute gives a finality to the orders passed by the competent authority under the Act, the Civil Court's jurisdiction must be held to be excluded – The substantial questions of law are answered accordingly.

"In Dhulabahi etc. and others v. State of Madhya Pradesh and another, AIR 1969 SC 78, the Constitution Bench of the apex Court laid down the principles regarding exclusion of jurisdiction of the Civil Court. The apex Court held :"(1) Where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure." (Para 9 & 13)

For Appellants : Mr.P.P.Mohanty, A.S.C.(C.T.)
For Respondent : None

Date of Hearing :22.03.2018 Date of Judgment: 02.04.2018

JUDGMENT

Dr. A.K. RATH, J.

State of Orissa and its functionaries are the appellants against a reversing judgment.

2. The plaintiff-respondent instituted the suit for declaration that the orders passed by the Commercial Tax Officer, Puri, defendant no.3 demanding a sum of Rs.63,119.42 towards arrear tax and Rs.31,569.71 as penalty are illegal, the said amount cannot be recovered in Certificate Proceeding under the Orissa Public Demands Recovery Act ("O.P.D.R. Act") and permanent injunction. The case of the plaintiff is that he is the registered dealer in petrol, diesel and other lubricants. He is liable to pay tax under the Orissa Motor Spirit (Taxation on Sales) Act, 1946 ("the Act"). The Commercial Tax Officer, defendant no.3 by its order dated 21.11.1974, 31.3.1977, 30.4.1977, 17.7.1978 and 17.4.1979 imposed penalty without issuing prior notice under Section 3(2) of the Act. Thereafter Certificate Case was initiated by defendant no.2 under O.P.D.R. Act to realize the same. Though he challenged the liability of tax and penalty, but no relief was granted to him. The Certificate Officer has no power to adjudicate the matter. The order is an infraction of natural justice. With this factual scenario, he instituted the suit.

3. The defendants filed written statement stating, inter alia, that the plaintiff had submitted three returns for the months of March and April, May to August and September to November, 1977. He is liable to pay the admitted taxes under the Act. The plaintiff did not pay the arrear tax. The action taken by defendant no.3 by imposing penalty on the plaintiff is legal and valid. The suit for permanent injunction is not maintainable. The suit is barred under Section 9 C.P.C.

4. Stemming on the pleadings of the parties, learned trial court struck eight issues. Parties led evidence. Learned trial court dismissed the suit holding inter alia that the order imposing penalty is illegal. The suit is barred under the provisions of the Act and O.P.D.R. Act and, as such, not maintainable. The plaintiff appealed before the learned District Judge, Puri, which was subsequently transferred to the court of the learned Additional Sub-Judge, Puri and renumbered as Title Appeal No.16/134 of 1986/1983.

Learned appellate court held that no notice under Section 3(2) of the Act has been served on the plaintiff. The plaintiff is not liable to pay penalty. The Civil Court has jurisdiction to entertain the suit. Held so, it allowed the appeal.

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

> "Whether the civil court has jurisdiction to entertain the suit against the order passed by the Commercial Tax Officer, Puri under Sec.3(2) of the Orissa Motor Sprit (Taxation on Sales) Act, 1946 read with Rules 27 and 28 of the said Rules framed thereunder, when a hierarchy of forum is provided in the statute ?"

6. Heard Mr.P.P.Mohanty, learned Additional Standing Counsel (C.T.) for the appellants. None appeared for the respondent.

7. Mr.Mohanty, learned Additional Standing Counsel (C.T.) for the appellants submitted that any person aggrieved by any order passed under sub-section (2) of Section 3 of the Act or under Section 8 may file appeal under Section 28 (I) of the Act within thirty days. Thus, the jurisdiction of the Civil Court is impliedly barred. He placed reliance on the decision of the apex Court in the case of Premier Automobiles Ltd. v. Kamlakar Shantaram Wadke and others, AIR 1975 SC 2238 and this Court in the case of Puri Konark Development Authority v. Ratna Bhadra and others, AIR 2002 Orissa 207.

8. Before adverting into the contentions raised by the learned Additional Standing Counsel (C.T.) for the appellants, it will be necessary to set out Section 28 of the Act. Section 28 of the Act reads thus:-

> "28. (1) Any person aggrieved by any order passed under sub-section (2) of section 3 or under section 8 may, within thirty days after the date of such order, appeal-
>
> (a) To the Revenue Commissioner, if such order is passed by the Collector or Deputy Commissioner of a district, or
>
> (b) To the Collector or Deputy Commissioner of the district, if such order is passed by an officer exercising the powers of a Collector under this Act,
>
> (2) Every order passed in appeal under this section shall, subject to the provisions of sub-section (3), be final.
>
> (3) The Revenue Commissioner may, at any time, call for and examine the record of any case in which any order referred to in sub-section (1) or subsection (2) is passed for the purpose of satisfying himself as to the legality or propriety of such order and may, after examining the record, pass any order which he thinks proper."

9. In Dhulabahi etc. and others v. State of Madhya Pradesh and another, AIR 1969 SC 78, the Constitution Bench of the apex Court laid down the principles regarding exclusion of jurisdiction of the Civil Court. The apex Court held :

> "(1) Where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
>
> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.
>
> Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.
>
> (3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.
>
> (4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.
>
> (5) Where the particular Act contains no machinery for refund' of tax collected in excess of constitutional limits or illegally collected a suit lies.
>
> (6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.
>
> (7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply." (emphasis laid)

10. Dhulabahi (supra) was referred to in Premier Automobiles Ltd. (supra). The apex Court held that if a statute confers a right and in the same breath provides for a remedy for enforcement of such right the remedy provided by the statute is an exclusive one. Under Section 9 of the Code, the

courts have subject to certain restrictions, jurisdiction to try suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred. In the said case, the jurisdiction of the Civil Court with regard to the Industrial Disputes was the subject matter of consideration.

11. In Raja Ram Kumar Bhargav (dead) by LRs., v. Union of India, AIR 1988 SC 752, the apex Court held that generally speaking the broad guiding considerations are that wherever a right, not pre-existing in common law, is created by a statute and that statute itself provided a machinery for the enforcement of the right, both the right and the remedy having been created uno-flatu and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the civil courts' jurisdiction is impliedly barred.

12. In Puri Konark Development Authority (supra), a Division Bench of this Court had the occasion to consider the jurisdiction of the Civil Court to examine the order passed under Section 91 of the Orissa Development Act ("O.D.A.Act"). A Bench speaking through Justice A.S.Naidu (as he then was) on a survey of the decisions of the apex Court held that without exhausting the remedies stipulated under the Special Statute, i.e., ODA Act, a person cannot knock at the doors of a Civil Court and that the Civil Court has no jurisdiction to entertain such a suit.

13. Section 28(1) of the Act provides that any person aggrieved by any order under sub-section (2) of Section 3 or under section 8 may file appeal within thirty days. Sub-section (2) of Section 28 provides that every order passed in appeal under sub-section (2) shall subject to the provisions of sub-section (3), be final. The statute gives a finality to the order of the Commercial tax Officer. Adequate remedy has been provided under Section 28 of the Act. Where a special statute provides for an appeal, jurisdiction of the Civil Court is impliedly barred. Since the statute gives a finality to the orders passed by the competent authority under the Act, the Civil Court's jurisdiction must be held to be excluded. The substantial questions of law are answered accordingly.

14. A priori, the impugned judgment is set aside. The appeal is allowed. Consequently, the suit is dismissed. No costs.

Appeal allowed.

2018 (I) ILR - CUT-775

DR. A.K. RATH, J.

S.A. No.182 of 1988

STATE OF ORISSA & ORS. ……..Appellants

.Vrs.

MAA KURAI SHUNI BRICK INDUSTRIES & ORS. ……..Respondents

(A) CODE OF CIVIL PROCEDURE, 1908 – Section 9 – Jurisdiction of civil court to entertain suits – Tax collected under OST Act without any order of assessment – Claim of refund not considered – Suit filed claiming refund – Plea of State that provisions for appeal and revision being provided under the OST Act, the civil court has no jurisdiction to entertain the suit – Held, there being no order of assessment or order directing payment of interest or order imposing penalty the provision for appeal or revision cannot be pressed into service – Civil court has jurisdiction to entertain the Suit. (Paras 13 & 14)

(B) PRACTICE AND PROCEDURE – Litigations against State – What should be the approach of the State – Indicated.

"Before parting with the case, this Court observes that for a paltry amount, the plaintiff is running from pillar to post since 1983. No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived or frivolous petitions as held by the apex Court in the case of Dr. Buddhi Kota Subbarao vs. K. Parasaran and others, AIR 1996 SC 2687. State is a virtuous litigant. About 60 years back in the case of Firm Kaluram Sitaram vs. The Dominion of India, AIR 1954 Bombay 50, Chief Justice Chagla (as he then was) speaking for the Bench stressed that when the State deals with a citizen it should not ordinarily rely on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent judges, as an honest person. The claim of the plaintiff was denuded on jejune grounds. As a sequel to the above discussion, the appeal is dismissed with cost of Rs.25,000/- (rupees twenty-five thousand)."

(Para 18 & 19)

Case Laws Relied on and Referred to :-

1. AIR 1969 SC 78 : Dhulabhai etc. & ors. vs. State of Madhya Pradesh & anr.
2. (1988) 68 STC 334 : State of Orissa and others vs. Orissa Cement Ltd.
3. (1987) 67 STC 284 Orissa : Orissa and Secretary to Government of Orissa, Finance Department vs. Straw Products Limited.
4. AIR 1974 SC 1126 : Smt. Ganga Bai vs. Vijay Kumar and ors.
5. AIR 1995 SC 2001 : Most. Rev. P.M.A. Metropolitan and ors. etc. vs. Moran Mar Marthoma and another, etc.
6. AIR 1996 SC 2687 : Dr. Buddhi Kota Subbarao vs. K. Parasaran and others.

For Appellants : Mr. P.P. Mohanty, A.S.C. (C.T.)

For Respondents : Mr. R.P. Kar, Mr. A.N. Ray.

Date of Hearing : 04.04.2018 Date of Judgment:16.04.2018

JUDGMENT

Dr. A.K. RATH, J.

This is a defendants' appeal against confirming judgment.

2. Plaintiffs-respondent nos.1 to 3 instituted the suit for realization of Rs.9996/- with 18% interest. The case of the plaintiffs is that plaintiff no.1 is a registered partnership firm carrying on business in the manufacturing and sale of bricks in the name and style of "MAA KURAI SHUNI BRICK INDUSTRIES". Since the firm did not have its transport facility, it used to engage the transport service from 16.12.1982 to 29.01.1983. The sales of the firm did not exceed the non-taxable limit of turnover of Rs.50,000/-. The Additional Sales Tax Officer, Berhampur, defendant no.6, arbitrarily collected sales tax @Rs.51.00 on each transit amounting to Rs.9996/- in spite of the protest of the plaintiffs. The defendant no.4 issued receipts for Rs.5304/- in favour of the purchasers for the transits made between 16.12.1982 to 21.10.1983, even though the way bills and other documents stood in the name of the firm, plaintiff no.1. Subsequently, the defendant no.6 issued receipts for Rs.5304/- in favour of the purchasers for the transits made between 12.01.1983 to 29.04.1983. The plaintiffs filed a petition before the defendants on 05.01.1983 for refund of the sales tax amounting to Rs.9996/-. But then, no refund was made. The firm applied for registration under Sec.9 of the Orissa Sales Tax Act (in short, "OST Act") with effect from 29.01.1983 as its gross turnover exceeded Rs.50,000/-. The firm was registered. The plaintiff no.1 paid sales tax on turnover for the turnover of the year ending 1982-83. The defendant no.4 allowed deduction of tax collected under Rule 36 of the Orissa Sales Tax Rules, 1947. But then, the defendant no.6 did not deduct the tax collected during the period from 16.12.1982 to 29.01.1983. With this factual scenario, they instituted the suit seeking the reliefs mentioned supra after issuing notice under Sec.80 C.P.C.

3. The defendant nos.1 to 5 entered contest and filed written statement stating, inter alia, that the purchasers had voluntarily paid tax through their respective truck drivers amounting to Rs.5304/-. The said amount is not refundable to the plaintiffs. The firm having not applied for provisional registration under Sec.9-C of the OST Act, is not entitled for refund of sales tax amounting to Rs.4692/-. The jurisdiction of the civil court is barred under Sec.22 of the OST Act to entertain the suit. The suit against the defendant no.6 is barred under Sec.27 of the OST Act. Defendant no.6 is sex exparte.

4. Stemming on the pleadings of the parties, learned trial court struck six issues. Parties led evidence, oral and documentary, to substantiate their respective cases. Learned trial court decreed the suit in part holding inter alia that the plaintiff-firm had hired trucks for marketing its product and had produced way bills. The firm as hire purchaser was for the time being in charge of the vehicles and as such tax collected from the drivers amounts to collection from the firm. Since the firm had already paid the tax assessed for the assessment year ending period 1982-1983, it is entitled to refund of the tax collected at the check gate. However, some transit way bills for Exts.33, 41, 46, 49, 57, 70, 77, 78, 80, 107, 118 and 132 for the transits covered the period between 16.12.1983 to 21.01.1983. The plaintiff-firm is liable for a refund of Rs.9333/-. Since the tax has been collected twice, the same amounts to wrongful enrichment of the defendants. Civil court has jurisdiction to try the suit. Felt aggrieved, the plaintiff filed appeal before the learned District Judge, Berhampur, which was subsequently transferred to the court of the learned Ist Additional District Judge, Berhampur and renumbered as M.A. No.9/87. The defendants also filed cross objection. Learned lower appellate court concurred with the findings of the learned trial court and dismissed the appeal.

5. The second appeal was admitted on the substantial question of law enumerated in ground no.5 of the appeal memo. The same is:

> "5. Whether in view of Sec.22 of the Orissa Sales Tax Act, the civil court has jurisdiction to entertain and decide the suit for refund of sales tax under the said Act ?"

6. Heard Mr. P.P. Mohanty, learned A.S.C. (C.T.) for the appellants and Mr. R.P. Kar, learned counsel, along with Mr.A.N. Ray, learned counsel for the respondents.

7. Mr. Mohanty, learned A.S.C. (C.T.) for the appellants, submitted that Sec.22 of the OST Act provides bar to certain proceedings. Any person aggrieved by the order of assessment for a direct payment of interest or penalty may file appeal under Sec.23(1) of the OST Act within thirty days. Thus the jurisdiction of the civil court is barred. He placed reliance on the decisions of the apex Court in the case of *Dhulabhai etc. and others vs. State of Madhya Pradesh and another,* AIR 1969 SC 78 and this Court in the cases of *State of Orissa and others vs. Orissa Cement Ltd.,* (1988) 68 STC 334 Orissa and *Secretary to Government of Orissa, Finance Department vs. Straw Products Limited,* (1987) 67 STC 284 Orissa.

8. Per contra, Mr. Kar, learned counsel for the respondents, submitted that the gross turnover of the plaintiffs had not exceeded Rs.50,000/-. Plaintiff-firm was not a registered dealer at the relevant point of time, when tax was collected in the check gate. The plaintiff was not liable to pay tax. There is no provision in the Act to file appeal. Secs.22 and 23 of the OST Act cannot be pressed into service. The civil court has jurisdiction to entertain the suit. There is no infirmity in the impugned judgment.

9. Before adverting into the contentions raised by the parties, it will be necessary to set out the provisions of Secs.22 and 23(1)(4) of the OST Act.

> "**22. Bar to certain proceedings:-** Save as is provided in Section 24 no assessment made or purporting to have been made and no order passed or purporting to have been passed under the provisions of this Act and the rules made thereunder by the Commissioner, Tribunal or Additional Tribunal, as the case may be or any person appointed under Section 3 to assist the Commissioner shall be called in question in any court and save as is provided in Section 23, no appeal or application for revision shall lie against any such assessment or order, as the case may be.
>
> xxx xxx xxx
>
> **23. Appeals and Revision-**
>
> (1) Within thirty days from the date of receipt of the copy of-
>
> (a) an order of assessment with or without penalty under section 12, 12-A or 12-B; or
>
> (b) an order directing payment of interest under sub-section (4-a) of section 12; or
>
> (c) an order imposing penalty under sub-section (3) of section 9-B or under sub-section (3) of section 11.
>
> any dealer or person, as the case may be, may, in the prescribed manner appeal to the prescribed authority against such order.
>
> xxx xxx xxx
>
> (4)(a) Subject to such rules as may be made for reasons to be recorded in writing, the Commissioner may, upon application by a dealer (or person) or on his own motion revise any order made under this Act or the rules made thereunder by any person other than the Tribunal appointed under sub-section (3) of section 3 to assist him."

10. In *Dhulabahi etc. and others* (supra), the Constitution Bench of the apex Court laid down the principles regarding exclusion of jurisdiction of the Civil Court. The apex Court held :

> "(1) Where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whetherremedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund' of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply." (*emphasis laid*)

11. 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.

12. In *Most. Rev. P.M.A. Metropolitan and others, etc. vs. Moran Mar Marthoma and another, etc.,* AIR 1995 SC 2001, the apex Court held:

"27. xxx xxx xxx

One of the basic principles of law is that every right has a remedy. Ubi jus ibi remediem is the well known maxim. Every civil suit is cognisable unless it is barred, 'there is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue' Smt. Ganga Bai vs. Vijay Kumar & Ors., AIR 1974 SC 1126. The expansive nature of the Section is demonstrated by use of phraseology both positive and negative. The earlier part opens the door widely and latter debars entry to only those which are expressly or impliedly barred. The two explanations, one existing from inception and latter added in 1976 bring out clearly the legislative intention of extending operation of the Section to such religious matters where right to property or office is involved irrespective of whether any fee is attached to the office or not. The language used is simple but explicit and clear. It is structured on the basic principle of a civilised jurisprudence that absence of machinery for

enforcement of right renders it nugatory. The heading which is normally key to the Section brings out unequivocally that all civil suits are cognizable unless barred. What is meant by it is explained further by widening the ambit of the Section by use of the word `shall' and the expression, `all suits of a civil nature' unless `expressly of impliedly barred'.

28. Each word and expression casts an obligation on the court to exercise jurisdiction for enforcement of right. The word `shall' makes it mandatory. No court can refuse to entertain a suit if it is of description mentioned in the Section. That is amplified by use of `expression, `all suits of civil nature'.

xxx xxx xxx

The word 'civil nature' is wider than the word 'civil proceeding'. The Section would, therefore, be available in every case where the dispute has the characteristic of affecting one's rights which are not only civil but of civil nature."

13. On the anvil of the decisions cited supra, the instant appeal may be examined. Sec.22 of the OST Act provides that no assessment made or purporting to have been made and no order passed or purporting to have been passed under provisions of this Act and the rules made thereunder by the Commissioner, Tribunal or any persons appointed under Sec.3 to assist the Commissioner shall be called in question in any court and save as is provided in Sec.23, no appeal or application for revision shall lie against any such assessment or order, as the case may be.

14. Sec.23 of the OST Act provides appeals and revision. Sec.23(1) of the OST Act comes into play when there is an order of assessment with or without penalty under Secs.12, 12-A or 12-B; or an order directing payment of interest under sub-section (4-a) of Sec.12; or an order imposing penalty under sub-section (3) of Sec.9-B or under subsection (3) of Sec.11. Any dealer or person, as the case may be, may, in the prescribed manner appeal to the prescribed authority against such order. In the instant case, neither there is any order of assessment or order directing payment of interest or order imposing penalty. Thus, Sec.23 cannot be pressed into service.

15. Under Section 9 C.P.C., the courts have subject to certain restrictions, jurisdiction to try suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred. In view of the same, both the courts perfectly justified that the civil court has jurisdiction to entertain the suit. The substantial question of law has been answered in affirmative.

16. Reliance placed on *Orissa Cement Ltd.* (supra) and *Straw Products Limited* (supra) is totally misplaced. In *Orissa Cement Limited* (supra), the plaintiff was a registered dealer under the Central Sales Tax Act. He instituted the suit for realization of money with P.L and F.I. According to the

plaintiff, it paid tax under the Act for the years 1962-63, 1963-64 and 1964-65 on which it is entitled to rebate under Sec.13(3) of the OST Act, 1947, which was not allowed by the defendants. The defendants took the plea that the suit was barred under Sec.22 of the OST Act, 1947. A question arose before this Court was as to whether the orders rejecting applications for refund have been passed. Counsel for the State submitted that the applications of the plaintiff had been rejected. This Court held that the order is revisable and no suit is lie. The decision is distinguishable on facts.

17. In *Straw Products Limited* (supra), the plaintiff filed the suit for realization of Rs.42,176.74 paise. The plaintiff claimed the amount as due to it as rebate under the provisions of Sec.9(3) of the Central Sales Tax Act, 1956 read with Sec.13(8) of the OST Act, 1947 as it stood at the relevant time. According to the plaintiff, they had paid the tax due from it regularly in due time for the financial years 1963-64 to 1968-69 the last such payment being made on 30th April, 1969 for the month ending 31st March, 1969. The plaintiff filed application for refund on 11th November, 1969 which was rejected by the Assistant Commissioner on 28th January, 1970. The plaintiff carried a revision before the Commissioner ofCommercial Taxes, Orissa under Rule 22 of the Central Sales Tax (Orissa) Rules, 1967 read with Sec.23(4) of the State Act as against the order of assessment passed by the Sales Tax Officer, but no revision was made against the order of Assistant Commissioner refusing to allow the rebate. The Commissioner rejected the revision against the assessment as not admissible since he held that proceedings of assessment under the Act are appelable after which a reference lies to this Court and hence the revision was not entertainable. This Court held that the question of rebate is one relating to the assessment process itself. A rebate is to be allowed on the basis of the return submitted by the dealer and if not so allowed, it is open to challenge in appeal and thereafter in reference to the High Court. The plaintiff did not pursue such remedies. The decision is also distinguishable on facts.

18. Before parting with the case, this Court observes that for a paltry amount, the plaintiff is running from pillar to post since 1983. No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived or frivolous petitions as held by the apex Court in the case of *Dr. Buddhi Kota Subbarao vs. K. Parasaran and others,* AIR 1996 SC 2687. State is a virtuous litigant. About 60 years back in the case of *Firm Kaluram Sitaram vs. The Dominion of*

India, AIR 1954 Bombay 50, Chief Justice Chagla (as he then was) speaking for the Bench stressed that when the State deals with a citizen it should not ordinarily rely on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent judges, as an honest person. The claim of the plaintiff was denuded on jejune grounds.

19. As a sequel to the above discussion, the appeal is dismissed with cost of Rs.25,000/- (rupees twenty-five thousand).

Appeal dismissed.

2018 (I) ILR - CUT- 782

DR. A.K.RATH, J

S.A.No.161 of 1995

DAYANIDHI BAIDYA .....Appellant

.Vrs.

KESHABA BAIDYA & ANR. .....Respondents

CODE OF CIVIL PROCEDURE, 1908 – Section 100 – Second Appeal – Suit for declaration decreed ex-parte – Application under Order 9 Rule 13 C.P.C. filed to set aside the ex-parte judgment – Dismissed – Appeal against and then Revision filed also dismissed – Thereafter Title Appeal was filed under Section 96 C.P.C. before the learned Additional District Judge – Appellate court held that, the appeal, having been filed by the defendants against the ex-parte judgment and decree after exhausting remedy available under Order 9 Rule 13 C.P.C., is not maintainable – Held so, it dismissed the appeal – Whether correct? Held, No – First appeal maintainable.

"Notwithstanding dismissal of application under Order 9 Rule 13 C.P.C., the appeal under Section 96 C.P.C. is maintainable. When an application under Order 9 Rule 13 C.P.C is dismissed, the defendant can prefer an appeal in terms of Order 43 Rule 1 C.P.C. Once such an appeal is dismissed, the appellant cannot raise the same contention in the first appeal. The defendant cannot raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it. It is open to the defendant to argue in the first appeal filed by him under Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable." (Para 8)

Case Laws Relied on and Referred to :-

1. (2005) 1 SCC 787 : Bhanu Kumar Jain v. Archana Kumar and another.

For Appellant : Mr.P.V.Balkrishna
For Respondents : None

Date of Hearing :16.4.2018 Date of Judgment:23.4.2018

JUDGMENT

Dr. A.K.RATH, J.

This appeal is by defendant no.1 against a confirming judgment.

2. The dispute lies in a narrow compass. It is not necessary to recount in detail the case of the parties. Suffice it to say that plaintiff-respondent no.1 instituted the suit for declaration that the defendants have no right, title, interest over the suit land and recovery of possession. The defendants filed written statement denying the assertions made in the plaint, but subsequently they were set ex parte. The suit was decreed ex parte. The defendants filed an application under Order 9 Rule 13 C.P.C. to set aside the ex parte judgment. The same having been dismissed, they filed appeal, which met the same fate. They filed revision, which was eventually dismissed. Thereafter they filed T.A.No.1 of 1995 under Section 96 C.P.C. before the learned Additional District Judge, Jeypore. Learned appellate court held that the appeal, having been filed by the defendants against the ex parte judgment and decree after exhausting remedy available under Order 9 Rule 13 C.P.C., is not maintainable. Held so, it dismissed the appeal.

3. The Second Appeal was admitted on the following substantial question of law:

> "Whether the lower appellate court was right in holding that the appeal filed by the appellant under Section 96(2) C.P.C. was not maintainable as the appellant had already exhausted the remedy under Order-9, Rule-13 C.P.C. ?"

4. Heard Mr.P.V.Balkrishna, learned Advocate for the appellant. None appeared for the respondents.

5. Mr.Balkrishna, learned Advocate for the appellant submitted that notwithstanding dismissal of application under Order 9 Rule 13 C.P.C., the defendants can pursue appeal under Section 96 C.P.C.

6. In Bhanu Kumar Jain v. Archana Kumar and another, (2005) 1 SCC 787, the apex Court held that when an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the trial court merges with the order passed by the

appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein. An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the ground that (i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour and (ii) The suit could not have been posted for ex-parte hearing. Although there may not be a statutory bar to avail two remedies simultaneously and an appeal as also an application for setting aside the ex-parte decree can be filed; one after the other; on the ground of public policy the right of appeal conferred upon a suitor under a provision of statute cannot be taken away, if the same is not in derogation or contrary to any other statutory provisions. A right to question the correctness of the decree in a First Appeal is a statutory right. Such a right shall not be curtailed nor shall any embargo thereupon be fixed unless the statute expressly or by necessary implication says so. When an application under Order 9, Rule 13 of the Code is dismissed, the defendant can only avail a remedy available there against, viz, to prefer an appeal in terms of Order 43, Rule 1 of the Code. Once such an appeal is dismissed, the appellant cannot raise the same contention in the first appeal. If it be held that such a contention can be raised both in the first appeal as also in the proceedings arising from an application under Order 9 Rule 13, it may lead to conflict of decisions which is not contemplated in law. The dichotomy can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex-parte hearing by the Trial Court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under Section 96(2) of the Code on the merit of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court

can also be a possible plea in such an appeal. The "Explanation" appended to Order 9 Rule 13 of the Code shall receive a strict construction.

7. Bhanu Kumar Jain (supra) was quoted with approval in M/s. Neerja Realtors Pvt. Ltd. v. Janglu (dead) Thr. LR. (Civil Appeal No.71 of 2018 disposed of on 29.1.2018). The apex Court held that a defendant against whom an ex parte decree is passed has the option of filing an appeal or application under Order 9 Rule 13 C.P.C. The defendant can take recourse to both the proceedings simultaneously. The right of appeal is not taken away by filing an application under Order IX Rule 13. But if the appeal is dismissed as a result of which the ex-parte decree merges with the order of the appellate court, a petition under Order IX Rule 13 would not be maintainable. When an application under Order IX Rule 13 is dismissed, the remedy of the defendant is under Order XLIII Rule 1. However, once such an appeal is dismissed, the same contention cannot be raised in a first appeal under Section 96.

8. Notwithstanding dismissal of application under Order 9 Rule 13 C.P.C., the appeal under Section 96 C.P.C. is maintainable. When an application under Order 9 Rule 13 C.P.C is dismissed, the defendant can prefer an appeal in terms of Order 43 Rule 1 C.P.C. Once such an appeal is dismissed, the appellant cannot raise the same contention in the first appeal. The defendant cannot raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it. It is open to the defendant to argue in the first appeal filed by him under Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. The substantial question is answered in negative.

9. A priori, the judgment of the learned appellate court is set aside. The matter is remitted back to the learned appellate court for de novo hearing. No costs. Appeal remanded.

2018 (I) ILR - CUT- 785

DR. A.K.RATH, J

S.A. NO. 314 OF 2000

BISIKESAN NAIK ……. Appellant

.Vrs.

STATE OF ORISSA & ANR. ……..Respondents

(A) ORISSA PREVENTION OF LAND ENCROACHMENT ACT, 1972 – Section 16 – Bar of suits and proceedings – Notwithstanding the bar contained in Sec.16 of the OPLE Act, the civil court has jurisdiction to adjudicate the complicated question of title. (Paras 10 & 11)

(B) ADVERSE POSSESSION – Claim of – Ingredients required – Held, the possession should be 'nec vi nec clam nec precario' means the possession required must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor – Element of hostile animus being absent, mere possession of the suit land for long time is not suffice to hold that the plaintiff has perfected title by way of adverse possession, unless the classical requirements of adverse possession nec vi, nec clam, nec precario are pleaded and proved. (Para 13 & 14)

Case Laws Relied on and Referred to :-

1. AIR 1996 ORISSA 199 : State of Orissa vs. Bhanumali (Dead) Nurpa Bewa & ors.
2. AIR 1934 Privy Council 23: Secretary of State v. Debendra Lal Khan.

For Appellant : Mr. Lalit Kumar Moharana,
For Respondents : Mr. Ram Prasad Mohapatra, A.G.A.

Date of Hearing : 18.04.2018 Date of Judgment:23.04.2018

JUDGMENT

Dr.A.K. RATH, J.

This is a plaintiff's appeal against confirming judgment.

2. The suit was for declaration of title over schedule 'A' land,correction of ROR and for a direction to the defendants to settle the schedule 'A' land in his favour. The case of the plaintiff was that he is a landless scheduled tribe. His residential house stands over a piece of Government land described as schedule 'A' for more than forty-six years. In the current settlement, the land had been settled in the name of the Government. The kissam of land is Abadajogya Anabadi. In the remarks column, the note of possession of his father had been reflected. His father was in peaceful possession of the land. After his death, he is in possession of the land peacefully, continuously and with the hostile animus of the defendants. While matter stood thus, Encroachment Case Nos.719 of 1989, 355 of 1987 and 357 of 1987 had been initiated against him. He being an encroacher appeared in the cases, paid dues and obtained receipts. He had not been evicted from the suit land. In an encroachment case, the order of eviction was passed. He filed Encroachment Appeal Nos.11 and 12 of 1987 before the Sub-Collector, Baripada. The

appeals were allowed and the matter was remanded back to the Tahasildar, Baripada, defendant no.2, to enquire into the same and settle the land in his favour. No order has been passed till yet. With this factual scenario, he instituted the suit seeking the reliefs mentioned supra.

3. The defendants filed written statement denying the assertions made in the plaint. The case of the defendants was that the suit is barred under Sec.16 of the Orissa Prevention of Land Encroachment Act ("OPLE Act"). The suit land is a Government land. The same has been recorded in the name of the Government in the ROR. The plaintiff has no right, title and interest over the same. Encroachment Case Nos.719/87, 193/87, 355/87 and 357/87 had been initiated against the plaintiff for unauthorised occupation of the suit land. The plaintiff was in unauthorized occupation of the suit land since 1984. The land is objectionable and cannot be settled.

4. On the interse pleadings of the parties, learned trial court struck four issues. Parties led evidence, oral and documentary, to substantiate their cases. Learned trial court dismissed the suit holding inter alia that the plaintiff paid penalty for his unauthorised occupation in the encroachment case initiated under the OPLE Act. Since he had paid penalty in the encroachment case and accepted title of the suit, the plea of adverse possession is bound to fail. Sec.16 of the OPLE Act is a bar to civil court to try the suit. It further held that the plaintiff had admitted the superior title of the State by paying penalty and has failed to prove his continuous, uninterrupted peaceful possession of the suit land for more than thirty years with the hostile animus against the true owner. The unsuccessful plaintiff filed appeal before the learned District Judge, Baripada, which was subsequently transferred to the court of the learned Civil Judge (Sr. Divn.), Baripada and renumbered as T.A. No.13/36 of 1998-97. Learned lower appellate court held that the civil court has jurisdiction to entertain the suit. It concurred with the finding of the learned trial court and dismissed the appeal.

5. The second appeal was admitted on the substantial questions of law enumerated in ground nos.6(A), (B) and (C) of the memorandum of appeal. The same are:

> "6(A) Whether the learned lower appellate court is satisfied in holding that by paying the penalties in the encroachment proceeding the appellant is precluded from claiming title by adverse possession.
>
> (B) The plea of adverse possession can only be raised by a party by admitting title of the other party. A declaration of title relief by adverse possession can only be raised and decided by the civil court. Any order passed by the court of l imited

> jurisdiction cannot operate as res judicata regarding title to the property raised subsequently after the decision of the court of limited jurisdiction. In view of the aforesaid principle of law as has been set at rest in A.I.R. 1991 S.C. 884 and A.I.R. 1982 S.C. 1081, whether the learned lower appellate court is justified in holding that plaintiff has no cause of action to file the suit because of admission of title of Govt. in the encroachment proceedings by paying penalty.
>
> (C) Whether Ext.3 series, the order passed in the encroachment proceeding and receipts showing payment of penalty can arrest the adverse possession be raised in civil court and the findings of the learned courts below to that extent sustainable."

6. Heard Mr. Lalit Kumar Moharana, learned counsel, on behalf of Mr. S.K. Mishra, learned counsel for the appellant and Mr. Ram Prasad Mohapatra, learned A.G.A. for the respondents.

7. Mr. Moharana, learned counsel for the appellant, submitted that the learned lower appellate court committed a manifest illegality and impropriety in holding that by paying penalty in encroachment proceeding, the plaintiff has accepted title by way of adverse possession. The plea of adverse possession can only be raised by the parties by admitting title of other party. The civil court has jurisdiction to declare the title. The order passed by the court of limited jurisdiction will not operate as res judicata regarding title of the property.

8. Per contra, Mr. Mohapatra, learned A.G.A. for the respondents, submitted that the plaintiff is an unauthorised occupant. In the encroachment case, he had paid the penalty and admitted the title.

9. Sec.16 of the OPLE Act is the hub of the issue. The same is quoted hereunder.

> "**16. Bar of suits and proceedings**—No suit or other legal proceedings in respect of the matters or disputes for determining or deciding which provision is made in this Act shall be instituted in any Court of law except under and in conformity with the provisions of this Act."

10. In *State of Orissa vs. Bhanumali (Dead) Nurpa Bewa and others,* AIR 1996 ORISSA 199, a question arose that whether the decision of the Revenue Officer in the proceeding under the Orissa Prevention of Land Encroachment Act will operate as res judicata in the subsequent suit filed by the plaintiff for declaration of title and recovery of possession. This Court held that the decision of the Revenue Officer in the proceeding under the Orissa Prevention of Land Encroachment Act can neither operate as res judicata nor Sec.16 thereof can stand as a bar relating to the question of title in the subsequent civil suit by the plaintiffs.

11. Notwithstanding the bar contained in Sec.16 of the OPLE Act, the civil court has jurisdiction to adjudicate the complicated question of title.

12. The next question arises for consideration as to whether the plaintiff has perfected title by way of adverse possession ?

13. In the celebrated judgment, the Privy Council in the *Secretary of State v. Debendra Lal Khan*, AIR 1934 Privy Council 23 held that the classical requirement of adverse possession is that the possession should be nec vi nec clam nec precario. Their Lordships quoted with approval the decision in the case of *Radhamoni Devi v. The Collector of Khulna and others*, Indian Appeals 1900 Vol. XXVII at page 140 that "the possession required must be adequate in continuity, in publicity, and in extent to shew that it is possession adverse to the competitor".

14. The date of entry into the suit land has not been mentioned. In the encroachment case, the plaintiff had paid the penalty. In the suit, the plaintiff prayed for a direction to the defendants to settle the schedule 'A' land in his favour. Thus the element of hostile animus is absent. Mere possession of the suit land for long time is not suffice to hold that the plaintiff has perfected title by way of adverse possession, unless the classical requirements of adverse possession nec vi, nec clam, nec precario are pleaded and proved. The substantial questions of law are answered accordingly.

15. As a sequel to the above discussion, the appeal fails and is dismissed. There shall be no order as to costs.

Appeal dismissed.

2018 (I) ILR - CUT- 789

DR. B.R. SARANGI, J

W.P.(C) NO. 690 OF 2003

ANUPAMA BEHERA .....Petitioner

.Vrs.

GRIDCO & ORS. .....Opp. Parties

SERVICE – PENSION & GRATUITY – Direction for recovery of certain amount without determining the same following due procedure – Writ petition challenging the order of recovery and to regularize the family pension with all consequential benefits – Held, since there was no determination of the amount due, there can be no recovery – Direction issued.

"As a matter of course, any recovery to be made from any employee has to be in accordance with law and by following due procedure. From the extracted paragraph it would only be evident that an amount of Rs.2,17,288.52 is lying outstanding towards the cost of materials issued to the deceased husband of the petitioner, which may be recovered from his final dues. As such, no determination or adjudication has been made by the authority for claiming such amount and such amount has never been ascertained by giving opportunity of hearing to the husband of the petitioner. No such material has been produced before this Court to indicate wherefrom the amount of Rs.2,17,288.52 was arrived at, save and except towards the cost of materials issued in favour of the husband of the petitioner. Needless to say, to substantiate the said contention, which has been raised in the letter itself, no material has been produced before this Court to satisfy that the material costing Rs.2,17,288.52/- are to be recovered and, as such, neither opposite party no.1, nor opposite party no.3 has taken any decision with regard to determination of liability against the husband of the petitioner. But all on a sudden, by only allowing provisional family pension to the petitioner, the opposite party no.1 has withheld gratuity for a quite long period, i.e., from the death of the husband of the petitioner till date. Unless the amount due is determined by following due procedure, the same cannot be recovered at the whims and caprice of the authority concerned."

(Para 9).

Case Laws Relied on and Referred to :-

1. (2009) 16 SCC 767 : State of Jharkhand v. Uma Prasad.
2. AIR 1960 SC 251 : Indian Hume Pipe Co. Ltd. v. Workmen.
3. AIR 2001 SC 1997 : Delhi Transport Corporation Retired Employees Association v. Delhi Transport Corporation.
4. AIR 2004 SC 1426 : Ahmedabad Pvt. P.T. Association v. Administrative Officer.

For petitioner : M/s.M.K. Mohanty, B.P. Routray, S. Samal & M.K. Padhy,
For opp. Parties : M/s. B.K. Patnaik, P.K. Sahoo, P. Sinha and R.K. Nayak, M/s.P. Sinha, P.K. Sahoo & R.K. Nayak

Date of Hearing : 02.04.2018 Date of Judgment: 06.04.2018

JUDGMENT

Dr. B.R. SARANGI, J.

The petitioner, being widow of the deceased employee Khagendra Behera, has filed this application to quash the communication dated 15.04.2000 in Annexure-6 issued by Asst. Manager (Personnel), Hirakud Industrial Works Limited, Bhubaneswar, by which an amount of Rs.2,17,288.52 has been directed to be recovered from the final dues of her deceased husband and paid to Hirakud Industrial Works Limited, Bhubaneswar. She further seeks direction to opposite party no.1 to release the gratuity amount of her husband and regularize the family pension with all consequential benefits as due to her.

2. The factual matrix of the case is that the husband of the petitioner late Khagendra Behera was working as Asst. Engineer under Grid Corporation of Orissa (hereinafter referred to as "GRIDCO")-opposite party no.1. In the year 1996, he was deputed to the Project Wing of Hirakud Industrial Works Limited-opposite party no.3, which is a subsidiary unit of Industrial Development Corporation Limited-opposite party no.2. While he was discharging his duty, he became ill and made representation to go back to his parent organization. On consideration of the same, opposite party no.1, vide orders dated 06.07.1998 and 17.07.1998, directed him to hand over the charges with up-to-date site account to Sri P.K. Pal, Assistant Executive Engineer, Hirakud Industrial Works Limited, Paradeep within seven days from the date of order, and he was further directed to join in his new assignment under opposite party no.1, vide order dated 27.07.1998. In compliance of the same, the petitioner handed over all the charges of the Project Wing of Hirakud Industrial Works Limited with up-to-date site account to Sri P.K. Pal and he was relieved, vide order dated 01.09.1998, with effect from the said date to enable him to join in his new assignment. Consequentially, he joined in his parent organization, i.e., GRIDCO in the office of the Chief Engineer, EHT(M), Bhubaneswar.

2.1 To the misfortune of the petitioner, while her husband was discharging his duty, he died on 09.01.1999. After the death of her husband, she applied for family pension and on scrutiny of the same, the Deputy Manager(HR), GRIDCO stated that there was nothing outstanding against late husband of the petitioner so far as GRIDCO is concerned and the Non-drawal Certificate of the Government would be issued after receipt of the same from the Department of Energy, which was sought for vide letter dated 28.01.2000. During life time of the husband of the petitioner, nothing was communicated to him by Hirakud Industrial Works Limited regarding any outstanding amount, but all on a sudden on 15.04.2000 vide Annexure-6, opposite party no.3 communicated to opposite party no.1 stating that an amount of Rs.2,17,288.52 was lying outstanding towards the cost of materials issued to her late husband, which may be recovered from his final dues and paid to Hirakud Industrial Works Limited. As a result, on consideration of the family pension papers of the husband of the petitioner, which were submitted to the Assistant Engineer, HR(Pension), GRIDCO for finalization, the Deputy Manager (HRD), vide letter dated 22.11.2002, intimated that the petitioner would only be allowed to draw the provisional family pension, pending regularization of the case and receipt of the final

NDC (No Dues Certificate) in accordance with Rules-65 and 76 of the Orissa Civil Services (Pension) Rules, 1992. Consequentially, while withholding gratuity dues, provisional family pension was released pending finalization of the amount claimed by opposite party no.3, hence this application.

3. Mr. M.K. Mohanty, learned counsel for the petitioner strenuously contended that on the basis of the representation submitted by the husband of the petitioner, he was allowed to join under GRIDCO-opposite party no.1 by handing over all the charges. While handing over the charges, at no point of time, it was pointed out that he is liable to pay the amount outstanding, as claimed subsequent to his death. More so, there is no determination of amount due by following prescribed procedure, which is claimed by opposite party no.3 to be deducted by opposite party no.1 from the dues of the deceased employee. It is contended that the claim so made, without determination of the amount due, cannot sustain in the eye of law. Therefore, since the amount so claimed by opposite party no.3 cannot be recovered from the final dues of the husband of the petitioner, the amount so withheld be paid and family pension of the petitioner be regularized. To substantiate his contentions, learned counsel for the petitioner has relied upon the case of ***State of Jharkhand v. Uma Prasad***, (2009) 16 SCC 767.

4. Mr. B.K. Pattnaik, learned counsel appearing for opposite party no.1 has admitted that the husband of the petitioner was an employee of GRIDCO-opposite party no.1 in the rank of Asst. Engineer(Electrical) and his services were placed under opposite party no.3 on deputation for the period from 03.01.1996 to 07.09.1998 and thereafter he was reverted back, pursuant to notification dated 06.07.1998 issued by opposite party no.1, on consideration of his representation, and after reverting back, while he was continuing under the GRIDCO, he died on 09.01.1999. But, however, he contended that opposite party no.3, after death of the husband of the petitioner, vide letter dated 15.04.2000 in Annexure-6, intimated that an amount of Rs.2,17,288.52 was outstanding towards the cost of materials issued to him and requested to recover the said amount from his final dues and pay to opposite party no.3. Pending settlement of the said amount, the petitioner has been sanctioned provisional family pension, save and except stating that an amount of Rs.2,17,288.52, which was outstanding towards cost of materials issued to her husband, has been claimed by opposite party no.3 from opposite party no.1 to be recovered from the dues of the petitioner. It is contended that the retiral benefits, such as death-cum-retiral gratuity and family pension, are being regulated under the Orissa Civil Services (Pension)

Rules, 1992, which empowers the employer to withhold and recover the amount outstanding against an employee from his death cum retiral gratuity and pension.

5. Though M/s P. Sinha, P.K. Sahoo and R.K. Nayak, advocates have entered appearance for opposite party no.3, none was present at the time of call. They have filed counter affidavit on 25.08.2004, which is on record. Since it is an old case of the year 2003 and, in the meantime, more than 14 years have elapsed, without awaiting for the counsel appearing for opposite party no.3, this Court, taking into consideration the counter affidavit filed by opposite party no.3, proceeded with the matter. In the said counter affidavit, opposite party no.3 has stated that the petitioner's husband, while working in the Project Wing of opposite party no.3, had taken various materials for execution of project works, but he handed over the site account up to July, 1998 and had not handed over the charge for the subsequent period and submitted the utilization certificate of the materials received by him. As it was found that an amount of Rs.2,17,288.52, towards the cost of materials, was to be recovered from the husband of the petitioner, opposite party no.3 intimated to opposite party no.1 to recover the said amount and transmit the same to opposite party no.3 forthwith. As such, the demand made by opposite party no.3 is well within its competence and the husband of the petitioner is liable to pay the said amount.

6. In the rejoinder affidavit filed by the petitioner, it has been specifically mentioned that when the husband of the petitioner handed over the charge, at no point of time either any objection was raised or it was stated that the amount claimed is to be recovered from him. Needless to say that after the death of the husband of the petitioner on 09.01.1999, for the first time, a communication was made on 15.04.2000 to opposite party no.1 by opposite party no.3 claiming the amount of Rs.2,17,288.52 from the husband of the petitioner.

7. This Court heard learned counsel for the parties and perused the records. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

8. The facts delineated above are undisputed. Husband of the petitioner was an employee of GRIDCO-opposite party no.1 in the rank of Assistant Engineer(Electrical) and his services were placed under opposite party no.3 for the period from 03.01.1996 to 07.09.1998. Thereafter, he was reverted back to opposite party no.1, pursuant to notification dated 06.07.1998 issued

by opposite party no.1, on consideration of his representation. As the husband of the petitioner was suffering from lever cancer, he died on 09.01.1999. After his death, a demand of Rs.2,17,288.52 has been raised by opposite party no.3, vide letter dated 15.04.2000 addressed to opposite party no.1, to be recovered from final dues of the husband of the petitioner. Even though the petitioner has already been paid provisional pension, gratuity has not been released and final family pension has not been regularized, thereby it has caused penury to the petitioner. But fact remains, neither opposite party no.1, nor opposite party no.3, has produced any material before this Court in support of determination of amount of Rs.2,17,288.52 which is stated to be recoverable from the deceased husband of the petitioner. To be more specific, no such determination has been made by any authority by following due procedure of law and no whisper has been made in the counter affidavits filed by the respective opposite parties nos.1 and 3, with regard to initiation of proceeding or any other mode of determination of the amount sought to be recovered from the outstanding dues of the petitioner.

9. As a matter of course, any recovery to be made from any employee has to be in accordance with law and by following due procedure. Even otherwise, there is no pleading available in the record itself indicating that the amount so claimed was ever admitted by the husband of the petitioner towards shortage of any material or any proceeding was initiated against him for such outstanding dues. Eventually, when the husband of the petitioner was reverted back on 06.07.1998 to GRIDCO and was continuing there, he suffered from lever cancer and died on 09.01.1999. After his death, for the first time, on 15.04.2000 vide Annexure-6, opposite party no.3 communicated to opposite party no.1 claiming the amount of Rs.2,17,288.52 to be recovered from the final dues of the husband of the petitioner. But nothing has been indicated therein as to how the amount is payable to opposite party no.3. In para-5 of the said communication, it has been indicated as follows:

> "5. **Other outstanding Dues**
>
> *An amount of Rs.2,17,288.52 (Rupees two lakhs seventeen thousand two hundred eight and paise fifty two) only is lying outstanding towards the cost of materials issued to Late Behera which may be recovered from his final dues and paid to Hirakud Industrial Works Limited, Bhubaneswar. Copy of the details of material account is enclosed."*

From the extracted paragraph it would only be evident that an amount of Rs.2,17,288.52 is lying outstanding towards the cost of materials issued to

the deceased husband of the petitioner, which may be recovered from his final dues. As such, no determination or adjudication has been made by the authority for claiming such amount and such amount has never been ascertained by giving opportunity of hearing to the husband of the petitioner. No such material has been produced before this Court to indicate wherefrom the amount of Rs.2,17,288.52 was arrived at, save and except towards the cost of materials issued in favour of the husband of the petitioner. Needless to say, to substantiate the said contention, which has been raised in the letter itself, no material has been produced before this Court to satisfy that the material costing Rs.2,17,288.52/- are to be recovered and, as such, neither opposite party no.1, nor opposite party no.3 has taken any decision with regard to determination of liability against the husband of the petitioner. But all on a sudden, by only allowing provisional family pension to the petitioner, the opposite party no.1 has withheld gratuity for a quite long period, i.e., from the death of the husband of the petitioner till date. Unless the amount due is determined by following due procedure, the same cannot be recovered at the whims and caprice of the authority concerned.

10. In ***Ahmedabad Pvt. P.T. Association v. Administrative Officer***, AIR 2004 SC 1426 the apex Court held as follows:

> *"The expression "gratuity" itself suggests that it is a gratuitous payment given to an employee on discharge, superannuation or death. It is an amount paid unconnected with any consideration and not resting upon it, and has to be considered as something given freely, voluntarily or without recompense. It is sort of financial assistance to tide over postretiral hardships and inconveniences."*

11. In ***Delhi Transport Corporation Retired Employees Association v. Delhi Transport Corporation***, AIR 2001 SC 1997, the apex Court held that "Gratuity" is a reward for good, efficient and faithful service rendered for a considerable period.

12. Similarly in ***Indian Hume Pipe Co. Ltd. v. Workmen***, AIR 1960 SC 251, the apex Court held that "Gratuity" is a kind of retirement benefit like the provident fund or pension gratuity paid to workmen is intended to help them after retirement whether the retirement is the result of the rules of superannuation or of physical disability. Essentially "Gratuity" is a bounty or a gift to an officer on retirement.

In view of the above settled position of law, it can safely be construed that in the instant case by withholding gratuity amount great prejudice has been caused to the petitioner, who is in harness due to premature death of her husband while in employment.

13. In ***Uma Prasad*** mentioned supra, the apex Court, taking note of the fact that no charge-sheet was submitted against deceased Birendra Prasad, who was suspended but it was revoked after 2 years and he died 4 years later while in employment, held that there could be no recovery of any amount from retiral benefits of the deceased employee.

14. As already stated, in the instant case, the husband of the petitioner was an employee under opposite party no.1. He was deputed to work under opposite party no.3 for the period from 03.01.1996 to 07.09.1998, and thereafter reverted back to opposite party no.1, pursuant to notification dated 06.07.1998 issued by opposite party no.1, on consideration of his representation, and thereafter died on 09.01.1999. Neither he faced any proceeding nor any amount was determined during his tenure and, above all, no charge-sheet has been submitted claiming recovery of any such amount sought to be recovered now. Therefore, applying the principle decided in ***Uma Prasad*** (supra), there could be no recovery of any amount from the final dues of deceased husband of the petitioner.

15. In the above view of the matter, the communication dated 15.04.2000 seeking recovery of Rs.2,17,288.52 out of the final dues of the husband of the petitioner and to pay the same to opposite party no.3 is absolutely unwarranted and uncalled for. Therefore, the same is liable to be quashed. Accordingly, the communication dated 15.04.2000 in Annexure-6 is hereby quashed. Consequentially, this Court directs opposite party no.1 to release gratuity amount and finalise family pension and pay the same to the petitioner as expeditiously as possible, preferably within a period of three months from the date of communication of this judgment.

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

Writ petition allowed.

2018 (I) ILR - CUT-796

D .DASH, J.

RSA. NO. 337 OF 2005

BAIKUNTHA NATH SAHOO ……. Appellant

.Vrs.

KUMUDINI SAHOO ……..Respondent

HINDU MARRIAGE ACT, 1955 – Section 13 – Suit for dissolution of marriage by Husband – Grounds – Desertion & institution of criminal

case by wife amounting to cruelty – Desertion not established – Institution of criminal case whether amounts to cruelty? – Held, No – Action of wife lodging a FIR and giving rise to this criminal case against husband cannot be taken to be an act of cruelty of such nature and degree entitling the husband to a decree of dissolution of marriage. (Para 10)

For Appellant : M/s. S.P.Mishra, S.Mishra, S.Dash, S.Nanda & P.Sahu

For Respondent : B.K.Nayak& D.K.Mohanty

Date of Hearing : 07.02.2018 Date of Judgment : 14.03.2018

JUDGMENT

D.DASH, J.

The appellant by filing this appeal under section 100 of the Code of Civil Procedure challenges the judgment and decree passed by the learned Addl. District Judge, Nayagarh in T.A. No. 04 of 2001 setting aside the judgment and decree passed by the learned Civil Judge (Sr.Divn.), Nayagarh, in T.S. No. 36 of 1995.

It is pertinent to state here that the appellant (plaintiff) in the suit has prayed for passing of a decree of dissolution of his marriage with the respondent (defendant) stating that sufficient mental cruelty has been meted out at him at the behest of the respondent (defendant) and that has been projected as the sole ground for dissolution of their marriage. The trial court had decreed the suit granting the decree for dissolution of marriage between the parties with a direction to the appellant (plaintiff) to pay a sum of Rs.250/- per month for the maintenance of their son while declining to grant maintenance to the respondent (defendant).

The respondent (defendant) being aggrieved by the said judgment and decree had called those in question by filing the above noted first appeal. The lower appellate court recording the findings, contrary to what had been returned by the trial court and answering those against the present appellant (plaintiff) has allowed the appeal. Consequent upon the same, the judgment and the decree of dissolution of marriage of the plaintiff and the defendant have stood annulled.

2. For the sake of convenience, in order to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arraigned in the trial court.

3. The plaintiff's case in short is that his marriage with the defendant had taken place on 30.01.1990 and thereafter they had stayed together under one roof in their house at Khalisahi for about two weeks. It is stated that the defendant thereafter went to her parents house at Ranpur where she was serving as a school teacher. The plaintiff used to often visit the defendant at her parents place at Ranpur. It is next stated that sometime thereafter, the defendant began misbehaving and ill-treating the plaintiff and also refused to have the sexual relationship. It is alleged that the defendant has taken away cash of the plaintiff, his Life Insurance and National Savings Certificates as well as other bank documents. Later, she refused to come and stay with the plaintiff in his village. Plaintiff states that all the best efforts for resolution of the dispute even through mediators, did not yield any fruitful result. So, it is stated that the defendant has willfully deserted the plaintiff after subjecting him to cruelty. The plaintiff (husband) therefore has prayed for a decree of dissolution of his marriage with the defendant (wife).

4. The defendant contested the proceeding. She admits to be serving as a school teacher and to have stayed 23 days in the house of the plaintiff after the marriage before coming to rejoin her service at her father place. She has stated that during her stay in-the laws place, she was duly performing her duties towards the family members of the plaintiff and also attending all required household works to the best of her ability. It is stated that she was frequently visiting the father-in-laws house whenever she was finding time from her service place and attending all the family functions. It is further stated that she was paying a part of her salary to the plaintiff and were leading happy conjugal life, have also begotten a son. She has denied the allegation made against her by the plaintiff about misbehaving and ill-treating plaintiff, further about denial of keeping the sexual relationship. It is her counter allegation that the plaintiff used to pick up quarrel with her and assault her frequently; that every time he was insisting her to quit the job. It is alleged that the plaintiff who also serves as a school teacher then married one Tuni Sahoo, daughter of Nishamani Sahoo of village Kainfulia and stayed with her as husband and wife. The defendant has also stated about the factum of lodging of FIR after said second marriage of the plaintiff. With all the above pleadings, the defendant resisted the suit for dissolution of her marriage with the plaintiff by a decree of divorce and urged for its dismissal.

5. On the above rival pleadings, the trial court has framed as many as five issues. Taking up issue no. 4 relating to the ground projected by the plaintiff in seeking the decree for divorce i.e. mental cruelty being inflicted

upon him by the defendant and willful desertion by the defendant which in fact is the most crucial issue and the determining factor for the fate of the suit; upon analysis of evidence on record, the trial court has answered the same in favour of the plaintiff in finally saying that the plaintiff has proved his case in establishing the ground for dissolution of marriage with the defendant. Thereafter coming to the issue of alimony, in view of the fact that both the parties are serving as school teacher and as such earning, the trial court while declining to grant any alimony to the defendant has, of course granted alimony of Rs.250/- per month to be paid by the plaintiff to his son who was then under care and custody of the defendant.

The lower appellate court proceeding to judge the sustainability of the finding on that issue regarding the establishment of the ground in seeking the decree for dissolution of marriage has finally concluded that the case in hand does not warrant passing of decree for dissolution of marriage.

6. The unsuccessful plaintiff thus has moved this Court in this second appeal. The appeal has been admitted on the substantial question of law as stated hereunder:-

"Whether filing of criminal case by wife against the husband relating to dowry amounts to mental cruelty when the case is subjudice?"

7. Learned counsel for the appellant at the outset submits that the parties have now approached the age of fifty five years and are fighting out legal battle for more than two decades by residing separately having no such relationship. He further submits that when even during this period, all the efforts to reunite them have failed and they have not yet compromised the dispute, existence of this legal relationship of husband and wife has become meaningless and the marriage has irretrievably broken down. He next contends that the conclusion of the lower appellate court that since the defendant lodged criminal case against the plaintiff, the same is sufficient reason for the defendant to live separately, is erroneous. According to him, the lower appellate court ought to have taken that as a ground to hold that the plaintiff has been meted out with the cruelty by such institution of criminal case by the defendant causing undue harassment till he was acquitted after undergoing the serious trauma of a criminal trial. Therefore, according to him, the lower appellate court ought to have confirmed the decree for dissolution of marriage between the plaintiff and the defendant.

8. Learned counsel for the respondent submits that the lower appellate court has rightly arrived at a concl usion that the plaintiff has failed to

establish that it was the defendant who had treated him with cruelty and thereafter had willfully deserted him. According to him, in a matrimonial dispute seeking the dissolution of marriage, the grounds described as per the provisions of the statute are to be established.

It is submitted that when no such perversity in the matter of appreciation of evidence on record is seen, it is not permissible for this Court in seisin of a second appeal to take a view to the contrary upon reappreciation of evidence at its level. According to him, there is no denial of the fact that the defendant had lodged an FIR and that fact she has not suppressed which had ultimately put the plaintiff on trial in a criminal case. It is submitted that rather the FIR has been proved by her which has been marked, Ext.G. He further submits that the same is no ground to say that the plaintiff in view of such action of the defendant in lodging the FIR against him is entitled to a decree for divorce taking that as the factum of establishment of cruelty of that nature and degree as to have been meted out at him providing the justification for dissolution of marriage.

9. On carefully going through the rival case projected by the parties and the discussion as well as analysis of evidence as has been made by the lower appellate court at para-4 and 5 of its judgment, this Court on thorough search is not in a position to locate any perversity therein in saying that any such material evidence available on record let in by the plaintiff has been overlooked or that some such facts and circumstances which have not emanated from the evidence on record have been taken into consideration which have weighed in the mind of the Court.

10. It's a case where the marriage had taken place on 30.1.1990 and the suit has been filed by the husband on 20.6.1995. The lower appellate court has taken into consideration two letters dated 7.9.1993 and 4.11.1993 proved from the side of the defendant. The letters had been written by the plaintiff to the defendant and have been admitted in evidence marked as Exts. A and B. Having gone through the contents of the same, the lower appellate court has found that at that point of time, the relationship between the parties was good. Taking the cue from the contents of the letters, it has rather discarded the evidence let in by the plaintiff that the defendant was treating the plaintiff with cruelty and has fastly deserted him.

Undeniably, it is the defendant who had lodged the FIR against the plaintiff under Ext. G. It had given rise to the registration of a case against the plaintiff and so-called second wife for alleged commission of offence

under sections 498-A/323/494 IPC. Police had investigated the case and submitted a charge sheet. Now it is submitted at the Bar that the plaintiff has been acquitted of those charges. From the evidence on record the Court is not in a position to render a positive finding that such allegations are pulpably false. Moreover, the absence of any such finding being recorded by the court in seisin of the criminal case, initial presumption in that light cannot also be drawn. Thus, in my considered view said action of the defendant in lodging the FIR giving rise to the criminal case against the plaintiff cannot be taken to be an act of cruelty of such nature and degree entitling the plaintiff to a decree of dissolution of his marriage with the defendant.

During the course of hearing, nothing has also been placed by the learned counsel for the appellant in order to arrive at a conclusion that FIR which had been lodged by the defendant was based on falsehood. Therefore, the substantial question of law receives the answer that such institution of the criminal case by the defendant against the plaintiff for alleged commission of offence under sections 498-A/323/494 IPC and even taking the fact of his facing the criminal trial do not amount to an act of cruelty in saying that the plaintiff's prayer for grant of a decree for dissolution of his marriage with the defendant merits acceptance. In that view of the matter, no fault is found with the ultimate result returned by the lower appellate court by non-suiting the plaintiff.

11. In the wake of aforesaid, the appeal stands dismissed. In the facts and circumstances of the case, however no order as to cost is passed.

Appeal dismissed.

2018 (I) ILR - CUT- 801

B. RATH, J.

W.P. (C). NO. 5672 OF 2004

KAILASH CHANDRA SAHU ……....Petitioner

.Vrs.

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

PRACTICE AND PROCEDURE – Maintaining The Decorum of The Court Room – Duty of The Lawyer – Indicated.

"It is here, this Court observes that though there is no codified norm dealing with the behaviour or role of a lawyer in the Court room, but so far as High Court

practice isconcerned, minimum courtesy desires, a lawyer while advancing his case should not only be submissive but also to cooperate the Courts in answering to the queries made by the Court to clear its doubt. A lawyer not only has a duty to the Court, but also a duty to pay respect to the Court, at the same time a lawyer has also a duty to maintain dignity as well as decorum of the Court. No doubt, there is freedom to a lawyer to have his own way of submission at the same time, it does not mean a lawyer will attempt to make the Court room that of a daily market (Hata). It is high time for the Bar Council of India as well as the State Bar Council to look into such matters and bring concrete measures to avoid such unpleasant situation in Court rooms in future."

Case Laws Relied on and Referred to :-

1. AIR 2001 S.C. 457 : D.P. Chadha vrs. Triyugi Narain Mishra and others.

For petitioner : Mr. Ajay Kumar Nanda,
For opp. Parties : A.K. Mishra, Addl. Govt. Adv.

Date of Order 12.03.2018

ORDER

B. RATH, J.

Heard Shri Ajay Kumar Nanda, learned counsel appearing for the petitioner and Shri A.K. Mishra, learned Addl. Government Advocate appearing for opposite party nos.1 and 2-State.

2. From the order-sheet, it appears that even though the writ petition was filed in the year 2004, but no notice has been issued to the private opposite party nos.3 and 4 as of now. The matter was listed lastly on 09.06.2004 and deferred with the only direction to the State counsel to take instruction involving the impugned order and also with an order of no distribution of the disputed land without leave of the Court. In the meantime, opposite party no.2 even though already filed a counter in response to the above direction since 06.10.2005 and a copy of which even though has been received by Shri Ajay Kumar Nanda, learned counsel appearing for the petitioner since 06.10.2005, there is no attempt to request the Court to issue notice to the private opposite parties. In the meantime, fourteen years have passed. Even assuming, there was any error in the impugned order for being obtained behind the back of the petitioner or for not providing any scope to the petitioner, this Court observes, instead of rushing to this Court, nothing prevented the petitioner to file a review petition bringing forth the facts supporting him before the same authority at the relevant point of time, but however, immediately after coming to know of the impugned order. This Court observes that Shri Ajay Kumar Nanda, learned counsel appearing for

the petitioner went on avoiding to answer the queries made by this Court and remained busy in overpowering the Court by not only raising high voice but also raising unnecessary and uncalled-for remarks against the Court. Considering that the petitioner was not a party in the proceeding in the authority below and new facts have been brought to the notice of this Court for the first time, as a decision on the new facts required to be taken by the original authority itself and that too involving the party likely to be affected, this Court though not inclined to interfere with the impugned order at this stage, but however, permits the petitioner to move a review petition to the Revenue Officer-cum-Additional Tahasildar within three weeks hence bringing his case and the grounds raised hereinabove for consideration of the Additional Tahasildar. In such event, the Additional Tahasildar shall do well in considering the matter after giving opportunity to the parties likely to be affected and passing necessary order within four months from the date of appearance of opposite party nos.3 and 4 herein. This Court also observes that the effect of the impugned order at Annexure-5 shall be dependant on the decision involving the review petition. Till such a decision is taken, there shall be no effect to the order at Annexure-5.

3. For the unruly behaviour of Shri Ajay Kumar Nanda, learned counsel appearing for the petitioner, this Court observes that even after a cool hearing of this matter and passing of the order, Shri Ajay Kumar Nanda, learned counsel went on making his submissions and comments in high peach, thereby obstructing the further proceeding of the Court deliberately. Shri Ajay Kumar Nanda, learned counsel appearing for the petitioner at this stage of the matter not only went on making unnecessary allegations against the Court but also obstructed the Court proceeding by continuing his submissions not connected to the case for over fifteen minutes. All attempts of the Court to bring him to normalcy failed compelling the Court sit mom and to rise to Chamber. It is here, this Court observes that though there is no codified norm dealing with the behaviour or role of a lawyer in the Court room, but so far as High Court practice is concerned, minimum courtesy desires, a lawyer while advancing his case should not only be submissive but also to cooperate the Courts in answering to the queries made by the Court to clear the doubts. Shri Ajay Kumar Nanda, learned counsel appears to have crossed all limits. A lawyer not only has a duty to the Court, but also a duty to pay respect to the Court, at the same time a lawyer has also a duty to maintain dignity as well as decorum of the Court. The manner Shri Ajay Kumar Nanda, learned counsel made his submission and in the voice and the tone taking the Court to the

level of daily market remained unknown to the Court practices. Such behaviour is never expected from a counsel who is always treated as an Officer of the Court also. Action of Shri Ajay Kumar Nanda, learned counsel in a complete packed Court left a bad signal to the youngster watching the Court proceeding, lowering the dignity of the Court in the mind of the litigants present in the Court and his behaviour disturbing the mind of the other counsels waiting for their cases to be taken up, this is a conduct of a lawyer wholly disturbing the Court atmosphere. Unless such behaviour is curbed outright it will lead a situation bezare and the sanctity of the Court room will be destroyed. No doubt, there is freedom to a lawyer to have his own way of submission at the same time, it does not mean a lawyer will attempt to make the Court room that of a daily market (Hata). The way Shri Ajay Kumar Nanda, learned counsel made his submission, is an attempt to destroy the minimum norms of practice in a Court room. It is high time for the Bar Council of India as well as the State Bar Council to look into such matters and bring concrete measures to avoid such unpleasant situation in Court rooms in future.

4. It is here, this Court takes note of two paragraphs from a decision of the Hon'ble Apex Court in the case of ***D.P. Chadha vrs. Triyugi Narain Mishra and others,*** reported in AIR 2001 S.C. 457. Paragraphs-21 and 23 of the aforesaid judgment reads as hereunder :-

> "The term 'misconduct' has not been defined in the Act. However, it is an expression with a sufficiently wide meaning. In view of the prime position which the advocates occupy in the process of administration of justice and justice delivery system, the Courts justifiably expect from the lawyers a high standard of professional and moral obligation in the discharge of their duties. Any act or omission on the part of a lawyer which interrupts or misdirects the sacred flow of justice or which renders a professional unworthy of right to exercise the privilege of the profession would amount to misconduct attracting the wrath of disciplinary jurisdiction. In the Bar Council of Maharashtra v. M. V. Dabholkar, (1976) 2 SCC 291: (AIR 1976 SC 242), Krishna Iyer, J. said that the vital role of the lawyer depends upon his probity and professional lifestyle. The central function of the legal profession is to promote the administration of justice. As monopoly to legal profession has been statutorily granted by the nation, it obligates the lawyer to observe scrupulously those norms which make him worthy of confidence of community in him as a vehicle of justice – social justice. The Bar cannot behave with doubtful scruples or strive to thrive on litigation. Canons of conduct cannot be crystallized into rigid rules but felt by the collective conscience of the practititioners as right. "Law is no trade, briefs no merchandise." Foreseeing the role which the legal profession has to play in shaping the society and building the nation, Krishna Iyer, J. goes on to say (Para 25 of AIR)-

> "For the practice of Law with expanding activist horizons, professional ethics cannot be contained in a Bar Council rule nor in traditional cant in the books but in new canons of conscience which will command the members of the calling of justice to obey rules of morality and utility, clear in the crystallized case-law and concrete when tested on the qualms of high norms – simple enough in given situations, though involved when expressed in a single sentence."
>
> 23. In George Frier Grahame v. Attorney-General, Fiji, AIR 1936 PC 224 the Privy Council has approved the following definition of 'professional misconduct' given by Darling J. in Re A Solicitor ex parte the Law Society, (1912) 1 KB 302 –
>
> "If it is shown that an Advocate in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to say that he is guilty of professional misconduct."

5. For the observations and following the ruling as well as the observations of the Hon'ble Apex Court in the aforesaid judgment, this Court for the unruly behaviour of Shri Ajay Kumar Nanda, learned counsel though finds, the action of Shri Ajay Kumar Nanda amounting to contempt of Court, but however, to afford one more chance to Shri Ajay Kumar Nanda, learned counsel to bring correction in his attitude in attending the Courts, this Court imposes a cost of Rs.1,000/- (rupees one thousand) which amount shall be deposited by Shri Ajay Kumar Nanda, learned counsel in the High Court Bar Association Welfare Fund within fifteen days hence.

6. The writ petition thus stand disposed of with the observation and directions made hereinabove.

Writ petition disposed of.

MISC. CASE NO. 4234 OF 2018

Arissing out of (W.P. (C). NO. 5672 OF 2004)

Date of Order- 04. 04. 2018

Considering the affidavit of Sri A.K.Nanda, learned counsel for the petitioner personally appearing, particularly taking into consideration his begging unconditional written apology for the conduct involving the proceeding dated 12.3.2018, this Court while re-calling the order in paragraph-5 of this Courts order dated 12.3.2018. so far as it relates to imposition of cost of Rs. 1000/- on Sri A.K.Nanda, learned counsel for the petitioner, observe that the discussions on the behavior of the particular Counsel on the said date and the role of the Lawyers in maintaining dignity, discipline and decorum of the Court may be treated as a matter of observations of this Court and have nothing to do personally involving the Counsel.

The Misc. Case stands disposed of with the modification of the order dated 12.3.2018 to the above effect.

2018 (I) ILR - CUT- 806

BISWANATH RATH, J.

C.M.P. No. 369 OF 2018

RAJENDRA SAO .....….Petitioner

.Vrs.

NADEEM AHMED & ANR. …….Opposite parties

CODE OF CIVIL PROCEDURE, 1908 – Order 26 Rule 9 – Application under – Sufficient material available to consider the suit on merit – Stage of suit – Recording of evidence over – Held, if the application with such background is accepted, it will be leading to collection of evidence for a party after failure on the part of such party establishing his case on the basis of oral and documentary evidence.

(Paras 10 & 11)

Case Laws Relied on and Referred to :-

1. AIR 1988 Orissa 248 : Mahendranath Parida vrs. Purnananda Parida and others
2. AIR 1988 Orissa 250 : Managing Committee, Baptist Church Middle English School, Berhampur and another vrs. State of Orissa & Ors.

For petitioner : M/s. Sanjeev Udgata, S.B.Udgata, A.Mishra.

For Opp. parties : M/s. Goutam Misra, D.K. Patra, A. Dash, J.R. Deo, A.Khandal

Date of Hearing : 11.04.2018 Date of Judgment : 20.04.2018

JUDGMENT

BISWANATH RATH, J.

This matter involves a challenge to the order dated 09.03.2018 passed by the Civil Judge (Junior Division), Rourkela in Civil Suit No.16 of 2015 appearing at Annexure-5, thereby rejecting an application filed by the defendant-petitioner under Order-26, Rule-9 of the Code of Civil Procedure.

2. Short background involved in this case is that Civil Suit No.16 of 2015 is filed by the opposite parties herein praying for eviction of the petitioner from the suit schedule shop room measuring 8 feet x 24 feet alleged to have been constructed on Hal Plot No.25/1168, Khata No.129/16 in Mouza- Bisra, P.S.- Bisra, District- Sundargarh as claimed by the plaintiffs. The defendant, the petitioner herein on his appearance filed written statement, inter-alia, contending that there is no shop room constructed over the suit schedule property and the petitioner neither paid any rent to the opposite parties at the same time disputing existence of 'Landlord' and 'Tenant' between the parties. Admittedly, evidence from both sides is concluded and it is at this point of time and before commencement of the

argument, the defendant, the petitioner herein filed the petition under Order-26, Rule-9 of C.P.C. for appointment of a Survey Knowing Commissioner to conduct local investigation / enquiry to find out the physical features of the said Hal Plot No.25/1168, Khata No.129/16, Mouza- Bisra, P.S.- Bisra including the ascertainment of its distance from the Main road and submitting report for effective adjudication of the dispute involved therein. In filing the application the petitioner apart from placing the pleadings of the respective parties, taking assistance of the evidence of P.W.1 claiming to be his admission in paragraph-39 of cross-examination to the effect that he has not filed any document to show that "Ekram Market Complex" situates over Plot No.25/1168 of Khata No.129/16 and that except this plot, the plaintiffs have no other land. The petitioner-defendant also taking assistance of the statement in cross-examination of the plaintiffs at page-40, contended that the plaintiffs even admitted that Plot No.25/1168 of Khata No.129/16 does not situate about 176 feet away from Main Road. It is in the above background of the matter, petitioner-defendant justified the necessity of deputing a Commission to find out the actual position of the shop room.

3. The opposite parties-plaintiffs filing their objection to the aforesaid application submitted that the suit involved is for eviction of the petitioner-defendant and also for realization of arrear rent and damages. It is also contended that there exists a tenancy agreement executed between the opposite parties-plaintiffs and the petitioner-defendant and marked as Ext.3. Signature of the petitioner-defendant in Ext.3 has also been admitted by the petitioner-defendant in paragraph-39 of his evidence. In paragraph-33 the petitioner-defendant even has admitted that he is a tenant in respect of the suit schedule property, the petitioner-defendant also admitted in his evidence that the schedule shop situates in "Ekram Market complex". Taking help of the provision at Sections 115 and 116 of the Evidence Act the petitioner-defendant also contended that for the existence of the agreement between the parties accepting 'Landlord' and 'Tenantship' between the parties involved therein, a party to such document is debarred from taking up the dispute on 'Landlord' and 'Tenant' relationship. The plaintiffs also objected the petition on the premises that in an earlier attempt of the petitioner-defendant in a petition under Order-16, Rule-1 of C.P.C. asking the Court to direct the Tahasildar, Bisra to produce the original Khata No.13 and Khata No.129/2 having been rejected and for such development, subsequent petition was also otherwise not maintainable. It is thus contended that the attempt of the petitioner-defendant through the present petition is to overcome the rejection

of application under Order-16, Rule-1 of CPC at an earlier occasion involving the same suit.

4. Considering the rival contentions of the parties, the trial Court on the observation that for the materials available through pleading as well as evidence oral and material, there is sufficient material to decide the suit on its own merit and without entering into any further enquiry by way of Commission.

5. Being aggrieved by the rejection of the application under Order-26, Rule-9 of CPC, the petitioner-defendant filed the present Civil Miscellaneous Petition.

6. Besides, reiterating the stand taken in the application under Order-26, Rule-9 of CPC, Shri Udgata, learned counsel appearing for the petitioner taking this Court again to some recording in the evidence, submitted that there has been erroneous appreciation of evidence resulting the bad impugned order. Shri Udgata, learned counsel appearing for the petitioner referring to the evidence of both the sides, submitted that for the confusion arisen involving the location of the shop room, for the interest of justice, deputation of a Commission was very much essential. Shri Udgata, learned counsel appearing for the petitioner thus contended that for existence of a dispute with regard to identification and location of the shop room, the trial Court failed in appreciating such dispute and arrived at the wrong and illegal impugned order which unless be entertained and allowed, there will be no effective adjudication of the dispute involved herein. Shri Udgata, learned counsel appearing for the petitioner also referring to two decisions of this Court in the case of ***Mahendranath Parida vrs. Purnananda Parida and others,*** reported in AIR 1988 Orissa 248 and further in the case of ***Managing Committee, Baptist Church Middle English School, Berhampur and another vrs. State of Orissa and others,*** reported in AIR 1988 Orissa 250, submitted that for the support of both the aforesaid decisions to the case of the petitioner-defendant, the impugned order is otherwise against law. Under the circumstances, Shri Udgata, learned counsel appearing for the petitioner prayed this Court for interfering in the impugned order and setting aside the same, thereby allowing the application under Order-26, Rule-9 of C.P.C.

7. Shri Goutam Mishra, learned counsel appearing for the opposite parties-plaintiffs on reiteration of the stand of his party in the Court below filed by way of objection to the petition under Order-26, Rule-9 of C.P.C. and as appearing at Annexure-4, submitted that for the clear admission of existence of an agreement between the plaintiffs and the defendant, not only

marked as Ext.3 but also marked without objection and further for the admission of the defendant of his signature on the agreement vide Ext.3, submitted that there has been right appreciation of the issue involved. Taking this Court to the recording of evidence involving both parties, Shri Mishra, learned counsel appearing for the opposite parties attempted to justify the rejection of the application under Order-26, Rule-9 of C.P.C. In the premises, Shri Mishra, learned counsel appearing for the opposite parties prayed for dismissal of the Civil Miscellaneous Petition.

8. Considering the rival contentions of the parties, this Court finds that the suit is admittedly for a decree of eviction of the defendant from the suit shop room and putting the plaintiffs to possession thereof, also for a decree for a sum of Rs.5,400/- recoverable from the defendant towards arrear rent from 01.01.2015 to 30.06.2015 and also for a decree for damages @ Rs.200/- per day with effect from 11.07.2015 till the eviction of the defendant. It appears, the plaintiffs making such a claim have the pleading that over the disputed property the plaintiffs have a market complex in the name and style "Ekram Market complex". The defendant has been housed as a tenant under the plaintiffs in respect of a particular shop room measuring an area of 8 feet x 24 feet having pucca wall with RCC roof fitted with shutter etc. The plaintiffs also claimed that the tenancy is created on a monthly rate basis and period of tenancy was 11 months after the parties, i.e., 'Landlord' and 'Tenant' entered into execution of an agreement. The tenancy agreement also executed as Ext.3. It is on the premises of violation of the terms and conditions by the tenant, particularly non-payment of rent in clear violation of the conditions in the agreement, the plaintiffs filed the suit for the aforesaid reliefs. The defendant on his appearance filed the written statement while objecting the claim by the plaintiffs submitted that the 'Landlord', the plaintiffs have no title over the disputed property, thereby asked the plaintiffs to establish their title before entering into such controversies. On the basis of some transaction indicated therein, the defendant disputed the existence of the shop room over the disputed property.

9. This Court during perusal of the written statement at paragraph-7 finds, defendant while admitting the plaint averment in paragraph-2 in paragraph-6, in paragraph-7, contended that the plaintiffs are not the only record holders of the land under Khata No.129/16, the schedule property involved in the suit and claimed the dismissal of the suit for non-joinder of necessary parties. Defendant though has the defence that the market complex in which he is housed is not by way of any tenancy agreement, at the same

time the defendant again submitted that the tenancy agreement dated 15.12.2001, the basis of the plaintiff in filing the suit, has never been acted upon. Thus, it appears that the defendant blowing hot and cold together.

10. It is at this stage, considering the necessity of the deputation of a Commission for the particular identification purpose, under the above facts pleaded by both parties, this Court now enters into the evidence led by both the parties. In the process, this Court going through the evidence of P.W.1 finds that the P.W.1 has been able to not only establish the case of installation of the shop room in Ekram market complex and the tenancy was created by virtue of an agreement between the parties being marked as Ext.3 and marked without objection, has also filed the R.O.R. to establish his case. For the pendency of the suit, this Court does not want to deal with much of the evidence as it is likely to affect the ultimate trial of the suit. It is at this stage, looking to the cross-examination of the defendant, this Court finds, the defendant failed in producing any document to satisfy that the Ekram market is situated over Plot No.25/1168, Khata No.129/16 at the same time admitting that he is not in a position to say the plot number of the land on which Ekram market situates. In paragraph-33 of the cross-examination of the defendant, this Court also noticed that the defendant had a clear admission that he is a tenant in the suit schedule property and further that the suit schedule shop situates in Ekram market complex and that he has not taken any other shop on rent except the suit shop, even in paragraph-39 the defendant while admitting the existence of Ext.3 even admitted his signature on Ext.3 in the capacity of a tenant.

11. It is under the circumstances and for the discussions made hereinabove, this Court finds, there is sufficient material available to consider the merit involving the suit and this Court also observes that in the event application under Order-26, Rule-9 of CPC with such background is accepted, it will be leading to collection of evidence for a party after failure on the part of such party establishing his case orally and documentary. Looking to the purpose behind Order-26, Rule-9 of C.P.C. and further looking to the observations as well as the findings in the impugned order, this Court finds, there has been right appreciation of the dispute involved, particularly taking into account the restrictions involved in the provision at Order-26, Rule-9 of C.P.C. This Court has gone through both the decisions cited by Shri Udgata, learned counsel appearing for the petitioner and taken note hereinabove, but the circumstances indicated hereinabove, none of the decisions referred to have application to the case at hand.

12. In the circumstances, this Court finds no scope for interference in the impugned order, consequently dismisses the Civil Miscellaneous Petition for having no merit. Evidence since already closed, the trial Court is directed to conclude the suit proceeding within a period of two months hence at the maximum. This Court observes that whatever observation made hereinabove is only for the purpose of consideration of merit involving application under Order-26, Rule-9 of C.P.C. and these observations have nothing to do with the ultimate decision involving the suit.

13. The Civil Miscellaneous Petition thus stand dismissed. In the circumstances, there is no order as to costs.

Petition dismissed.

2018 (I) ILR - CUT- 811

S.K. SAHOO, J.

JCRLA No. 18 Of 2010

KARTIKA MUNDA & ANR. ….....Appellant

.Vrs.

STATE OF ORISSA ….....Respondent

INDIAN PENAL CODE, 1860 – Sections 376 (2) (g)/307 – Offence under – Conviction – Victim is the informant in the case- As per FIR appellants were unknown to victim – Held, it was very much necessary on the part of the investigating agency to take step for conducting test identification parade to establish the complicity of the appellants in the crime – No explanation for not conducting the test identification parade – Victim was examined about two years after the occurrence and she implicated the appellants by their names and further stated that she knew them – No material is forthcoming as to how the names of the appellants cropped up during investigation to be the culprits – Other material discrepancies – Conviction and sentences set aside.

(Paras 8 & 9)

For Appellants : Mr. Gokulananda Sahu
For Respondent : Mr. Chita Ranjan Swain, Addl. Standing Counsel

Date of Hearing : 12.04.2018 Date of Judgment: 12.04.2018

JUDGMENT

S. K. SAHOO, J.

The appellants Kartika Munda and Menja Munda faced trial in the Court of learned Sessions Judge, Keonjhar in Sessions Trial Case No.153 of

2007 for offences punishable under section 376(2)(g) and 307 of the Indian Penal Code.

The learned trial Court found the appellants guilty of the offences charged and sentenced each of them to undergo rigorous imprisonment for 10(ten) years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo rigorous imprisonment for one year for the offence under section 376(2)(g) of the Indian Penal Code and to undergo rigorous imprisonment for 10(ten) years and to pay a fine of Rs.5,000/-(rupees five thousand), in default, to undergo R.I. for 1(one) year for the offence under section 307 of the Indian Penal Code and both the sentences were directed to run concurrently.

2. The prosecution case, as per the first information report lodged by the victim (P.W.5) on 05.03.2007 before the Inspector in charge of Town Police station, Keonjhar is that on 04.03.2007 in the evening hours while the victim was returning home from the weekly market, one person who was residing in the house of one Makuru munda (his name was unknown to the victim) and his associate lifted her to an isolated place and committed rape on her and also inserted one Amari stick inside the vagina of the victim. It is further stated in the first information report that one Janaki Munda is an eye witness to the occurrence. The victim was the mother of three children and after the death of her husband, she was staying with her mother. After the incident, the victim was treated at Keonjhar hospital.

3. Mr. Ambika Prasad Das, S.I. of Police, Town police station, Keonjhar on receipt of the written report from the victim, in absence of the Inspector in charge, registered Keonjhar Town P.S. Case No. 36 of 2007 on 05.03.2007 under section 376(2)(g)/307 of the Indian Penal Code against *unknown persons* and directed P.W.6 Dibyakanti Lakra, S.I. of Police to take up investigation of the case. During course of investigation, P.W.6 examined witnesses, visited the spot, arrested the appellant no.1 Kartika Munda and seized one Amari stick (M.O.I) on 07.03.2007 as per seizure list Ext.2. The wearing apparels of appellant no.1 were seized under seizure list Ext.5 and he was sent to District Headquarters Hospital, Keonjhar for his medical examination. Subsequently the appellant no.2 Menja Munda was also arrested and he was also sent for medical examination. The Investigating Officer seized the wearing apparels of the victim on 16.03.2007 as per seizure list Ext.8 and forwarded the material objects to S.F.S.L., Bhubaneswar for chemical examination through Court. After completion of investigation, P.W.6 submitted charge sheet on 27.06.2007 under sections 376(2)(g)/307 of the Indian Penal Code.

4. In order to prove its case, the prosecution examined eight witnesses.

P.W.1 Dr. Chandrabhanu Sethy was the O & G Specialist in the District Headquarters Hospital, Keonjhar and he examined the victim and noticed one injury on her vagina and proved the medical examination report Ext.1.

P.W.2 Sukrumani Munda stated that on the date of occurrence at about 4 p.m. near the jail wall, she found the victim was sleeping and the appellant no.1 Kartika Munda was standing near her and she intimated the fact to the mother of the victim.

P.W.3 Kalicharan Maharana stated about the seizure of one Amari stick as per seizure list Ext.2.

P.W.4 Mita Behera has not stated anything about the prosecution case.

P.W.5 is the victim and she is also informant in the case. She stated about the commission of rape on her by the two appellants.

P.W.6 Dibyakanti Lakra was attached to Town police station, Keonjhar and he is the Investigating Officer.

P.W.7 Dr. Prafulla Chandra Das was the Asst. Surgeon attached to the District Headquarters Hospital, Keonjhar and he examined appellant no.1 Kartika Munda on 07.03.2007 and proved his examination report (Ext.12).

P.W.8 Dr. Pradip Kumar Nayak was the Asst. Surgeon attached to the District Headquarters Hospital, Keonjhar and he examined appellant no.2 Menja Munda on 08.03.2007 and proved his examination report (Ext.13).

The prosecution exhibited as many as thirteen documents. Exts.1, 12 and 13 are the medical reports of the victim, appellant no.1 and appellant no.2 respectively, Exts.2, 5, 6, 7 and 8 are the seizure lists, Ext.3 is the F.I.R., Ext.4 is the spot map, Ext.9 is the copy of forwarding letter of M.Os., Ext.10 is the chemical examination report and Ext.11 is the serology examination report.

The prosecution also proved four material objects. M.O.I is the Amari stick, M.O.II is the saree, M.O.III is the saya and M.O.IV is the full pant.

5. The defence plea of the appellants was one of the denial.

6. The learned trial Court after assessing the evidence on record has been pleased to hold that there is no reason to disbelieve the evidence of the doctor relating to the injury sustained in the private part of the victim and there is no reason as to why the victim would depose falsely against the

appellants. The learned trial court further held that from the facts and circumstances of the case, one can conclude that the two appellants attempted to murder the victim by inserting M.O.I, the 'Amari' stick into her private part after committing gang rape on her. The learned trial Court further held that the existence of extensive human blood in the garments of victim is another strong item of evidence of prosecution to establish the guilt of the appellants. Learned trial Court further held that from the totality of oral and documentary evidence adduced on behalf of the prosecution, a conclusion is available that prosecution has proved its case beyond reasonable doubt against the appellants.

7. Mr. Gokulananda Sahu, Advocate was engaged as amicus curiae on behalf of the appellants. He was supplied with the paper book of the case and given time to prepare the case. He placed the judgment and evidence on record and contended that the first information report was lodged by the victim against unknown persons and after the arrest of the appellants, no test identification parade has been conducted to establish the identity of the culprits. The occurrence in question stated to have taken place on 04.03.2007 in the evening hours and the victim for the first time in Court on 02.01.2009 during trial stated that she knew the appellants and named them and therefore, her evidence should not have been accepted by the learned trial Court. It is further contended that in the first information report, it is mentioned that one Janaki Munda is an eye witness to the occurrence but she has not been examined during trial. It is further contended that P.W.2 stated to have found the victim sleeping near the jail wall and the appellant no.1 standing near her on the date of occurrence and this statement creates doubt about the participation of the appellants in the alleged crime 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 on the other hand supported the impugned judgment and contended that even though the F.I.R. was lodged by the victim against unknown persons but she has named the appellants in her evidence and attributed specific overt act against each of them and the medical evidence corroborates the version of the victim and therefore, there is no illegality or infirmity in the impugned judgment.

8. The victim is the informant in the case. In the first information report (Ext.3) which was lodged on the next day of occurrence, she has mentioned that one person who was staying in the house of one Makru Munda with whose name she was not aware and his associate lifted her forcibly to an isolated place and committed rape on her and they also inserted one 'Amari' stick in her vagina. She further mentioned that the occurrence was witnessed by one Janaki Munda. If the appellants were unknown to the victim, it was

very much necessary on the part of the investigating agency to take step for conducting test identification parade to establish the complicity of the appellants in the crime. The appellants were arrested immediately after the occurrence and therefore, there was no difficulty on the part of the investigating agency in making a prayer before the learned Magistrate to conduct the test identification parade. No explanation is forthcoming as to why the test identification parade was not conducted. Most peculiarly the victim was examined during trial on 02.01.2009 which is almost about two years after the occurrence and she implicated the appellants by their names and further stated that she knew them. If the victim was aware about the names of the appellants, she could have mentioned their names in the first information report but the first information report indicates that rape was committed on the victim by two persons with whose names, the victim was not acquainted. She stated that the appellant no.2 Menja Munda committed rape on her first and then it was appellant no.1 Kartika Munda who committed rape on her and then appellant no.2 Menja Munda brought one 'Amari' stick and forcibly inserted into her vagina. The victim stated in her cross-examination that the F.I.R. after being written as per her instruction was read over and explained to her and she put her L.T.I. on it. Her evidence is silent as to who was the scribe of the first information report. The scribe has also not been examined in the case. It has been confronted to the victim in her cross-examination that she has not mentioned in the F.I.R. that the appellant no.2 first committed rape on her and then appellant no.1 committed rape on her and then appellant no.2 inserted the Amari stick inside her vagina. In fact in the first information report, the victim has not mentioned about all such aspect. The Amari stick which was seized in connection with the case and sent for chemical examination was found not to be containing any blood or semen. The victim has stated that on the date of occurrence at about 10.00 a.m. to 11.00 a.m., she had taken Handia i.e. liquor made of rice. The doctor (P.W.1) who examined her on the date of occurrence stated that the victim was admitted in the hospital at 9.30 p.m. on 04.03.2007 (which was prior to lodging of the first information report) and at that time she was drunk and in a semi-conscious state and irritable. Even though the doctor has noticed one injury on her vagina but since the victim has not named any of the appellants in the first information report and it has not been brought on record as to how the involvement of the appellants came to light for which they were taken into custody in connection with the case, the prosecution case becomes doubtful. When the eye witness named in the first information report has not been examined nor the house owner where one of the accused who committed rape on the victim was residing as per the story narrated in the first information report, has been examined by the prosecution and the test identification parade has not been conducted in order to establish the complicity of the appellants in the crime, it is very difficult to accept the evidence of the victim implicating the appellants for the first time in her evidence which was given almost two years after the occurrence.

The appellant no.1 was medically examined on 07.03.2007 and appellant no.2 was examined on 08.03.2007. The doctors P.W.7 and P.W.8 have stated that the appellants were capable of committing sexual intercourse but from their clothing, no clue of sexual intercourse was found and no injury on their person suggestive of forcible sexual intercourse was also found.

P.W.2 has stated she found the victim was sleeping near the jail wall and the appellant no.1 Kartika Munda was standing near her. She has not marked any untoward incident which would raise accusing finger at the appellant no.1 and even she has not stated about the presence of appellant no.2 at the spot.

9. In view of the available materials on record, when the first information report was lodged against unknown persons and the material witnesses of the prosecution have been withheld and it is not forthcoming as to how the names of the appellants cropped up during course of investigation to be the culprits and the test identification parade has not been conducted in the case in order to establish the complicity of the appellants in the crime and the victim for the first time named the appellants about two years after the incident and her condition when she was examined by the doctor on the date of occurrence, it is difficult to hold that the prosecution has successfully established its case beyond all reasonable doubt against the appellants and therefore, I am inclined to give benefit of doubt to the appellants.

Accordingly, the jail criminal appeal is allowed. The impugned judgment and order of conviction of the appellants under sections 376(2)(g)/307 of the Indian Penal Code and sentences passed there under is set aside. The appellants are acquitted of all the charges. They should be released forthwith from judicial custody if their detention is not required in any other case.

Lower Court records with a copy of the judgment be sent down to the learned trial Court forthwith for information.

Before parting with the case, I would like to put on record my appreciation to Mr. Gokulananda Sahu, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.5,000/- (rupees five thousand only).

Appeal allowed.

2018 (I) ILR - CUT- 817

S.K. SAHOO, J.

CRLMC No. 2030 Of 2008

SHIVA KUMAR SANTUKA .....Petitioner

.Vrs.

GOVINDA CHANDRA DAS .....Opp. Party

NEGOTIABLE INSTRUMENTS ACT, 1881– Section 138 – Complaint filed by Power of Attorney Holder – Whether maintainable – Held, yes.

"Law is well settled that a power-of-attorney holder of a payee or a holder in due course, as the case may be, can make a complaint under section 142 of the N.I. Act. In view of specific provision under section 2 of the Powers-of-Attorney Act, 1882, it would have to be presumed as per law that the complaint lodged by the holder of power-of-attorney, is a complaint lodged by the payee. There is nothing in section 142 of the N.I. Act which makes it mandatory on the complainant to file the complaint petition personally. The complaint of dishonour of cheque can even be filed by the holder of power-of-attorney of the payee in the name and on behalf of the payee."

For Petitioner : Mr. Surendra Kumar Rout
For Opp. Party : None

Date of Hearing : 16.04.2018 Date of Judgment: 16.04.2018

JUDGMENT

S. K. SAHOO, J.

This is an application under section 482 of the Code of Criminal Procedure filed by the petitioner Shiva Kumar Santuka challenging the impugned order dated 13.09.2007 passed by the learned Sub-divisional Judicial Magistrate, Sadar, Cuttack in I.C.C. Case No.737 of 2007 in taking cognizance of offence under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred as "N.I. Act").

It appears that on the complaint petition filed by the opposite party Govinda Chandra Das, the power-of-attorney holder of one Kiran J. Saha before the learned S.D.J.M., Sadar, Cuttack, I.C.C. No.737 of 2007 was registered.

It is the case of the complainant that he is the power–of-attorney holder of one Kiran J. Saha to handle the bank accounts and to receive and draw the cheques and other matters as mentioned in the power-of-attorney and he was also working as accountant under the firm of Kiran J. Saha. The family of Kiran J. Saha and the family of the petitioner were friends and both were business men families. Due to shortage of funds, the petitioner approached the complainant-opposite party for a loan of Rs.2,00,000/-

(rupees two lakhs) to purchase his business materials for the Dussehra business. Accordingly, on 11.08.2006 as per the direction of Kiran J. Saha, the complaint-opposite party handed over a sum of Rs.1,00,000/- (rupees one lakh) as loan in presence of the witnesses with a condition that the petitioner shall refund the amount immediately after Dussehra Puja and Kali Puja is over. Since even after the stipulated period of time, the petitioner failed to refund the loan amount, the opposite party met him and asked him for repayment of the loan amount. After several approach, the petitioner handed over a cheque of Rs.1,00,000/- (rupees one lakh) on 30.12.2006 drawn on Urban Co-operative Bank, Tinikonia Bagicha, Cuttack. After getting the cheque, on the advice of Kiran J. Saha, the opposite party presented the said cheque with his Banker, U.T.I. Bank, Cuttack on 11.04.2007. On 27.04.2007 the complainant-opposite party received intimation from the Bank regarding dishonour of the cheque on the ground of insufficiency of fund. On the very next day, the complainant met the petitioner and told him about the dishonour of cheque. The petitioner assured the complainant to repay the amount within fifteen days but since the amount was not repaid, legal notice was sent by registered post on 21.05.2007 to the petitioner which was received by him on 24.05.2007. In spite of receipt of notice, since the petitioner did not pay the cheque amount, the complaint petition was filed on 06.07.2007.

The learned Magistrate after perusing the complaint petition, initial evidence affidavit and documents filed by the complainant, came to hold that the prima facie material for commission of offence under section 138 of the N.I. Act is well made out and accordingly, took cognizance of such offence.

Mr. Surendra Kumar Rout, learned counsel appearing for the petitioner contended that since the petitioner is the power-of-attorney holder of Kiran J. Saha, the complaint petition at his instance is not maintainable. He drew attention of this Court to paragraph-9 of the 482 Cr.P.C. application wherein it is mentioned that since the complainant intimated regarding the dishonour of cheque to the petitioner on 28.04.2007 and the complaint petition was filed on 06.07.2007, it was beyond the period of limitation as prescribed under section 142 of the N.I. Act and therefore, the order of taking cognizance is barred by limitation and the same is liable to be quashed.

None appears on behalf of the opposite party.

On perusal of the complaint petition, it appears that intimation was received by the complainant from the Bank regarding dishonour of the cheque on the ground of insufficiency of fund on 27.04.2007 and thereafter,

the complainant met the petitioner for repayment of the cheque amount and the petitioner assured the complainant to repay the amount within fifteen days but since within fifteen days he did not pay that amount, legal notice was sent by registered post to the petitioner on 21.05.2007 and it was received by the petitioner on 24.05.2007. Clause (b) of the proviso to section 138 of the N.I. Act states that the payee or the holder in due course of the cheque, as the case may be, has to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, *within thirty days* of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

In this case, since the intimation was received from the Bank on 27.04.2007 regarding dishonour of cheque on the ground of insufficiency of fund and legal notice was sent by the registered post to the petitioner on 21.05.2007, therefore, it is within the stipulated period of time as per the clause (b) of the proviso to section 138 of the N.I. Act. Clause (c) of the proviso to section 138 of the N.I. Act states that if the drawer of such cheque fails to make payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen day of the receipt of the notice then the cause of action will arise in terms of section 142 of the N.I. Act and the complaint petition has to be filed within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138 of the N.I. Act.

In the present case, the notice dated 21.05.2007 was received by the petitioner on 24.05.2007 and since within the stipulated period of fifteen days of the receipt of the notice as envisaged under clause (c) of the proviso to under section 138 of the N.I. Act, the payment of the cheque amount was not made, the cause of action arose and the complaint petition can be filed within one month of the date on which the cause of action arose in view of the section 142(1)(b) of the N.I. Act. The complaint petition was filed on 06.07.2007 and therefore, I am of the view that it was well within the period of limitation. The learned Magistrate has not committed any illegality in acting upon such complaint petition filed by the opposite party-complainant. Accordingly, the contention of the learned counsel for the petitioner that the complaint petition was beyond the period of limitation is totally misconceived.

Coming to the point raised by the learned counsel for the petitioner regarding the locus standi of the opposite party to file the complaint petition, it is seen that in the complaint petition, it is clearly mentioned that the

complainant-opposite party is the power-of-attorney holder of Kiran J. Saha and he was authorized to handle the bank account, receive and draw the cheques and other matters and he was working as the accountant under the firm of Kiran J. Saha.

Law is well settled that a power-of-attorney holder of a payee or a holder in due course, as the case may be, can make a complaint under section 142 of the N.I. Act. In view of specific provision under section 2 of the Powers-of-Attorney Act, 1882, it would have to be presumed as per law that the complaint lodged by the holder of power-of-attorney, is a complaint lodged by the payee. There is nothing in section 142 of the N.I. Act which makes it mandatory on the complainant to file the complaint petition personally. The complaint of dishonour of cheque can even be filed by the holder of power-of-attorney of the payee in the name and on behalf of the payee.

Therefore, the contention of the learned counsel for the petitioner that the complainant-opposite party has no locus standi to file the complaint petition is not sustainable. Since both the contentions raised by the learned counsel for the petitioner are not legally acceptable, therefore, I am not inclined to interfere with the impugned order. Accordingly, the CRLMC application being devoid of merits, stands dismissed.

CRLMC dismissed.

2018 (I) ILR - CUT- 820

S.K. SAHOO, J.

CRLMC NO. 3008 OF 2006

SUNAMANI ROUL ……..Petitioner

.Vrs.

STATE OF ORISSA ……..Opp. party

CRIMINAL TRIAL – Taking Cognizance and issue of process against a person not named in the charge sheet – No reason recorded by the courts bellow – Effect of – Indicated.

"In view of the settled position of law, even if the Investigating Officer files charge sheet against some accused persons and was of the view that no case was made out against other persons, if after examination of the statements of the witnesses examined by the police during investigation, the Magistrate feels that some non-charge sheeted persons are required to be proceeded against he can pass such order giving his reasons thereon. On perusal of both the orders, it appears that no reasons have been assigned. Law is well settled that reasons

introduce clarity in the order and it is an indispensable part of sound judicial system. Setting forth reasons howsoever brief in the order is indicative of application of judicial mind. Reasons should be clear and explicit. It indicates fair play in action and also rules out the possibility of leveling the order as arbitrary and whimsical. Therefore, the impugned order suffers from non-application of mind and accordingly, invoking inherent power under section 482 of Cr.P.C., I quash the impugned order so far as the petitioner is concerned. Needless to say that if during course of trial, any clinching materials come against the petitioner regarding his involvement in the case, the learned trial Court is at liberty to invoke its power under section 319 of Cr.P.C. to proceed against the petitioner in accordance with law."

(Paras 6 to 9).

Case Laws Relied on and Referred to :-

1. Uma Shankar Singh -Vrs.- State of Bihar (2010) 47 OCR 633
2. M/s. India Carat Pvt. Ltd. -Vrs.-State of Karnataka A.I.R. 1989 SC 885
3. Union of India -Vrs.- Prakash P. Hinduja (2003) 26 OCR (SC) 243
4. Gangula Ashok -Vrs.- State of Andhra Pradesh (2000) 18 OCR (SC) 364

For Petitioner : Mr. Satya Ranjan Mulia
For Opposite Party : Mr. Arupananda Das, Addl. Govt. Advocate

Date of Hearing: 09.04.2018 Date of Order: 09.04.2018

JUDGMENT

S. K. SAHOO, J.

This is an application under section 482 of Cr.P.C. filed by the petitioner Sunamani Roul challenging the impugned order dated 31.01.2006 passed by the learned J.M.F.C., Salipur in G.R. Case No. 319 of 1999 in taking cognizance of offences under sections 302/304-A/34 of the Indian Penal Code and section 3 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereafter "S.C. & S.T. (PA) Act") and issuance of process against him.

2. It is the prosecution case that on 04.07.1999 night at about 9.30 p.m., the accused Dhruba Charan Roula along with his wife Sanjua @ Sanjukta Roula committed murder of the deceased Madhab @ Madhaba Mallick at Paschimakhandabhola near his house by forcibly pushing the deceased to the charged electric line which was taken unauthorizedly from the house of accused Kuna @ Ratnakar Padhi and thereby the deceased came in contact with electric current.

The wife of the deceased namely Geeta Mallik lodged the first information report before the officer in charge of Salipur police station, on the basis of which Salipur P.S. Case No. 160 of 1999 was registered on 06.07.1999. During course of investigation, prima facie material was found

against the accused persons Sunamani Roula and Sanjukta Roula for offence punishable under sections 302/34 of the Indian Penal Code and for offence under section 304-A of the Indian Penal Code against accused Kuna @ Ratnakar Padhi and accordingly, they were forwarded to Court but ultimately, on conclusion of investigation, prima facie case under sections 302/34 of the Indian Penal Code and section 3 of S.C. & S.T. (PA) Act was found against the accused persons Sanjukta Roula and Dhruba Charan Roula and offence under section 304-A of the Indian Penal Code was found against the accused Kuna @ Ratnakar Padhi and accordingly, charge sheet was submitted against three accused persons namely Kuna @ Ratnakar Padhi, Smt. Sanju @ Sanjukta Roula and Dhruba Charan Roula on 11.11.1999 under sections 302/304-A/34 of the Indian Penal Code and section 3 of SC & ST(PA) Act and thereafter, the case record was sent with charge sheet to the Court of learned Sessions Judge -cum- Special Judge, Cuttack. It is specifically mentioned in the charge sheet that no evidence under sections 302/304-A/34 of the Indian Penal Code and section 3 of the S.C. & S.T. (PA) Act was made out against the petitioner whose name might have been added by the informant due to enmity.

3. Even though no charge sheet was submitted against the petitioner but when the matter was placed before the learned Sessions Judge -cum- Special Judge, Cuttack on 18.11.1999, the learned Court passed following the order:-

> "Charge sheet under sections 302/304-A/34 of the Indian Penal Code and under section 3 S.C./S.T. (PA) Act is received against the accused persons namely 1) Kuna @ Ratnakar Padhi, 2)Smt. Sanjua @ Sanjukta Roul and 3) Dhruba Roul. Cognizance is taken against all the accused persons namely 1)Sunamani Roul, 2) Sanjua @ Sanjulata Roul, 3) Kuna @ Ratnakar Padhi and 4) Dhruba Roul under sections 302/34 of the Indian Penal Code and section 3 SC/ST (PA) Act."

Subsequently in view of the ratio laid down by the Hon'ble Supreme Court in case of **Gangula Ashok -Vrs.- State of Andhra Pradesh reported in (2000) 18 Orissa Criminal Reports (SC) 364**, the record of the case was sent back to the Court of learned J.M.F.C., Salipur. On receipt of such record and as per the order of the learned Special Judge, Cuttack dated 18.11.1999, cognizance of offence was taken under sections 302/304-A/34 of the Indian Penal Code and section 3 of the S.C. & S.T.(PA) Act by the learned J.M.F.C., Salipur on 31.01.2006 and process was issued against the three charge sheeted accused persons as well as the petitioner.

4. Mr. Satya Ranjan Mulia, learned counsel for the petitioner contended that when charge sheet clearly reveals that there is no material against the petitioner for the alleged offences under sections 302/34 of the Indian Penal

Code and section 3 of S.C. & S.T.(PA) Act and charge sheet was submitted against three co-accused persons only, without assigning any reason, it was not proper on the part of the learned Special Judge to issue process against the petitioner after taking cognizance of offences and also for the learned J.M.F.C., Salipur to follow that order and passing the impugned order and issuing process against the petitioner. It is contended that the impugned order suffers from non-application of mind and accordingly invoking inherent power under section 482 Cr.P.C., the same should be quashed.

Mr. Arupananda Das, learned Addl. Govt. Advocate on the other hand supported the impugned order and submitted that there is no dearth of power of the Magistrate or with the Special Judge to take cognizance of the offences and issued process against the non-charge sheeted persons if materials on record indicate prima facie case against such persons.

5. In case of **M/s. India Carat Pvt. Ltd. -Vrs.-State of Karnataka reported in A.I.R. 1989 SC 885**, it is held that upon receipt of a police report under Section 173(2) of Cr.P.C., a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order issue of process to the accused. Section 190(1)(b) of the Code does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) of the Code and direct the issue of process to the accused.

In case of **Union of India -Vrs.- Prakash P. Hinduja reported in (2003) 26 Orissa Criminal Reports (SC) 243,** it is held that Magistrate is not bound to accept the final report (sometimes called as closure report) submitted by the police and if he feels that the evidence and material collected during investigation justify prosecution of the accused, he may not accept the final report and take cognizance of the offence and summon the accused but this does not mean that he would be interfering with the investigation as such. He would be doing so in exercise of powers conferred by Section 190 Cr.P.C.

In case of **Uma Shankar Singh -Vrs.- State of Bihar reported in (2010) 47 Orissa Criminal Reports 633,** it is held that law is well settled that even if the investigating authority is of the view that no case has been made out against an accused, the Magistrate can apply his mind independently to the materials contained in the police report and take cognizance there upon in exercise of his powers U/s. 190(1)(b) Cr.P.C. In that case the investigation had been handed over to the C.I.D. and both the C.I.D. and the local police had submitted their reports in final form exonerating the petitioner of the allegations made against him in the F.I.R. However, the Chief Judicial Magistrate took cognizance of the offence U/s. 302/379 of the Indian Penal Code and Section 25 of the Arms Act against the petitioner. The Hon'ble Court held that this is not a case where the Magistrate took recourse to any further inquiry but took cognizance on the police report itself, which he was entitled to do U/s. 190(1)(b) Cr.P.C.

6. In view of the settled position of law, I am of the humble view that even if the Investigating Officer files charge sheet against some accused persons and was of the view that no case was made out against other persons, if after examination of the case records and taking into account the statements of the witnesses examined by the police during investigation, the Magistrate feels that some non-charge sheeted persons are required to be proceeded against as there are also prima facie materials against them, he can pass such order giving his reasons thereon.

7. In the present case, when the charge sheet was first placed before the learned Special Judge, the learned Special Judge took note of the fact that charge sheet has been submitted only against Kuna @ Ratnakar Padhi, Smt. Sanjua @ Sanjukta Roula and Dhruba Roula. After perusing the same, in the next line he mentioned about taking cognizance not only against the three charge sheeted accused persons but also against the petitioner. When as per the Gangula Ashok case (supra), the matter was remitted back to the learned J.M.F.C., Salipur, he just followed the order of the learned Special Judge, Cuttack dated 18.11.1999 and passed the impugned order.

On perusal of both the orders, it appears that no reasons have been assigned as to why the Court thought it proper to issue process against the petitioner in spite of the fact that the Investigating Officer was of the opinion that no material under sections 302, 304-A /34 of the Indian Penal Code and section 3 of the S.C. & S.T. (PA) Act was made out against the petitioner whose name might have been added by the informant due to their enmity.

8. Law is well settled that reasons introduce clarity in the order and it is an indispensable part of sound judicial system. Setting forth reasons howsoever brief in the order is indicative of application of judicial mind. Reasons should be clear and explicit. It indicates fair play in action and also rules out the possibility of leveling the order as arbitrary and whimsical.

When the investigating officer has not submitted charge sheet against the petitioner and the Magistrate wants to ignore the conclusion arrived at by the investigating officer and defer from the opinion of the investigating officer, it was very much necessary on his part to give some reasons, even brief in nature to show as to why he was disagreeing with the report submitted by the investigating officer and issuing process against the non-charge sheeted petitioner.

Since the impugned order passed by the learned J.M.F.C., Salipur shows inscrutable face of the sphinx and no reasons are there either in the impugned order or in the order dated 18.11.1999 of the learned Special Judge, Cuttack which the learned Magistrate has followed and there is no prima facie material against the petitioner relating to commission of the offences under which the charge sheet has been submitted, I am of the view that it was not proper on the part of the learned Magistrate to proceed against the petitioner.

9. Therefore, in my humble opinion the impugned order suffers from non-application of mind and accordingly, invoking inherent power under section 482 of Cr.P.C., I quash the impugned order so far as the petitioner is concerned. Needless to say that if during course of trial, any clinching materials come against the petitioner regarding his involvement in the case, the learned trial Court is at liberty to invoke its power under section 319 of Cr.P.C. to proceed against the petitioner in accordance with law. Accordingly, the CRLMC application is allowed.

CRLMC allowed.

2018 (I) ILR - CUT- 825

S. N. PRASAD, J.

W.P.(C) No. 2894 of 2018 WITH BATCH

AZEED AHEMAD ……..Petitioner

.Vrs.

THE TRANSPORT COMMISSIONER -CUM-CHAIRMAN, STA & ANR. ……Opp. Parties

(A) MOTOR VHECLES ACT, 1988 – Section 4A – Payment of road tax – Claim of the petitioners for payment of tax on monthly basis and not onetime – Plea that the amended provision being after the registration of the vehicle not applicable – Question arose as to which would be the appointed date whether from the date of enactment of Section 4A w.e.f. 1.6.1989 or from the date of amendment/addition in Section 4A by virtue of different notifications issued in this regard – Held, the appointed date will go from the date of insertion of the original provision.

"This Court, after considering the legal position, is of the view that when the legislature has come out with a provision as contained under Section 4A the owner of the vehicle is required to pay tax by way of onetime tax subject to the conditions as laid down in sub-section(3) of Section 4A giving protection to such category of vehicles which has been registered prior to the insertion of the provision of Section 4A of the Act,1975, the intent of the legislature is very clear that whatever may be the nature of vehicle, the same is to be registered on payment of onetime tax subject to the conditions as laid down under sub-section(3) otherwise there would have no requirement of insertion of the provision of Section 4A since prior to its insertion as per the provision of Section 4 of the Act,1975, tax was being paid on the basis of annually or monthly, hence the intent of the legislature is to make payment of tax by way of onetime payment depending upon the appointed date and the appointed date will go from the date of insertion of the original provision.Thus, on the basis of the legal position, the contention of the petitioners cannot be accepted for the reason that the amending Act by way of insertion of Section-4A has come on1.6.1989 and thereafter the provision of Section 4A is being amended by way of inserting name of the vehicle making the same more clarificatory as it was in the original Act by giving nature of vehicle specifically, hence the nature will be said to be clarificatory and it will go to the date of enactment of the original Act." (Paras 6 & 7)

(B) INTERPRETATION OF STATUTE – Principles – Indicated.

"It is settled position of law that legal fiction must be given full effect but it is equally well settled that the scope and ambit of a legal fiction should be confined to the object and purport for which the same has been created. Further settled position is that legal fiction, as is well known, should be applied only to the extent for which it was enacted. It, although must be given its full effect but the same would not mean that it should be applied beyond a point which was not contemplated by the legislature or which would lead to an anomaly or absurdity. The court, while interpreting a statute must bear in mind that the legislature was supposed to know law and the legislation enacted is a reasonable one. The Court must also bear in mind that where the application of a parliamentary and a legislative Act comes up for consideration, endeavours shall be made to see that provisions of both the Acts are made applicable. It is also well settled principle of interpretation of statutes that the court must give effect to the purport and object of the Act. Rule of purposive construction should, subject of course to the applicability of the other principles of interpretation, be made applicable in a case of this nature."

Case Laws Relied on and Referred to :-

1. (1997) 3 SCC 472 : Allied Motors(P) Ltd. –vs-Commissioner of Income Tax.
2. (1997)5 SCC 482 : Commissioner of Income Tax –vs- Podar Cement(P) Ltd.

For Petitioners : Mr. Subash Chandra Pani
For Opp. Parties : Mr.B.K.Sharma

Date of hearing 20.04.2018 Date of judgment : 20.04.2018

JUDGMENT

S.N.PRASAD, J.

As common question is involved in all the writ petitions, they are being heard together and disposed of by this common judgment.

2. At the outset it is noted here that in W.P.(C) Nos.2894, 1327, 1328, 1329, 2895,4791,4792,4793,4794 and 4795 of 2018 Mr.B.K. Sharma, learned counsel has put his appearance, extra copies of the writ petitions has been served and in spite of the communication made by Mr.Sharma to the opposite parties for seeking instruction for filing counter affidavit, no instruction has been given and as such counter affidavit could not have been filed.

In W.P.(C) Nos.5417,5419,5420,5422,5423,5425 and 5426 of 2018 Mr.Sharma accepts notice on behalf of the opposite parties but in spite of the order passed by this Court, extra copy of the writ petition has not been supplied to him by the petitioner.

Mr.Sharma, however, submits that since the petitioners are raising legal issues and as such he is ready to argue the matter on the basis of the pleadings made in the writ petition as also on legal position.

3. In all the writ petitions the relief sought for are:

(i) to direct the opposite partyno.2, RTO, Bhubaneswar-I to accept tax in prevailing procedure (monthly mode) in old rate when the petitioner is paying yearly tax and is willing to continue the same and is not able to pay one-time tax.

(ii) Further fees towards Fitness Certificate be accepted;

(iii) Fitness Certificate be issued in favour of the petitioner against the vehicle as referred in individual writ petition.

At the outset the learned counsel for the petitioner has submitted that he is confining his prayer only to prayer(i) and as such he has only pressed this writ petition to substantiate the relief as sought for in the prayer No.(i).

4. Case of the petitioners is that in view of the provisions of Section 4A of the Orissa Motor Vehicles Taxation Act,1975 (herein after referred to as 'the Act,1975') the owners of the vehicle are liable to pay tax on monthly basis and no by way of onetime measure. He submits that although provision of Section 4A has been amended by inserting therein payment of onetime tax at the rate equal to a standard rate as specified in Schedule-III but there being no amendment in sub-section(3) of Section 4A which contains provision of option for paying levy either by way of onetime measure or on monthly basis and according to him since the vehicles in question have been purchased by the petitioners after the appointed date, as such they are liable to pay tax on monthly basis in view of the provision of sub-section(3)of Section 4A of the Act. According to him, section 4A of the Act has been amended by virtue of notification dated 21.11.2017 whereby and where under the vehicles in question which relate to maxi cab has been brought under the purview of Section 4A of the Act,1975, hence appointed date would be 21.11.2017 and the vehicle since registered prior to 21.11.2017 they will pay tax on monthly basis.

While, on the other hand, Mr. Sharma, learned counsel for the Transport Department while vehemently opposing the submission of the learned counsel for the petitioner has submitted that Section 3 of the Act,1975 contains provision of levy of tax while Section 4 contains provision of payment of tax and declaration of liability.

Section 4A contains the provision of levy and payment of onetime tax. According to him, Section 4A has been inserted in the statute by way of Orissa Act 8 of 1989 with effect from 1.6.1989 which has been amended by virtue of Orissa Act 3 of 2005 w.e.f. 25.2.2005, the said provision stipulates that notwithstanding anything contained in Sections 3 and 4 of this Act, but subject to the other provisions of this section, there shall be levied and paid in respect of every vehicle of the descriptions specified in items 1 and 2 and every motor vehicle(being a motor car, Omnibus and Motor Cab) covered by items 6 of Schedule-1 which is used personally or kept for personal use, onetime tax at the rate equal to a standard rate as specified in Schedule-III or five per centum of the cost of the vehicle whichever is higher.

So far as the contention of the petitioner that in view of sub-section(3) of Section 4A he will be allowed to pay monthly tax but that cannot be accepted for the reason under sub-section(3) of Section 4A the option to exercise for payment of onetime tax or monthly tax if the vehicle registered on or before the appointed date and the appointed date would be 1.6.1989,but

here in the instant case the vehicles in questions are registered after the amended provision of Section 4A and hence the appointed date would be 1.6.1989.

So far as the contention of the petitioner that the appointed date would be 21.11.2017 since on that date subsequent amendment has been brought on section 4A which cannot be said to be correct for the reason that Section 4A has been amended by virtue of the notification dated 21.11.2017 wherein in section 4A for sub-section(1) including the provisos to the sub-section shall be substituted and all the contents of Section4A as it was, is remained same, save and except, insertion of certain vehicles has been made there and as such it cannot be said that by virtue of the notification dated 21.11.2017, the entire provision as contained in section 4A has been amended rather the Act is the same and only insertion of some vehicles has been brought by virtue of the said notification, hence the appointed date would be 1.6.1989.

5. This Court, in order to appreciate the argument advanced on behalf of the parties, is of the view that the intent of the Act,1975 with its provision needs to be referred before examining the factual aspects.

The Act,1975 has been enacted and published on 16.9.1975 vide Orissa Gazette Ext.No.1556, came into effect from 1.10.1975.

The Act 1975 contains provision of levy of tax and payment of tax and declaration of liability under the provisions of Act 3 and 4.

Section 3 stipulates that there shall be levied on every motor vehicle used or kept for use within the State a tax at the rate specified in Schedule-I, which can be increased from time to time by virtue of the notification issued by the State Government, provided that such increase shall not exceed fifty percent of the rate specified in Schedule-I.

Section 4 stipulates payment of tax and declaration of liability which shall be paid in advance within such time and such manner as may be prescribed, to the Taxing Officer by the registered owner of person having possession or control of the vehicle. Sub-section(2) provides the period in respect of which tax is to be paid under sub-section(1) may be-

> (a) a year at the rate specified in Schedule-I hereinafter referred to as the annual rate; or
>
> (b) one or more quarters at one-fourth of the annual rate for each quarter; or
>
> (c) any period less than a quarter expiring on the last date of any quarter at one-twelfth of the annual rate of every month or part of a month comprising such period:

Provided that in the case of a vehicle and annual rate of tax in respect of which does not exceed five hundred rupees the tax shall be paid either annually or for a period of two quarters at a time;

Provided further that the State Government may, by notification, allow payment of tax monthly in respect of any motor vehicle or class of motor vehicles and in such case one-twelfth of the annual rate of tax specified in Schedule-I is to be paid for each months.

It is evident from the provisions of Section 4 of the Act,1975 that tax shall be paid either annually or for period of two quarters at a time and if the Government so wishes, may issue notification regarding payment of tax monthly in respect of any motor vehicles or class of motor vehicles.

Section 4A has been inserted by virtue of the Orissa Act 8 of 1989 with effect from 1.6.1989 which contains provision of levy and payment of onetime tax, the said provisions is being quoted herein below:

"(1) Notwithstanding anything contained in Sections 3 and 4 of this Act, but subject to the other provisions of this section, there shall be levied and paid in respect of every vehicle of the descriptions specified in items 1 and 2 and every motor vehicle(being a motor car) covered by items 6 of Schedule-I which is used personally or kept for personal use, onetime tax at the rate equal to ten times the annual rate of tax in respect of thereof as specified in Schedule-I:

Provided that in the case of a vehicle which-

(i) is already on road in State of Orissa, prior to the appointed date; or

(ii) Has been purchased or acquired inside or outside Orissa but brought to Orissa on or after the appointed date; or

(iii) Is altered after the appointed date to a motor car for which onetime tax is payable.

The onetime tax shall be such as may remain after deducting from the usual onetime tax a specified above, one-fifteenth thereof for each completed period of twelve months commencing on the date of initial purchase or acquisition of the vehicle for which tax has been paid in respect thereof but in no case, such tax shall be less than one-tenth of such usual onetime tax.

(2) The levy and payment of onetime tax shall be for the life time of the vehicle in respect of which such tax is paid.

(3) The levy and payment of onetime tax shall be compulsory in respect of vehicles registered on or after the appointed date and optional in respect of the vehicles registered prior to that date.

xx xxx xxx"

It is evident from the said provision that in the original Act there was no provision of payment of onetime tax rather as per the provisos to Section 4

it may be annual or monthly but for the first time by virtue of the notification dated 1.6.1989 the concept of onetime tax has been introduced by the legislature of the State.

It is evident from the provisions of the Section 4A of the Act that subject to the conditions contained in Sections 3 and 4 of the Act, there shall be levied and paid in respect of every vehicle of the descriptions specified in items 1 and 2 and every motor vehicle(being a motor car) covered by items 6 of Schedule-I which is used personally or kept for personal use, onetime tax at the rate equal to ten times the annual rate of tax in respect thereof as specified in Schedule-I, provided that in the case of a vehicle which is already on road in State of Orissa, prior to the appointed date; or has been purchased or acquired inside or outside Orissa but brought to Orissa on or after the appointed date; or is altered after the appointed date to a motor car for which onetime tax is payable.

The onetime tax shall be such as may remain after deducting from the usual onetime tax as specified, one-fifteenth thereof for each completed period of twelve months commencing on the date of initial purchase or acquisition of the vehicle for which tax has been paid in respect thereof but in no case, such tax shall be less than one-tenth of such usual onetime tax.

The levy and payment of onetime tax shall be for the life time of the vehicle in respect of which such tax is paid.

The levy and payment of onetime tax shall be compulsory in respect of vehicles registered on or after the appointed date and optional in respect of the vehicles registered prior to that date.

Thereafter Orissa Act 21 of 1990 has been enacted upon which Orissa Motor Vehicles Taxation(Amendment) Act,1990 whereby and where under Section 4-A has been amended to the effect as

(a) in sub-section(1) after the words and figures ‘items 1 and 2’ the words and figures ‘and every vehicle (being a motor car) covered under item 6 has been inserted,

(b) for the provisions of section (1) the following proviso shall be substituted that in the case of vehicle which

(i) is already on record in the State to the appointed date, or

(ii) has been purchased or acquired outside Orissa but brought to Orissa on or after the appointed date; or

(iii) is altered after the appointed date to a motor car for which onetime is payable. The onetime tax shall be such as may remain after deducting from the usual onetime tax a specified above, one-fifteenth thereof for each completed period of twelve months commencing on the date of initial purchase or acquisition of the vehicle for which tax has been paid in respect thereof but in no case, such tax shall be less than one-tenth of such usual onetime tax. It is evident from the amended Act of 1990 that the substantial law of making payment of onetime tax remains same save and except in certain items under section 4A (1).

Section 4A has again been amended by virtue of the Orissa Act 3 of 2005 w.e.f. 25.2.2005 which is quoted hereunder:

> "(1) Notwithstanding anything contained in Sections 3 and 4 of this Act, but subject to the other provisions of this section, there shall be levied and paid in respect of every vehicle of the descriptions specified in items 1 and 2 and every motor vehicle(being a motor car, Omnibus and Motor Cab) covered by items 6 of Schedule-I which is used personally or kept for personal use, onetime tax at the rate equal to a standard rate as specified in Schedule-III or five per centum of the cost of the vehicle whichever is higher:
>
> Provided that in the case of a vehicle which is on road in State of Orissa, whether purchased or acquired inside or outside the State of Orissa, onetime tax shall be at the rate as specified in Schedule-III.
>
> Provided further that the vehicles in respect of which onetime tax has already been realized shall not be liable to pay tax.
>
> (2) The levy and payment of onetime tax shall be for the life time of the vehicle in respect of which such tax is paid.
>
> (3) The levy and payment of onetime tax shall be compulsory in respect of vehicles registered on or after the appointed date and optional in respect of the vehicles registered prior to that date.
>
> xxx xxx xxx"

It is evident from the Amended Act of 2005 of Section 4A, certain categories of vehicles has been inserted in Section 4A.

The Act,1975 has again been amended by virtue of the notification dated 21.11.2017 which is quoted hereunder:

> "Section 4A(1) Notwithstanding anything contained in Sections 3 and 4, but subject to other provisions of this Act, there shall be levied and paid in respect of every vehicle of the description specified in items 1 and 2 of Schedule-I and every vehicle being motor car including jeep, which is used personally or kept for personal use, covered under item 6 of the said Schedule, motor cab and maxi cab covered under item 4(B) of the said Schedule, Omnibus, private service vehicle

covered under item 5A and educational institution buses covered under item 5B of that schedule which does not carry more than twelve persons excluding driver, onetime tax at the rate specified in Schedule-III, provided that in case of motor vehicle which,

(i) Is ready one road in the State of Odisha prior to the commencement of the Odisha Motor Vehicles Taxation (Amendment) Act,2017 (hereinafter referred to as the appointed date) or

(ii) has been purchased or acquired outside Odisha but brought to Odisha on or after the appointed date; or

(iii) is altered after the appointed date to a motor vehicle for which onetime tax is payable,

the onetime tax shall be such as may remain after conducting from the usual onetime tax, one-fifteenth for each completed year for which tax has been paid, but in no case, such tax shall be less than one-tenth of such usual onetime tax.

Explanation-I- For the purpose of this section, the expression "usual onetime tax" means such rate of tax as specified in Schedule III payable in respect of such vehicle, calculated on the basis of the cost of such vehicle prevalent on the date of its first registration.

Explanation-II – For the purpose of this section, the cost of vehicle shall include taxes and duties charged by the Dealer as mentioned in the invoice:

Provided further that there shall be levied and paid in respect of every e-cart and e-rickshaw, onetime tax at the rate of three per centum of the cost of such vehicle.

Provided also that the vehicle, in respect of which onetime tax has already been realized, shall not be liable to pay tax as specified in Schedule III."

It is thus evident that initially there was no concept of making payment of onetime tax and it was introduced for the first time by way of Orissa Act 8 of 1989 w.e.f. 1.6.1989. It is further evident from the Act,1989 that the provision of sub-sections in both the amended Acts has remained untouched. Sub-section(3) stipulates the levy and payment of onetime tax shall be compulsory in respect of vehicles registered on or after the appointed date and optional in respect of the vehicles registered prior to that date.

Section 4A(1) contain the provision that onetime tax shall be payable to such category of vehicles which is already on road in the State of Orissa prior to the appointed date, the said provision is also there in the amended Act,2017.

Contention of the learned counsel for the petitioners that after amendment of Section 4A(1) the sub-section(3) remains unaltered and as such the option is to be exercised either by onetime or monthly basis, but subject to the registration of vehicle on or before the appointed date.

According to the petitioner since the vehicle has been registered in the year 2012 and their vehicles i.e. Maxi Cab has been introduced for the first time by virtue of the notification dated 21.11.2017, hence the amended Act,2017 would be taken into consideration for the purpose of making payment of onetime tax and the date of issuance of the notification of the Act,2017 would be the appointed date within the meaning of Sub-section(3) of Section 4A.

6. This Court while examining the statutory provision is of the view that at the time of enactment of the Act,1975 there was no concept of making payment of onetime tax and tax has to be paid in view of the provision of Section 4 which was yearly or monthly as would be evident from the proviso to section 4 and thereafter the principle of onetime tax has been introduced vide notification 1.6.1989.

The legislature has taken care of the vehicle which was on the road on the date of issuance of notification w.e.f. 1.6.1989 and the rate of tax has also been ordered to be calculated.

In sub-section(3) option is available to the vehicle owner for payment of onetime tax compulsorily or to exercise option to make payment onetime or monthly.

The condition precedent for making payment of onetime tax compulsory is that if the vehicle is registered on or after the appointed date and optional in respect of the vehicle registered prior to the appointed date.

The appointed date would relate back to insertion the provisions of Section 4A that would be 1.6.1989 with respect to such category of vehicles which has been referred under section 4A(1) and as specified in item no.1 and 2 and every motor vehicle being motor car covered under Item-6.

The motor vehicle or vehicles has been defined under the provisions of Section-2(b) which means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and trailer, but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding thirty five cubic centimeters, meaning thereby under the definition of motor vehicles which mechanically propelled but not being used within the premises or the vehicle which is less than four wheels fitted with engine capacity of not exceeding thirty five cubic

centimeters will come under the definition of motor vehicle, but the motor vehicles which are being used in the enclosed premises will not come under the fold of definition of motor vehicle and as such payment of onetime tax will not applicable, hence the appointed date for such vehicles would be 1.6.1989.

The vehicles owners having purchased on or before 1.6.1989 will have the option either to pay onetime tax or month to month basis but after 1.6.1989 onetime tax is compulsorily to be paid.

In Section 4A of the Act 1990 after the words and figures 'item no.1 and 2", the words and figures' and every vehicle and other vehicles being motor car covered in Item no.6 of schedule-I shall be inserted.

Item no.6 of Schedule-I contains description of vehicle other those liable to pay tax under the provisions and that is not the basis of its weighing with the further stipulates under the amended Act,1990 onetime tax shall be such as may remain after deducting from the usual onetime tax as specified above, one-fifteenth for each completed period of twelve months for which tax has been paid in respect thereof but in no case, such tax shall be less thanone-tenth of such usual onetime tax, meaning thereby after enactment of Amendment Act,1989 due to insertion of category of vehicle if they have already paid onetime tax, the vehicle which were on road prior to the appointed date or has been purchased and acquired outside the Orissa but brought to Orissa on or after the appointed date, or is altered after the appointed date to a motor car for which onetime tax is payable, shall pay onetime tax at the rate equal to ten times of the annual rate of tax for such categories of vehicles as provided under sub-clauses (i), (ii) and (iii) of Sub-clause(1) of Section 4A of the Amendment Act,1989 and as also been amended in 1975.

Likewise, the amended Act,2005 has come into force w.e.f. 25.2.2005 wherein Section 4A(1) has been amended whereby and where under the category of motor car, Omnibus and Motor cab covered by item 6 of Schedule-I has been included as per the provisos (i), (ii) and (iii) of sub-section(1) of Section 4A of the Act,1989.

Similarly, under the Amended Act,2017 certain categories of vehicles has been incorporated which Maxi Cab covered under item 4(B) of the said Schedule, Omnibus, private service vbehicle covered under item 5A and educational institution buses covered under item 5B of that schedule which does not carry more than twelve persons excluding driver, onetime tax at the

rate specified in Schedule-III with the same stipulations as has been provided in the provisos (i), (ii) and (iii) of the Amendment Act,1989.

The sole question to be decided that which would be the appointed date whether from the date of enactment of Section 4A w.e.f.1.6.1989 or from the date of amendment/addition in Section 4A by virtue of different notifications issued in this regard.

There is no dispute in the legal position that the proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplied an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole. Reference in this regard may be made to para-13 of the judgment rendered in the case of **Allied Motors(P) Ltd. –vs-Commissioner of Income Tax**, reported in (1997) 3 SCC 472.

It is also settled position of law that legal fiction must be given full effect but it is equally well settled that the scope and ambit of a legal fiction should be confined to the object and purport for which the same has been created.

Further settled position is that legal fiction, as is well known, should be applied only to the extent for which it was enacted. It, although must be given its full effect but the same would not mean that it should be applied beyond a point which was not contemplated by the legislature or which would lead to an anomaly or absurdity.

The court, while interpreting a statute must bear in mind that the legislature was supposed to know law and the legislation enacted is a reasonable one. The Court must also bear in mind that where the application of a parliamentary and a legislative Act comes up for consideration, endeavours shall be made to see that provisions of both the Acts are made applicable.

It is also well settled principle of interpretation of statutes that the court must give effect to the purport and object of the Act. Rule of purposive construction should, subject of course to the applicability of the other principles of interpretation, be made applicable in a case of this nature.

This Court, after considering the legal position as referred to above, is of the view that when the legislature has come out with a provision as

contained under Section 4A the owner of the vehicle is required to pay tax by way of onetime tax subject to the conditions as laid down in sub-section(3) of Section 4A giving protection to such category of vehicles which has been registered prior to the insertion of the provision of Section 4A of the Act,1975, the intent of the legislature is very clear that whatever may be the nature of vehicle, the same is to be registered on payment of onetime tax subject to the conditions as laid down under sub-section(3) otherwise there would have no requirement of insertion of the provision of Section 4A since prior to its insertion as per the provision of Section 4 of the Act,1975, tax was being paid on the basis of annually or monthly, hence the intent of the legislature is to make payment of tax by way of onetime payment depending upon the appointed date and the appointed date will go from the date of insertion of the original provision as has been held by the Hon'ble Supreme Court in the case of **Commissioner of Income Tax –vs- Podar Cement(P) Ltd**., reported in (1997)5 SCC 482 wherein at paragraph-51 it has been laid down an amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force, the amending Act also will be part of the existing law.

Thus, on the basis of the legal position, the contention of the petitioners cannot be accepted for the reason that the amending Act by way of insertion of Section-4A has come on1.6.1989 and thereafter the provision of Section 4A is being amended by way of inserting name of the vehicle making the same more clarificatory as it was in the original Act by giving nature of vehicle specifically, hence the nature will be said to be clarificatory and it will goes to the date of enhancement of the original Act i.e. hear under Section 4A w.e.f. 1.6.1989 and in view thereof, the appointed date will be 1.6.1989 as stipulated under sub-section(3) of Section 4A.

Accordingly, the contention of the petitioner, so far as the vehicle which has been registered prior to the amending Act,2017, will be 21.11.2017 is contrary to the legal position as narrated herein above. Accordingly, the same is rejected.

The petitioners have purchased the vehicles and registered in the year 2012 and hence on the date when they have purchased the vehicles, they were on road prior to commencement of the Amendment Act,2017, they will have to pay onetime tax after deducting from the usual onetime tax, one-fifteenth for each completed period for which tax has been paid but in no case, such

tax shall be less than one-tenth of such usual onetime tax as per amended provision of Section 4A(1) of the Act,2017.

7. This Court, after reading the provisions of Section 4A along with its amendment, has found that the concept of onetime tax has been introduced by the State Government but simultaneously same may not be given effect to with such categories of vehicles which has been purchased prior to the date of enactment of Section 4A and as such has taken care of by giving them option but the said option as has been contended by the petitioner in view of sub-section(3) of Section 4A is not available in view of the provisos to Section 4A(1) and its subsequent amendment to the effect that in case of motor vehicle which is already on road in the State of Orissa prior to commencement of the Act,2017 the onetime tax shall be payable, meaning thereby the vehicle which has been purchased after the enactment of Section 4A they will have to pay onetime tax.

Petitioners contends that the authorities were accepting tax month to month basis which suggests that option was with them but according to my considered view, merely because the tax on month to month basis was being accepted by the State authorities, that does not create any right to the petitioners by giving go by to the statutory provisions as discussed above and further more on the principle that any illegality has been committed by the authorities, that cannot create any right to the petitioner if it is contrary to the statutory provision.

The petitioner has tried to impress upon the Court that since the Maxi Cab was under the fold of amended Act,2017 for the first time and as such Section 4A will applicable under these categories of vehicle w.e.f. 21.11.2017 but this contention is not acceptable to this Court reason being that even under the old Section 4A which has been brought into effect w.e.f. 1.6.1989, onetime tax was payable to every motor vehicle as dealt with herein above, the motor vehicle means any mechanically propelled vehicle adapted for use upon roads which are used only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding thirty five cubic centimeters, but the category of vehicle under item 4(B) which includes Maxi Cab is related to vehicle other than stage carriage which includes (i) for sitting not more than six persons, for every person the vehicle is permitted to carry, excluding the driver (ii) sitting more than six persons but not more than 25 persons, (iii) for sitting more than 25 persons for every persons the vehicle is permitted to carry

excluding the driver and conduction, according to my considered view, the legislature, only in order to avoid ambiguity with respect to the category of vehicle, has included the category of vehicles by incorporating it as Max Cab otherwise it cannot be said that the Maxi Cab is not coming under the definition of motor vehicle as per the provision of sub-sectionSection-2(b) and as such it will also come under the fold of section 4a(1) of the Orissa Act 8 of 1989 and admittedly the vehicle has been purchased in the year 2012 and as such they will have to pay onetime tax.

8. In view of the discussions made herein above, the issue raised by the petitioners is answered; accordingly the writ petitions fail and are dismissed.

Writ petitions dismissed.

2018 (I) ILR - CUT- 839

S. N. PRASAD, J.

O.J.C. No. 681 of 2002

KULWANT SINGH ……..Petitioner

.Vrs.

UNION OF INDIA AND ORS. ……..Opp. Parties

PERSONS WITH DISABILITIES (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 – Section 47 – Benefit & Protection under – Petitioner, a CISF Constable met with an accident and lost one hand – Declared permanently incapacitated in terms of the C.C.S. (Medical Examination) Rules, 1957 incorporated in Appendix-9 to C.C.S. (Pension) Rules, 1972 and Rule 38 of C.C.S. (Pension) Rules, 1972 on the plea that the CISF has been taken out from the purview of Section 47 w.e.f. 10.09.2002 by way of a Notification – Claim of the benefit & protection as per Section 47 of the Act, 1995 – Whether entitled, Held yes, as the petitioner has been declared unfit before the date of notification.

"It is not in dispute that the petitioner has sustained injury and declared medically unfit by its Medical Report dated 1.1.2002. It is also not in dispute there is Amputation from right upper arm, meaning thereby the petitioner is coming under the category of permanent disability i.e. more than 40%, as such he is coming under the purview of provision of Section 2(t) which contains the definition of 'disability'. It is also not in dispute that the CISF is a paramilitary Force and the said establishment has been taken out from the purview of Section 47 w.e.f. 10.09.2002 i.e. the date of Notification. It is settled that any notification will not be given its retrospective effect and as such keeping the said settled position into consideration, it is held herein that the Notification dated 10.09.2002 will be given effect to on or after 10.09.2002 since herein the petitioner has been declared to be unfit w.e.f. 1.1.2002 which is

prior to issuance of Notification , as such the petitioner is entitled to be protected under the provision of Section 47 of the Act, 1995."

Case Laws Relied on and Referred to :-

1. 2003 (4) SCC 524 *:* Kunal Singh vrs. Union of India & another.

For Petitioner : M/s. D.K. Samantaray, H.K. Panigrahi.
For Opp. Parties : M/s. U.K. Samal, ASC (Central), Mr. S.C. Samantray, Mr. A.K. Bose (A.S.G.I.).

Date of Hearing : 9.04.2018 Date of Judgment : 9.04.2018

JUDGMENT

S. N. PRASAD, J.

This writ petition is under Article 226 and 227 of the Constitution of India for quashing the order dated 10.01.2002 passed by the Commandant, CISF Unit, Nalco, Angul, whereby and where under the petitioner has been medically boarded out due to suffering from Amputation from right Upper Arm.

2. Case of the petitioner in brief is that he while working as Constable in CISF under CISF Unit, Angul, he met with an accident on 11.09.2001 while travelling to his village and while trying to be boarded in the Train fell down, as a result, the Train ran over on his right hand above elbow which was completely detached from the body. The petitioner was shifted to S.C.B. Medical College and Hospital, Cuttack and discharged on 8.10.2001. The petitioner thereafter has permanently declared incapacitated for further service as Constable in C.I.S.F., in terms of the procedure laid down in C.C.S. (Medical Examination) Rules, 1957 incorporated in Appendix-9 to C.C.S. (Pension) Rules, 1972 and Rule 38 of C.C.S. (Pension) Rules, 1972.

Case of the petitioner as has been pleaded in the affidavits is that while passing the order dated 10.01.2002, the provision of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (in short Act, 1995) has not been taken into consideration, as such the order dated 10.01.2002 is directly in the teeth of the statutory provision as stipulated under Section 47 of the said Act.

3. Learned counsel for the petitioner submits that CISF has been taken out from the purview of Section 47 by issuing the Notification under proviso to Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and the said Notification has been issued on 10.09.2002, the occurrence took place on

11.09.2001 and the petitioner has been declared to be medically boarded out on 01.01.2002, as such he is entitled to get the benefit of Section 47 and in view thereof, he cannot be discriminated from medically boarded out service.

4. Mr. A.K. Bose, learned Asst. Solicitor General of India has vehemently opposed the submission and prayer of the petitioner by submitting that the petitioner has been medically boarded out in the light of the provision laid down in C.C.S. (Medical Examination) Rules, 1957 incorporated in Appendix-9 to C.C.S. (Pension) Rules, 1972 and Rule 38 of C.C.S. (Pension) Rules, 1972, as such there is no implication of the provision of Section 47 of the Act, 1995.

He further submits that even accepting the argument of the petitioner that he is entitled to get the benefit of Section 47 but the establishment has been taken out from the purview of Section 47 vide Notification issued by the Ministry of Social Justice and Empowerment dated 10.09.2002, in view thereof he is not entitled to get the benefit. He further submits that the point related to Section 47 has not been pleaded in the writ petition, as such no advantage can be given to the petitioner.

5. In response, learned counsel for the petitioner submits that the Notification has been issued by the Ministry of Social Justice and Empowerment on 10.09.2002 while the petitioner has been declared to be medically unfit vide report dated 1.1.2002, as such on the date when the petitioner has declared medically unfit to retain in Government service is prior to issuance of Notification dated 10.09.2002, hence Section 47 is well be applicable to the case of the petitioner, as such he is entitled to be protected under the said statutory provision.

He submits that although there is no pleading in the writ petition but it has been pleaded in the rejoinder filed by the petitioner, wherein specific plea has been taken regarding implication of Section 47 of the Act, 1995, copy of the said rejoinder has duly been served upon the counsel appearing for the opposite parties way back on 2.4.2010 but no response has been filed to that effect, hence it is incorrect to say that no pleading regarding Section 47 of the Act, 1995 has been made, the same is being reproduced herein below for ready reference:-

> "**47. Non-discrimination in Government employees.** – (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

> Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:
>
> Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.
>
> (2) No promotion shall be denied to a person merely on the ground of his disability: Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

It also needs to refer the definition of 'disability' which includes locomotor disability. Locomotor disability has been defined under the provision of Section 2(o) of the Act, 1995 which means the disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy. Section 2(t) of the Act, 1995 defines the "person with disability" which means a person suffering from not less than forty per cent of any disability as certified by a medical authority.

6. Thus, it is evident that Section 47 is mandatory in nature which is to be followed by the establishment, if not taken out from the purview of Section 47 of the Act, 1995. It is mandatory for the reason that under Section 47 (1), the word 'shall' has been used by keeping the stipulation that no establishment shall dispense with or reduce in rank, an employee who acquires a disability during his service. The word 'shall' denotes the mandatory nature of the said provision, meaning thereby no person can be discriminated on the basis of disability. It also needs to refer the provision of Section 72 of the Act, 1995, which is being reproduced herein below for ready reference:-

> "**72. Act to be in addition to and not in derogation of any other law** – The provisions of this Act, or the rules made thereunder shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instruction issued thereunder, enacted or issued for the benefits of persons with disabilities."

The provision of Rule 38 of Central Civil Services (Pension) Rules, 1972 contains the Invalid Pension and invoking the said power, the petitioner has been boarded out vide order dated 10.01.2002 (impugned).

7. The Hon'ble Supreme Court while dealing with the scope of Section 47 and 72 of the Act, 1995 in the case of **Kunal Singh vrs. Union of India and another** reported in 2003 (4) SCC 524 has been pleased to hold the

mandatory nature of Section 47 and also deprecated the action of the authority in taking decision of granting invalid pension under the provision of Rule 38 of the CCS (Pension) Rules, 1972 by keeping the provision as contained in Section 72 of the Act, 1995 which speaks that any other Act will be in addition to and not in derogation and further the Hon'ble Supreme Court in the said judgment has been pleased to come with the conclusion that since the Act, 1995 is a beneficial legislation and as such it has to be complied with mandatorily.

8. In the light of this factual situation, now question fell for consideration before this Court is;

(a) whether the petitioner is entitled to get protection under the provision of Section 47 of the Act, 1995;

(b) whether the impugned order 10.01.2002 is illegal and arbitrary.

It is not in dispute that the petitioner has sustained injury and declared medically unfit by its Medical Report dated 1.1.2002. It is also not in dispute there is Amputation from right upper arm, meaning thereby the petitioner is coming under the category of permanent disability i.e. more than 40%, as such he is coming under the purview of provision of Section 2(t) which contains the definition of 'disability'.

It is also not in dispute that the CISF is a paramilitary Force and the said establishment has been taken out from the purview of Section 47 w.e.f. 10.09.2002 i.e. the date of Notification. It is settled that any notification will not be given its retrospective effect and as such keeping the said settled position into consideration, it is held herein that the Notification dated 10.09.2002 will be given effect to on or after 10.09.2002 since herein the petitioner has been declared to be unfit w.e.f. 1.1.2002 which is prior to issuance of Notification , as such the petitioner is entitled to be protected under the provision of Section 47 of the Act, 1995. In view thereof, first question has been answered.

So far as second question related to legality and propriety of the impugned order dated 10.01.2002 is concerned, since there is no dispute about the fact that the petitioner has been declared medically unfit from 1.1.2002 and that is the reason in exercise of power conferred under Rule 38 of the CCS (Pension) Rules, 1972, which speaks regarding "invalid pension" which may be granted if a Government servant retires from the service on account of any bodily or mental infirmity which permanently incapacitates

him for the service. As has been discussed above regarding implication of the provision of Section 47 of the Act, 1995 and as has been held by the Hon'ble Supreme Court in the case of **Kunal Singh vrs. Union of India & another**, reported in *2003 (4) SCC 524*, it reveals that the Act 1995 is to be in addition and not in derogation, hence the decision of the authority to medically boarded out the petitioner from service in the light of the Rule 38 of the CCS (Pension) Rules, 1972, if allowed to be continued, it will be directly in the teeth of the provision of Section 47 of the Act, 1995 which will not be said to be justified decision.

9. In view thereof, the order dated 10.01.2002 will be held to be not sustainable in the eye of law, in the result the impugned order dated 10.01.2002 is quashed.

In consequence, thereof, the matter is remitted before the competent authority to take decision afresh within a period of six weeks in the light of observations, the provision of Section 47 of the Act, 1995 and the judgment rendered by the Hon'ble Supreme Court in the case of **Kunal Singh (supra)**. Accordingly, the writ petition is allowed.

Writ petition allowed.

2018 (I) ILR - CUT- 844

S. N. PRASAD, J.

W.P.(C) No. 24085 of 2012

DILLIP KUMAR MALLICK ……..Petitioner

.Vrs.

UNION OF INDIA AND ORS. ……..Opp. Parties

CENTRAL RESERVE POLICE FORCE ACT, 1949 – Section 11(1) – Departmental Enquiry followed by order of Removal – Charge that the Petitioner suppressed the fact of pendency of a criminal case at the time of filling up of the attestation form and was appointed in 2003 – Criminal case was pending since 2001 – Effect of – Held, it can be said to be material suppression as because the petitioner was seeking an appointment in a disciplined Force under CRPF wherein the discipline is required to be maintained with high integrity and honesty – Order not to be interfered with.

Case Laws Relied on and Referred to :-

1. 2011 (I) OLR SC 1105 :Commissioner of Police and Others Vrs. Sandeep Kumar.

2. (2016) 8 SCC 471 : Avtar Singh Vrs. Union of India and Others.
3. (2011) 4 SCC 584 : State Bank of Bikaner and Jaipur v. Nemi Chand Nalwaiya.
4. (2015) 2 SCC 610 : Union of India and others v. P.Gunasekaran.
5. AIR 2017 SC 200 : Central Industrial Security Force and others v. Abrar Ali.

For Petitioner : M/s. Kali Pr. Mishra, S. Mohapatra, T. P. Tripathy and L. P. Dwivedy.
For Opp.Parties : M/s. Anup Kumar Bose, J. K. Khandayatray & Miss. Bijayalaxmi Tripathy.

Date of hearing : 10.04.2018 Date of judgment: 10.04.2018

JUDGMENT

S. N. PRASAD, J

This writ petition is for quashing the order of removal dtd.6.2.2009 (Annexure-5) whereby and where under the petitioner has been removed from service and the order dtd.22.8.2012 passed by the appellate authority (Annexure-9) affirming the removal order.

2. The brief fact of the case of the petitioner as per pleading made in this writ petition is that he was appointed under Central Reserve Police Force Group Centre, Bhubaneswar in the year 2003, while continuing, he has been directed to participate in the departmental enquiry for the allegation of neglect in duty /remissness in the discharge of his duty in his capacity as a member of the Force U/s.11(1) of CRPF Act, 1949 in that he was involved in Kendrapara P.S. Case No.349 dtd.26.9.2001 U/s.341/323/294/337/506/34 of the Indian Penal Code and charge sheeted vide charge sheet no.537/01 dtd.1.12.2001 U/s.341/323/294/337/506 and 34 of Indian Penal Code which was pending before the competent court of criminal jurisdiction, while filling up the verification roll, he has suppressed/concealed the fact of having his involvement in case which are pending against him, which is prejudicial to the good order and discipline of the Force.

The petitioner has participated in the departmental enquiry but the charge have been found to be proved by the enquiry officer and on submission of the enquiry report before the disciplinary authority, the petitioner was asked to give reply to the second show cause which he has submitted but the authorities have found it not satisfactory, hence passed the order of removal from service which has been assailed by him before the appellate authority but the appellate authority, vide order dtd.31st July, 2009, has refused to interfere with the decision taken by the disciplinary authority. The petitioner being aggrieved with the appellate order, has approached before this court by filing writ petition being W.P.(C) No.14945 of 2009.

This court, while disposing of the writ petition, has set aside the appellate order, directed the authority to re consider the appeal of the petitioner within two months from the date of communication of the order in the light of the judgment rendered by Hon'ble Apex Court in the case of **Commissioner of Police and Others Vrs. Sandeep Kumar**, reported in 2011 (I) OLR SC 1105. In terms of the order passed by this court, the appellate authority has passed a fresh order on 22.8.2012 but declined to interfere with the decision of the disciplinary authority, the said orders are under challenge in this writ petition.

3. The grounds taken by the petitioner in challenging the orders is that he never filled up the verification roll as 'Yes' as 'No', rather it has remain blank, as such it cannot be said to be suppression of facts. The ground has been taken that the petitioner has surrendered before the competent court and taking this fact into consideration, it cannot be said that the petitioner is a man of bad antecedent. The further ground has been taken by the petitioner before the enquiry officer that he took help of another constable namely Harekrishna for filling of the verification roll since it was not applicable for the petitioner, as such he thought it proper to left it blank, hence the petitioner never misled the authorities or deliberately suppressed any material fact. Apart from that the procedural ground has also been taken to the effect that no defence assistance has been provided to the petitioner and petitioner has not been given any opportunity to cross-examine the P.Ws., he has requested for the English version of the statements but that has not been supplied to him, as such the entire departmental enquiry including the order of removal from service are vitiated in the eye of law.

At last learned counsel for the petitioner has relied upon the judgment rendered by Hon'ble Apex Court in the case of **Avtar Singh Vrs. Union of India and Others reported in** (2016) 8 SCC 471 and has submitted that in view of the principle laid down in the case of **Avtar Singh** by the Hon'ble Apex Court, the case of the petitioner is fit to be considered.

4. Mr. A. K. Bose, Assistant Solicitor General of India assisted by his associate Miss. Bijaya Laxmi Tripathy has vehemently opposed the submission and argument advanced on behalf of the petitioner by submitting that the petitioner has been appointed as a member of the disciplined Force. At the time of filling of the verification roll for verification of his character and antecedent, the petitioner left the column no.12 regarding details of arrest / detention or bound down / fined, convicted by any court of law for any offence as blank and during course of verification the fact of his involvement

in Kendrapara P.S. Case No.349 dtd. 26.9.2001 U/s.341/323/294/337/506/34of IPC and submission of charge sheet no.537/01 dtd.1.12.2001 U/s.341/323/294/337/506 and 34 of Indian Penal Code has been transpired as per District Magistrate/Collector, Kendrapara letter no.1241/RES.VCA dtd.13.11.2017 and no.792/DIB dtd.3.11.2008. Accordingly, in the light of the instruction contained in the Government of India, Ministry of Personnel and Training OM No.11012/7/91-Establishment (A) dtd.19.5.2003, a Departmental enquiry was ordered against the petitioner for the charge of misconduct and suppression of material facts in which he, after getting full opportunity to defend himself, has been punished with the punishment of removal from service by taking lenient view which has been affirmed by the appellate authority, as such there is no infirmity in the decision taken by the authorities in removing the petitioner from service for the reason that the verification roll is only required to be seen regarding antecedent of the candidate but he intentionally has not filled up this application form which is the active suppression of material facts and it will be said to be material suppression because the petitioner was knowing about this fact that he is involved in a criminal case in which charge sheet was submitted and he has gone under judicial custody, hence it was incumbent upon him to furnish the detail of it to apprise the authority that the case is pending against him without caring for its consequence and since he has not furnished it, it will be said to be active concealment and that will be said to be misrepresentation on his part, as such it is a misconduct, hence he has found not fit to be retained in service as a member of the disciplined Force. They further submit that the judgment rendered in the case of **Avtar Singh** is not applicable on the basis of the factual aspect involved in this case since in the case of Avtar Singh the ratio has been laid down that suppression of material information presupposes that what is suppressed that matters not every technical of trivial matter. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant which comes to the knowledge of the employer the same can be considered in an objective manner while addressing the portion of business but that is not the case here, rather there was specific stipulation in the verification roll that the details is to be furnished regarding involvement in criminal case if yes or no, as such the judgment rendered by Hon'ble Apex Court in Avtar Singh's case is not applicable.

They further submit that the jurisdiction of this court sitting under Article 226 of the constitution of India is very limited and the High Court sitting under Article 226 of the constitution of India may not act as an appellate court for re-appreciating the evidence.

5. Heard the learned counsel for the parties and appreciated their rival submission by going into the factual aspect as well as the pleadings and the annexure appended to the affidavits.

The undisputed fact in this case is that the petitioner has made an application for appointment as a constable in the CRPF in which he has been declared successful. Before his selection he was required to fill the verification roll by furnishing details regarding arrest, prosecution, kept under detention or bound down/fined, convicted by a court of law for any offence under column no.12.

Under column.13 it has to be furnished whether any case is pending against him in any court of law at the time of filling up of the attestation form.

Admittedly the petitioner was appointed in the year 2003 and on that date the criminal case against the petitioner was pending by virtue of institution of FIR in Kendrapara P.S. on 26.9.2001 being Kendrapara P.S. Case No.349 for the offence U/s.341/323/294/337/506 and 34 of Indian Penal Code in which charge sheet has also been submitted on 1.12.2001.

The petitioner has not disclosed this aspect of the matter at any time on his own rather it was detected on verification in terms of the report submitted by the District Magistrate / Collector, Kendrapara vide its letter dtd.13.11.2007 and 3.11.2008 and in view thereof the decision was taken by the authorities to proceed against the petitioner by initiating a departmental enquiry by framing charges and accordingly following charges have been framed:-

> *That the said No.035040416 CT/GD Dilip Kumar Malik of C/91 Bn, CRPF, while functioning as CT/GD in C/91 Bn, CRPF during the period from 19.5.2003 (Date of enlistment) to till date committed an Act of neglect of duty/remissness in the discharge of his duty in his capacity as a member of the Force under section 11(1) of CRPF Act, 1949 in that he was involved in Kendrapara P.S. Case No.349 dtd.26.9.2001 under section 341/323/294/337/506/34 IPC and Charge Sheet No.537/01 dtd.1.12.2001 U/s.341/323/294/337/506/34 IPC has been submitted against him. The case is now sub-judice, while filling up the verification roll, he had suppressed/concealed the fact of having his involvement in the case which are pending against him, which is prejudicial to the good order and discipline of the Force."*

The petitioner has been provided with an opportunity of hearing before the enquiry officer in which he has taken plea that there is no material suppression of fact since the column under which he was required to furnish the detail was left blank, as such it cannot be said that the facts regarding

involvement in the criminal case has been suppressed.

The enquiry officer after going through the evidence, the respective column of the verification roll and the report of the District Magistrate/Collector, Kendrapara, has proved the charges against the petitioner and in consequence thereof the Disciplinary Authority, while accepting the enquiry report, has removed the petitioner from service after following due procedure.

The petitioner has approached before the appellate authority but the appellate authority while passing the order dtd.31.7.2009 has rejected the appeal.

The petitioner being aggrieved with the same has approached to this court by invoking its extra ordinary jurisdiction conferred under Article 226 and 227 of the constitution of India and taken the ground of interference by putting reliance upon the judgment rendered in the case of **Commissioner of Police and Others Vrs. Sandeep Kumar** (supra) and this court, while quashing the appellate order, has directed the appellate authority to reconsider the appeal of the petitioner within a period of two months.

The appellate authority has passed a fresh order on 22.8.2012 by elaborately discussing the factual aspect as also the judgment pronounced in the case of Commissioner of Police (supra) but rejected the appeal on the ground that the misconduct committed by the petitioner is serious in nature and the judgment of the Hon'ble Apex Court rendered in the case of Commissioner of Police Vrs. Sandeep Kumar (supra) is not applicable to the facts and circumstances of the present case since as per the authority of Hon'ble Apex Court Sandeep Kumar was enrolled as Head Constable (Ministerial) which is a clerical post in local police whereas the petitioner was enrolled as a Constable in CRPF and has to perform duties related to securities of the VIPs, law and order all over the country and to deploy for safety and security of public.

The petitioner being aggrieved with the order of removal as also the subsequent order passed by the appellate authority dtd.22.8.2012 is before this court by way of the instant writ petition.

The petitioner has taken ground that the column no.12 has not been filled up rather it has remained vacant, as such it cannot be said to be material suppression of fact. In addition to that he has also put reliance upon the judgment rendered by Hon'ble Apex Court in the case of Avtar Singh.

6. So far as the first ground is concerned, it is evident from the material available on record that an employee was asked to fill up the verification roll which explicitly contains that furnishing of false information or suppression of any factual information in the verification roll would amount to disqualification and is likely to render the candidate unfit for employment under the Government.

The column no.12 contains regarding furnishing the information regarding prosecution / kept under detention or bound down / fine, convicted by a court of law for any offence while column no.13 stipulates regarding details to be furnished as to whether any case is pending against him in any court of law at the time of filling of the attestation form.

Thus, it is evident that filling up of the verification roll was the mandatory requirement and if the verification roll is not being filled up, it amounts to suppression of fact because of the reason that the verification roll contains a specific declaration to be furnished by the candidates, as such it has to be answered in negative or positive and if not answered, even if there is pendency of criminal case, it will be said to be material suppression of fact.

Now, it is to be seen as to whether not furnishing the details about pendency of the criminal case can be said to be material suppression or not, according to the considered view of this court, it will be said to be material suppression as because the petitioner was seeking an appointment in a disciplined Force under CRPF wherein the discipline is required to be maintained with high integrity and honesty and the work is expected from the members of the disciplined Force with utmost sincerity. The information required under these columns in the verification roll is to assess the conduct and antecedent and if it is found that the candidate is involved in criminal case and even though it has not been furnished, the conduct of an employee will be multiplied in multiplying his misconduct. If the correct information would have been furnished by the candidate regarding his involvement in the criminal case, then it is up to the authority to take decision with respect to the nature of involvement in the criminal case but by not filling that column, the petitioner has not provided that opportunity to the employer, as such the petitioner cannot be said to be a man of full integrity, hence according to the considered view of this court, the authorities have rightly proceeded departmentally against him.

The contention of the petitioner that since it has not been filled up, hence it cannot be said to be suppression, but this argument is not fit to be sustainable accordingly rejected since there is stipulation in the verification

roll that furnishing of false information or suppression of any factual information would be a disqualification and not furnishing the details under the said column will be said to be suppression of factual information which relates to the antecedent of the petitioner.

7. So far as the second ground regarding putting reliance upon the judgment of Avtar Singh, this court has gone across the factual aspect involved in the said case along with the ratio laid down wherein there Lordships of Hon'ble Apex Court have been pleased to hold at paragraph 30 and 36 that the employer has to act prudently on due consideration of nature of post and duties to be rendered, for higher officials / higher posts, standard has to be very high and even slightest false information or suppression may by itself render a person unsuitable for the post. However, same standard cannot be applied to each and every post. For lower post which are not sensitive in nature of duties, impact of suppression unsuitability has to be considered by the authority concerned considering the post/nature of duties/services and power has to be exercised on both consideration of various aspects.

At paragraph 38.6 it has been laid down that in case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion, may appoint the candidate subject to decision of such case. At paragraph 38.8 it has been held that if criminal case was pending but not known to the candidate at the time of filling the form, it may not be treated as suppression of facts.

It has further been held that only such information which has required to be specifically mentioned has to be disclosed.

8. This court has appreciated the fact of the instant case in the light of the proposition as settled by the Hon'ble Apex Court in the case of Avtar Singh, and found that the nature of duty which the petitioner was to perform is of a member of the CRPF which is sensitive in nature of duties. The verification roll specifically provides a column for furnishing the details with the consequence that in case if it will not be disclosed, they will not be retained in service, as such the information was required to be furnished by the petitioner but the petitioner, with the full knowledge of the pendency of the criminal case since he has been taken into judicial custody and charge sheet was submitted on 1.12.2001, however convicted on 1.5.2008, has not disclosed the same in the verification roll.

Learned counsel for the petitioner has taken the ground that there was compromise and due to that reason the column was left blank but even accepting this argument that there was a compromise, then also it was incumbent upon the petitioner to disclose it as per the requirement given under column no.12 but here the fact is otherwise different since on the basis of the details furnished by the Superintendent of Police, Kendrapara it was found by the authorities that on the date of filling up of the attestation form the criminal case was pending against the petitioner.

It is further evident from the material available on record that the petitioner on its own has never disclosed at any point of time even after entry into service, rather it was on enquiry found by the authorities that he was involved in a criminal case and then the report was asked for from the concerned Superintendent of Police of the concerned District, hence the petitioner cannot be said to be man of high integrity.

9. Before parting with the order it would be appropriate to discuss the scope of judicial review so far as the findings in a departmental proceeding is concerned is very limited under Article 226 of the Constitution of India as has been held by the Hon'ble Apex Court in catena of decisions, the recent is the judgment rendered in the case of **State Bank of Bikaner and Jaipur v. Nemi Chand Nalwaiya,** (2011) 4 SCC 584, wherein in paragraph 7 it has been held as follows :-

> *"7. It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic inquiry, nor interfere on the ground that another view is possible on the material on record. If the inquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. The courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, 10 Page 11 capricious, mala fide or based on extraneous considerations."*

In the judgment reported in **Union of India and others v. P.Gunasekaran**, (2015) 2 SCC 610, the Hon'ble Apex Court in paragraph 12 has held as follows :

"12. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, re-appreciating even the evidence before the inquiry officer. The finding on Charge I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Articles 226/227 of the Constitution of India, shall not venture into re-appreciation of the evidence. The High Court can only see whether: (a) the inquiry is held by a competent authority; (b) the inquiry is held according to the procedure prescribed in that behalf; (c) there is violation of the principles of natural justice in conducting the proceedings; (d) the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;

(e) the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

(f) the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person 13.could ever have arrived at such conclusion;

(g) the disciplinary authority had erroneously failed to admit the admissible and material evidence;

(h) the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

13.(i) the finding of fact is based on no evidence.
13. Under Articles 226/227 of the Constitution of India, the High Court shall not:

(i) re-appreciate the evidence;

(ii) interfere with the conclusions in the inquiry, in case the same has been conducted in accordance with law;

(iii) go into the adequacy of the evidence;

(iv) go into the reliability of the evidence;

(v) interfere, if there be some legal evidence on which findings can be based

(vi) correct the error of fact however grave it may appear to be;

(vii) go into the proportionality of punishment unless it shocks its conscience."

Recently, in the judgment rendered in the case of **Central Industrial Security Force and others v. Abrar Ali**, AIR 2017 SC 200, the Hon'ble Apex Court in paragraph 12 held as follows :

"12.Though we are of the view that the High Court ought not to have interfered with the order passed by the Disciplinary Authority, the penalty of dismissal from service is not commensurate with delinquency. The Respondent was found guilty of desertion of the Force for a period of five days and not improving his conduct in spite of imposition of penalties on three occasions earlier. For the above delinquencies, the penalty of dismissal from service is excessive and harsh. In our

view, the penalty of compulsory retirement would meet the ends of justice. We are informed by the counsel for the Appellants that the Respondent is entitled for pension as he has completed 10 years of service. In order to avoid any controversy, we direct that the Respondent shall be entitled for notional continuity of service till the date of completion of minimum service required to make him eligible for pension. He will not be entitled for payment of salary and allowances for that period."

According to the considered view of this court, the petitioner has failed to make out a case to exercise the power of judicial review sitting under 15 Article 226 of the Constitution of India as per the proposition laid down by the Hon'ble Apex Court in the cases referred herein above. In view thereof this court declines to interfere with the order impugned. Accordingly the writ petition fails and it is dismissed.

Writ petition dismissed.

2018 (I) ILR - CUT- 854

DR. D.P. CHOUDHURY,J.

W.P.(CRL.) NO. 881 OF 2009

TANKADHAR MISHRA .....Petitioner

.Vrs.

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

LEGAL OPINION – Petitioner, a lawyer gave his opinion to the Bank upon verifying the documents – Any departure in the opinion – Held, the petitioner cannot be faulted with and thus the initiation of criminal proceeding is liable to be quashed.

"If the opinion of the lawyer is scrutinized, I am afraid, no legal person can vouch to give his opinion on the matter referred to. A lawyer cannot be made responsible for the opinion given by him far less from criminal prosecution if the same is found to be honest and fair. The noble job of the lawyer is always in high esteem. If any lawyer violates the ethics, certainly he is liable not only for professional misconduct, but also for professional negligence. But criminal case cannot be thought of unless he is found to have criminal intention to commit any crime. Before parting with the case, it must be remembered that the dignity of the noble profession of a lawyer should be maintained at high pedestal by all in the society. If the opinion of the lawyer is misconstrued, no lawyer will come forward to give any legal advice to his client. But a lawyer is supposed to maintain high standard while giving legal opinion to any Bank or any other institution as his

opinion carries a lot of meaning for the society. Be that as it may, in the instant case since there is no fraud committed by the petitioner, who has fairly given his opinion and it is informed that the loan amount has already been recovered and account being closed, any criminal proceeding will be sheer abuse of process of Court and violation of fundamental right of petitioner. Hence, the criminal proceeding against the petitioner is quashed." *(Paras 8,9 &10)*

Case Laws Relied on and Referred to :-

1. Central Bureau of Investigation, Hyderabad v. K. Narayan Rao, (2012) 9 SCC 512

For Petitioner : M/s. Milan Kanungo, P.K. Rath, P.K. Satapathy and A.K. Mishra

For Opp. Parties : Mr. J. Katkia, Addl. Govt. Adv.
Mr. S.K. Padhi, Senior Advoca
M/s. G. Kar, A.K. Mohanty & J. Behera.

Date of Hearing : 26.03.2018 Date of Judgment : 04.04.2018

JUDGMENT

DR. D.P. CHOUDHURY, J.

The petitioner assails the initiation of the criminal proceeding initiated against him who is a legal practitioner vide C.I.D. P.S. Case Nos. 34 and 36 of 2008 pursuant to the report of the Senior Branch Manager, Bank of Baroda, Manisahu Chhak dated 14.8.2008.

2. The conspectus of the case of the prosecution is that the Bank of Baroda has engaged the petitioner as an Advocate. According to the F.I.R., one Smruti Ranjan Samantray being the proprietor of the firm M/s. The Heritage has availed cash credit facility of Rs.9,50,000/- from the branch of Bank of Baroda on 25.4.2006 against creation of equitable mortgage of landed property standing in the name of guarantor Saumya Ranjan Samantray. After necessary documents were submitted, the Bank in question engaged one S.K. Parida, Advocate to make investigation. Mr. Parida submitted the report on 7.2.2008 stating that the mortgager is not having any right, title and interest over the mortgaged property created in favour of the Bank of Baroda as the same stands in the name of Didbyasingha Das, but not in favour of guarantor Saumya Ranjan Samantray. Since the Bank got smell of fraud, they lodged F.I.R. before the Superintendent of Police of C.I.D., Crime Branch. While the investigation was running implicating the petitioner, he challenged the initiation of the criminal proceeding on the ground that the petitioner being a lawyer and having only rendered opinion, does not have any sort of criminal intention than only to supply professional opinion. Hence, the case is filed to quash the criminal proceeding and to pay

damage of Rs.50,00,000/- after initiating Contempt proceeding against the Police Officers.

SUBMISSIONS:

3. Mr. Milan Kanungo, learned Senior Advocate for the petitioner submitted that the petitioner being the Advocate for the Bank of Baroda was only entrusted to give opinion basing on the record and accordingly he gave opinion to the best of his ability. The Banking official has also rendered the opinion after visiting the field. The petitioner being Advocate has given his opinion as to whether the land can be free from encumbrances to mortgage and avail loan. Mr. Kanungo further submitted that petitioner cannot be said to have committed any offence when he has given his legal opinion basing on records, but without any request from Bank to visit field. He further submitted that the action taken by Bank and the Officers of the Crime Branch without verifying the records has cast allegation against the present petitioner falsely and as such his fundamental right accrued under Article 14 read with Article 19 of the Constitution are clearly violated. Thus, he prayed to quash the entire criminal proceeding.

4. Mr. Kanungo, learned Senior Advocate for the petitioner has contended that the petitioner had not visited the field as he was not required to visit the field and only on verifying the documents of the land in question he gave the opinion, rather Bank Officer visited the spot. In such case the petitioner should not be made an accused. He relied on the decision in the case of **Central Bureau of Investigation, Hyderabad v. K. Narayan Rao, (2012) 9 SCC 512**.

5. Mr. Katkia, learned Addl. Government Advocate submitted that even if the petitioner is an advocate, but he has committed professional misconduct by giving false report as to the property in question being free from encumbrances and put the Bank into loss. During further hearing of the case, learned Addl. Government Advocate submitted that investigation of Crime Branch was directed against field visit, but not for verification of the documents. The I.O. who was present in Court also submitted that the land available on record has been physically merged with the river.

6. Mr. G. Kar, learned counsel for the Bank (opp. Party no.8) clearly submitted that the Bank has not lodged F.I.R. against the petitioner, but had lodged F.I.R. alleging the facts. At the same time during hearing he fairly admitted that the petitioner was engaged by the Bank to give opinion legally

about the right, title and interest over the land sought for, for mortgaging same with the Bank.

DISCUSSION:

7. It is the admitted fact that the petitioner is a legal practitioner and his service was hired by the Bank of Baroda. It is also not in dispute that the petitioner has given opinion as Advocate after going through the records in a format vide Annexure-A.

8. In terms of the submissions during course of hearing it is made by the parties it is amply disclosed that the petitioner has only given opinion as Advocate for the Bank basing on document and he has not visited the spot. When the petitioner gave his opinion as lawyer for the Bank by verifying document for any departure in the field the opinion of the petitioner cannot be faulted with. If the opinion of the lawyer is scrutinized like in this case, I am afraid, no legal person can vouch to give his opinion on the matter referred to. It is reported in the case of **Central Bureau of Investigation, Hyderabad v. K. Narayan Rao (supra),** where Their Lordships observed at paragraphs 27, 30 and 31 as follows:-

> "27. …….. A lawyer does not tell his client that he shall win the case in all circumstances. Likewise a physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence. This is what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the two findings, viz., either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess.
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> 30. Therefore, the liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the Bank. In the given case, there is no evidence to prove that A-6 was abetting or aiding the original conspirators.
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> 31. However, it is beyond doubt that a lawyer owes an "unremitting loyalty" to the interests of the client and it is the lawyer's responsibility to act in a manner that would best advance the interest of the client. Merely

> because his opinion may not be acceptable, he cannot be mulcted with the criminal prosecution, particularly, in the absence of tangible evidence that he associated with other conspirators. At the most, he may be liable for gross negligence or professional misconduct if it is established by acceptable evidence and cannot be charged for the offence
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> under Sections 420 and 109 of IPC along with other conspirators without proper and acceptable link between them. It is further made clear that if there is a link or evidence to connect him with the other conspirators for causing loss to the institution, undoubtedly, the prosecuting authorities are entitled to proceed under criminal prosecution. Such tangible materials are lacking in the case of the respondent herein."

9. With due regard to the aforesaid decision it appears that a lawyer cannot be made responsible for the opinion given by him far less from criminal prosecution if the same is found to be honest and fair. The noble job of the lawyer is always in high esteem. If any lawyer violates the ethics, certainly he is liable not only for professional misconduct, but also for professional negligence. But criminal case cannot be thought of unless he is found to have criminal intention to commit any crime.

10. Now adverting to the present case, the petitioner has only rendered the job for preparing verification report of the land in question. Without visiting the field, he cannot be made liable for having any offence committed. Before parting with the case, it must be remembered that the dignity of the noble profession of a lawyer should be maintained at high pedestal by all in the society. If the opinion of the lawyer is misconstrued, no lawyer will come forward to give any legal advice to his client. But a lawyer is supposed to maintain high standard while giving legal opinion to any Bank or any other institution as his opinion carries a lot of meaning for the society.

11. Be that as it may, in the instant case since there is no fraud committed by the petitioner, who has fairly given his opinion and it is informed by Mr. Kar, learned counsel for the Bank that the loan amount has already been recovered and account being closed, any criminal proceeding will be sheer abuse of process of Court and violation of fundamental right of petitioner. Hence, the criminal proceeding against the petitioner is quashed. The writ application is disposed of accordingly.

Writ application disposed of.