O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2015

(*FEBRUARY*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY
MONTHLY REVIEW OF CASES ON
CIVIL, CRIMINAL & OTHER LAWS, 2015 (FEBRUARY)

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2. Section 114 read with Order XLVII Rule 1
Federation of Indian Mineral Industries Vs. State of Odisha & others.
HIGH COURT OF ORISSA: CUTTACK, Review Petition No.72 of 2014
Amitava Roy, C.J. & Dr. Akshaya Kumar Rath, J.
Date of Judgment: 23.02.2015
Issue

Review of the Judgment.

Relevant Extract

Briefly stated the facts of the case are that the Principal Secretary to Government of Odisha, Steel and Mines Department issued a memo No.8620/SM dated 5th December, 2012 directing that at least 50% of the iron ore lumps and 50% of the fines won from the mines in any month, but not put to captive use by the lessees, shall be sold to the stand alone mineral based industries located in the State, limited to the requirement of such user industries, in an equitable manner, on payment of the prevailing fair market price by the user industries to the mining lessees. The reason for the above direction as mentioned in the impugned order is that the State based iron ore industries are facing acute shortage of iron ore, seriously affecting the production. Few of them are facing closure and others are experiencing low utilization of their existing capacity. There is likelihood of adverse socio-economic consequences of unemployment, loss of wages and impact on investment climate and industrialization process in the State. Therefore, it became necessary, in the greater public interest, to take measures to make adequate raw material available to the State based industries so as to maintain the pace of industrial growth and avoid adverse socio economic consequences.

The jurisdiction and scope of review is no more res integra. After survey of the earlier decisions, the Supreme Court in the case of Kamlesh Verma v. Mayawati and others AIR 2013 SC 3301 held as follows:

"15. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.

Summary of the Principles:

16. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

(A) When the review will be maintainable:-

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in Chhajju Ram v. Neki, AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius & Ors, (1955) 1 SCR 520 : (AIR 1954 SC 526), to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd. & Ors., JT2013 (8) SC 275 : (2013 AIR SCW 2905).

(B) When the review will not be maintainable:-

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

"..... A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition through different counsel of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the court which decided nor awareness of the precious public time lost what with a huge back-log of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in the conservation of judicial time for maximum use. We regret to

say that this case is typical of the unfortunate but frequent phenomenon of repeat performance with the review label as passport. Nothing which we did not hear then has been heard now, except a couple of rulings on points earlier put forward. May be, as counsel now urges and then pressed, our order refusing special leave was capable of a different course. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality."

Judged on the touchstone of the judicially recognized grounds of review, we are of the unhesitant opinion that present is not a case warranting reconsideration of the judgment and order dated 2.4.2014 under scrutiny. Not only the contentions raised on behalf of the review applicant in the writ proceedings had been attended to and dealt with, resultant conclusions were recorded as well. It is a trite law that mere plausibility of different deductions in the same factual and legal setting would not proprio vigore warrant a review the decision rendered. Such an eventuality per se does not tantamount to an error on the face of the record or attest an acknowledged vitiating infirmity to justify review of a judicial verdict. The review jurisdiction is not akin to one of appeal. Having regard to the legally prescribed constrictions of the scope of review, in our comprehension, the present petition lacks in merit and is accordingly dismissed.

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3. Order 7 Rule 11

P.V. Guru Raj Reddy Rep. By Gpa Laxmi Narayan Reddy & Anr. Vs. P. Neeradha Reddy & Ors. Etc. ***2015 STPL (Web) 108 SC (SC) (DB)***

Ranjan Gogoi & Prafulla C. Pant, JJ.

Date of Judgment: 13-2-2015.

Issue

Rejection of plaint.

Relevant Extract

It is the averments in the plaint that has to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law –

At the stage of exercise of power under Order VII rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial – It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected – In all other situations, the claims will have to be adjudicated in the course of the trial.

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4. Order 6 Rule 17

Mount Mary Enterprises Vs. Jivratna Medi Treat Pvt. Ltd.

2015 STPL (Web) 73 SC (SC) (DB)

Anil R. Dave & Kurian Joseph, JJ.

Date of Judgment: 30-1-2015

Issue

Amendment of Plaint

Relevant Extract

Change of Valuation of Suit Property – Suit for Specific Performance – Held that as per the provisions of Order 6 Rule 17 of the Civil Procedure Code, the amendment application should be normally granted unless by virtue of the amendment nature of the suit is changed or some prejudice is caused to the defendant – The defendant had made an averment in para 30 of the written statement filed in Suit that the plaintiff had undervalued the subject matter of the suit – If in pursuance of the averment made in the written statement the plaintiff wanted to amend the plaint so as to incorporate correct market value of the suit property, the defendant could not have objected to the amendment application – Reason assigned by the trial court for rejection of the amendment application that

upon enhancement of the valuation of the suit property, the suit was to be transferred to the High Court on its original side is not a reason for which the amendment application should have been rejected – Impugned judgment delivered by the High Court and the order of the trial court, whereby the amendment application had been rejected liable to be set aside – Trial court directed to permit the appellant-plaintiff to amend the plaint as prayed for in the amendment application so as to change valuation of the suit property.

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5. Order 12 Rule 6

Raveesh Chand Jain vs. Raj Rani Jain. **2015 STPL (Web) 105 SC (SC)(DB)**

M. Yusuf Eqbal & Shiva Kirti Singh, JJ.

Date of Judgment: 12-2-2015

Issue

Judgment on admission.

Relevant Extract

Question of ownership already decided in the earlier suit filed by the defendant/ appellant – The said issue need not have to be decided afresh and hence on the basis of the finding of ownership decided in favour of the plaintiff/respondent, the suit has to be decreed so far as the recovery of possession is concerned – Entitlement of the plaintiff/respondent to claim a decree for recovery of a sum of Rs. 5,55,000/- and future damages @ Rs.15,000/- per month, admittedly this question has not been decided either in the earlier suit or in this suit – In that view of the matter, decreeing the entire suit on the basis of ownership of the plaintiff/respondent already decided in the earlier suit, the decree for recovery of damages ought not to have been passed by the High Court – Taking into consideration the relationship of the appellant and the respondent being mother and son, the Court did not think it proper to again remand the matter to the trial court for deciding the issue as to the quantum of damages the respondent is

entitled to get from the appellant for his unauthorized possession of the suit property -Held that the amount of Rs.5,00,000/- would be just and proper so far as the claim for damages is concerned – Order passed by the High Court not interfered with.

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6. Order 39 Rules 1, 2 & 3A
Order 43

Shri Westarly Dkhar & Ors. Vs. Shri Sehekaya Lyngdoh. **2015 STPL (Web) 57 SC (SC)(DB)**

J. Chelameswar & Rohinton Fali Nariman , JJ*.*

Date of Judgment: 28-1-2015

Issue

Maintainability of Appeal – Ad Interim Injunction

Relevant Extract

United Khasi-Jaintia Hills Autonomous District (Administration of Justice) Rules, 1953, Rule 28, 29 and 47 – Constitution of India, Six Schedule Para 4 – Ad Interim Injunction – Appeal Maintainability – Order of ad interim injunction set aside by the Appellate Court – In revision petition High Court setting aside the appellant by stating that since an appeal had been filed within 30 days of the ad-interim ex-parte order, it would not be maintainable under the Code of Civil Procedure – Held that High Court failed to refer to Rule 28 of the 1953 Rules and has applied the letter of Order 39 Rule 3A read with Order 43 of the Code of Civil Procedure – On the facts of this case, the appeal becomes maintainable because Rule 28 of the 1953 Rules provides for such appeal without any requirement that ordinarily it should be filed only after 30 days -Judgment of the High Court liable to be set aside and the judgment of the District Council Court i.e. appellate Court restored.

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7. Section 190 and 204

Sonu Gupta Vs. Deepak Gupta & Ors. **2015 STPL(Web) 103 SC (SC)(FB)**

Anil R. Dave, J, Kurian Joseph & Shiva Kirti Singh,JJ.

Date of Judgment -11-2-2015.

Issue

Summoning order

Relevant Extract

Penal Code, 1860, Sections 464, 468 and 471 – Cognizance of offence – Summoning order – The specific case of the appellant that FIR was registered on an undated photocopy of a petition attributed to the appellant but not bearing her original signature – It could not have been rejected by the learned Magistrate at the present stage especially in view of the report of investigation by the CID which was also called for and there being no dispute that the FIR No.73/2002 was registered only on the basis of a photocopy on which the signature is not in original – High Court grossly erred in exercise of its jurisdiction by directing the appellant/complainant to lead further evidence and produce the original documents to show forgery – If the FIR is admittedly on the basis of only a photocopy of a document allegedly brought into existence by the accused persons, the High Court erred in directing the appellant to produce the original and get the signatures compared – High Court fell into error of evaluating the merits of the defence case and other submissions advanced on behalf of the accused which were not appropriate for consideration at the stage of taking cognizance and issuing summons.

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8. Section 397 and 401

Vivek Rai & Anr. Vs. High Court of Jharkhand Through Registrar General & Ors.
2015 STPL(Web) 87 SC (SC)(DB)

T.S. Thakur & A.K. Goel, JJ.

Date of Judgment -4-2-2015

Issue

Constitution of Criminal Revision against conviction.

Relevant Extract

High Court of Jharkhand Rules, 2001, Rule 159 – Criminal Procedure Code, 1973, Section 397 and 401 – Vires of Rule 159 of Rules 2001 – Challenge as to – Rule 159 of the Rules provided consideration of revision against conviction only if the petitioner surrender to custody – Held that generally a revision against conviction and sentence is filed after an appeal is dismissed and the convicted person is taken into custody in Court itself – The object of the Rule is to ensure that a person who has been convicted by two courts obeys the law and does not abscond – The provision cannot thus be held to be arbitrary in any manner – The provision is to regulate the procedure of the Court and does not, in any manner, conflict with the substantive provisions of the Cr.P.C. – Do not find any ground to hold that the impugned Rule suffers from any infirmity.

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9. Sections 407, 408

Kanaklata Vs. State Of (NCT) of Delhi & Ors. **2015 STPL(Web) 89 SC (SC)(FB)**

T.S Thakur, J, A.K. Goel & R. Banumathi, JJ.

Date of Judgment -4-2-2015

Issue

Transfer of Case – Atrocities.

Relevant Extract

Penal Code, 1860, Sections 323/354 – Scheduled Caste and Scheduled Tribe (Prevention of Atrocities Act), 1989, Sections 3(i) (X) (XI) (XV) – Transfer of Case – Discharge by Special Court of the accused for offences under Act, 1989 – In revision order set aside by the High Court and matter remitted to the Trial Court –

Despite the safeguards provided by the High Court's observations that the trial Court shall not be influenced by earlier findings, the apprehension of the complainant continues to subsist -Such apprehension is neither wholly misconceived nor can it be dubbed as forum shopping in disguise – The earlier order passed by the trial Court is so strongly worded that it could in all likelihood give rise to a reasonable apprehension in the mind of the complainant which cannot be lightly brushed aside – Justice must not only be done but must seem to have been done – A lurking suspicion in the mind of the complainant will leave him with a brooding sense of having suffered injustice not because he had no case, but because the Presiding Officer had a preconceived notion about it – On that test the present to be a case where the High Court ought to have directed a transfer – The case directed to be transferred to another Court.

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10. Section 439

Dr. Vinod Bhandari Vs. State Of M.P. **2015 STPL (Web) 86 SC (SC)(DB)**

T.S. Thakur & Adarsh Kumar Goel , JJ.

Date of Judgment -4-2-2015

Issue

Bail – Grant or Declining of Bail

Relevant Extract

The object of keeping a person in custody is to ensure his availability to face the trial and to receive the sentence that may be passed – The detention is not supposed to be punitive or preventive – Seriousness of the allegation or the availability of material in support thereof are not the only considerations for declining bail – Delay in commencement and conclusion of trial is a factor to be taken into account and the accused cannot be kept in custody for indefinite period if trial is not likely to be concluded within reasonable time – While a detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no prejudging and no prejudice, a brief examination to be satisfied about the existence or otherwise of a prima facie case is necessary.

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11. Section 300

Balu S/O Onkar Pund & Others Vs. State Of Maharashtra. **2015 STPL (Web) 78 SC (SC)(DB)**

Dipak Misra & Abhay Manohar Sapre , JJ.

Date of Judgment -2-2-2015

***Is*sue**

Murder – Offence Modified

Relevant Extract

Neither there was any motive and nor any intention on the part of any of the appellants to eliminate 'S' – There was no enmity of any kind with 'S' in person with any of the appellants -The appellants had gone there to take possession of the cattle shed and not with an intention to kill any member of the family of 'M' – If at all, if there was some kind of animosity or jealousy then it was towards A-1 whose panel had won the election – 'S' had nothing to do with election because she never contested the election – Despite the appellants armed with weapons, none of them inflicted any injury or gave blow to 'S' but single blow was inflicted only on 'M', who fortunately survived – 'S' died due to sustaining of burn injuries, which she suffered because the appellants ablazed the cattle shed by pouring kerosene on it – Had the appellants had not ablazed the cattle shed then the incident of death of 'S' would not have occurred – Eighthly, it was a fight on a spur of moment between the two male groups on the issue of taking possession of cattle shed with no intention to kill any one and in the absence of any overt act attributed to any of the appellants towards 'S' for inflicting any injury to her, the appellants could not have been convicted for an offence of committing murder of 'S' so as to attract the rigour of Section 302 IPC – Instead they should have been convicted for an offence of culpable homicide not amounting to murder under Section 304 Part I IPC – The appellants accordingly convicted for an offence punishable under Section 304 Part-I IPC instead of Section 302 IPC and each of the appellants is hereby awarded 7 years RI.

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12. Sec. 302 of IPC.

Sec.106 of Evidence Act.

Dasin Bai@ Shanti Bai Vs. State Of Chhattisgarh. **2015 STPL (Web) 102 SC (SC)(DB)**

M.Y. Eqbal & Pinaki Chandra Ghose, JJ.

Date of Judgment -11-2-2015.

Issue

Murder – Dying declaration -Circumstantial evidence.

Relevant Extract

Dead body of deceased found in the premises of the appellant -The appellant/accused in her statement, recorded under Section 313 of Criminal Procedure Code, has not given any explanation as to how the deceased was burnt and she even admits to be unaware of the name of the deceased – This is highly improbable and cast doubt on the innocence of the accused – She is unable to discharge the burden cast upon her by Section 106 of the Evidence Act, as it was within her special knowledge as to how the deceased came into the premises of her house – The ground of defense taken by the appellant, that she did not have any motive to kill the deceased, held to be ill-founded and does not break the chain of circumstances – PW-1 and PW-3, who recorded the dying declaration, were neighbours of the accused and hence the Trial Court correctly held that they are not interested witnesses – The findings of the Trial Court also bring to light the fact that they had no animosity with the appellant, and were visiting her house only on the fateful night – The Trial Court and the High Court have rightly analysed the evidence of these witnesses and the statements made in the dying declaration and held the accused guilty.

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13. Sec. 304B

Rajinder Kumar Vs. State of Haryana **. 2015 STPL(Web) 98 SC (SC)(DB)**

Sudhansu Jyoti Mukhopadhaya & N.V. Ramana, JJ.

Date of Judgment -14-1-2015

Issue

Dowry Death – Conviction upheld.

Relevant Extract

Relation witness – Testimony of – Appreciation of evidence – In normal circumstances, in the Indian Society demand for dowry or harassment for the same takes place within four corners of the house – Even the parents or relatives of the girl will not be aware of these, unless they are informed either by the girl herself or demand is made directly to them – The Police Officials or others cannot depose anything about the harassment in connection with demand of dowry in the absence of any complaint or statement made by witness u/s 161 Cr.P.C. – Seldom, the villagers-neighbours may come to know of the same – In this background, statement of family members of the deceased-lady cannot be discarded on the ground that they are relatives and are interested witnesses, till a contradiction is shown in their deposition or cross-examination.

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14. ***Section 304A & 337***

State Of M.P. Vs. Mehtaab **. 2015 STPL (Web) 114 SC (SC) (DB**)

T.S. Thakur & A.K. Goel, JJ.

Date of Judgment - 13-2-2015.

Issue

Sentence – Reduction

Relevant Extract

Conviction – Sentence – Reduction in sentence – Compensation – In criminal revision High Court reducing the sentence awarded to the respondent under Section 304A IPC from RI for one year and under Section 337 IPC from RI for three months to RI for 10 days which was the period already undergone by him without assigning any reason – No compensation awarded – Held that the respondent having been found guilty of causing death by his negligence the High Court was not

justified in reducing the sentence of imprisonment to 10 days without awarding any compensation to the heirs of the deceased – In the facts and circumstances of the case, the order of the High Court can be upheld only with the modification that the accused will pay compensation of Rs.2 lakhs to the heirs of the deceased within six months – In default, he will undergo RI for six months – The compensation of Rs.2 lakhs fixed having regard to the limited financial resources of the accused but the said compensation may not be adequate for the heirs of the deceased -In addition to the compensation to be paid by the accused, the State can be required to pay compensation of Rs. 3 lakhs under Section 357-A payable out of the funds available/to be made available by the State of Madhya Pradesh with the District Legal Services, Authority – In case, the accused does not pay the compensation awarded as above, the State of Madhya Pradesh will pay the entire amount of compensation of Rs.5 lakhs within three months after expiry of the time granted to the accused.

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15. Articles 14, 21 and 32

Rashmi Behl Vs. State of Uttar Pradesh and Ors. **2015 STPL (Web) 121 SC (SC)(DB)**

M. Yusuf Eqbal & Shiva Kirti Singh, JJ.

Date of Judgment -17.02.2015

Issue

CBI Investigation

Relevant Extract

Investigation – CBI investigation – Allegations of rape by her own father and others by petitioner – FIR registered but investigation not progressed – Having regard to the facts, sequence of events and inordinate delay in the investigation of the case, it would show that the investigation by the State police authorities is not being conducted in a proper direction – More than two years have passed but the police failed to conclude the investigation, which itself goes to show that police have not acted in a forthright manner in investigating the case – Prima facie the police has acted in a partisan manner to shield the real culprits and the investigation of the case is not being conducted in a proper and objective manner – Since local police is allegedly involved as per the statement of the petitioner recorded under Section 164, there may not be fair investigation – Taking into consideration the entire facts of the case and very serious allegations made against all the respondents including police officers, held to be a fit case where the investigation has to be handed over to an independent agency like CBI for the purpose of fair and unbiased investigation – Central Bureau of Investigation to investigate the case independently and in an objective manner and to conclude the same in accordance with law.

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16. Article 142

Mahatma Education Society's Pillai's Institute of Information Technology, Engineering, Media Studies & Research vs. All India Council for Technical Education & Ors., **2015 STPL (Web) 115 SC (SC)(DB)**

Anil R. Dave & Kurian Joseph, JJ.

Date of Judgment -16-2-2015

Issue

Education –Approvals for Technical Institutions

Relevant Extract

All India Council for Technical Education (Grant of Approvals for the Technical Institutions) Regulations, 2012, Regulation 6 – Education – Educational institutions – Imparting studies in the field of engineering – No grant of approval – For not having land as stipulated in Regulations – Petitioner society has been imparting education to students through its colleges for the last 15 years – If approval is not granted, the students, who have already been admitted by an interim order of the High Court for the academic year 2014-15, would be put to great inconvenience and difficulties for no fault on their part -As an exceptional case, without going into the merits of this case, in exercise power under Article 142 of the Constitution of India respondent no.1 directed to grant a letter of approval to the concerned colleges managed by the petitioner for the academic year 2014-15 – For the subsequent academic year the petitioner shall do the needful to comply with the requirements of the aforestated Regulation and other Regulations.

*****

17. Article 226

Krishna Hare Gaur Vs. Vinod Kumar Tyagi & Ors. **2015 STPL(Web) 111 SC (SC)(DB)**

V. Gopala Gowda & R. Banumathi, JJ.

Date of Judgment -11-2-2015

Issue

Service Law – Appointment

Relevant Extract

Constitution of India,– U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978, Rule 4(2)(c) read with Rule 2(h) – Uttar Pradesh Junior High School (Payment of Salaries of Teachers and other Employees) Act, 1978, Section 19(1) – Appointment – Challenge as to – Res judicata – From the materials on record, it emerges that respondent No.1 did not possess requisite experience of five years and his appointment is in contravention to Rule 4(2)(c) read with Rule 2(h) of the 1978 Rules – The appointment of respondent No.1 held to be not valid in law – The earlier Writ Appeal No. 13537 of 2011 was dismissed mainly on the ground that the District Basic Education Officer has recorded a finding that respondent No.1 has the requisite five years teaching experience – The Additional District Magistrate observed that the District Basic Education Officer did not thoroughly conduct the inquiry, and therefore, dismissal of the earlier writ appeal cannot be taken as res judicata – Held that when the appointment is made de hors the rules, the same is a nullity – In such an eventuality, the statutory bar like doctrine of res judicata is not attracted – Since respondent No.1 obtained appointment on the basis of bogus certificates the principle of res judicata will not be attracted to the case on hand –

Since the appointment of respondent No.1 is conditional that in the case of any concealment of facts, the approval is liable to be cancelled, the Basic Shiksha Adhikari rightly passed the order cancelling the appointment which was rightly upheld by the learned Single Judge – The Division Bench was not right in setting aside the order of the learned Single Judge on the principles of res judicata and the impugned order of the Division Bench liable to be set aside.

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18. Article 226
Khursheed Ahmad Khan Vs. State Of U.P. & Ors., **2015 STPL (Web) 95 SC (SC)(DB)**
T.S. Thakur & A.K. Goel, JJ.
Date of Judgment -9-2-2015
Issue

Service Law – Second marriage during currency of the first marriage

Relevant Extract

U.P. Government Servant Conduct Rules, 1956, Rule 29(1) – Misconduct – Second marriage during currency of the first marriage – Punishment – Removal from service – Quantum of punishment – Judicial review – Adequate material on record in support of the charge against the appellant that he performed second marriage during the currency of the first marriage – No intimation in any form on record that the appellant had divorced his first wife – In service record she continued to be mentioned as the wife of the appellant – She has given a statement in inquiry proceedings that she continued to be wife of the appellant – The appellant also admitted in inquiry conducted on directions of the Human Rights Commission that his first marriage had continued –Held that the finding of violation of Conduct

Rules cannot be held to be perverse or unreasonable – High Court was justified in holding that the penalty of removal cannot be held to be shockingly disproportionate to the charge on established judicial parameters.

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19. Art. 226 &227
Bhubaneswar Development Authority Vs. Commissioner of Central Excise, Customs and Service Tax & others.
THE HIGH COURT OF ORISSA : CUTTACK ,W.P.(C). No.23548 of 2014
Indrajit Mahanty & B.K.Nayak ,JJ.
Date of Judgment -23-2-2015
Issue

Writ application, challenge has been made to the demand-cum-show cause notice.

Relevant Extract

In the present writ application, challenge has been made to the demand-cum-show cause notice dated 22.9.2014 under Annexure- 13 on the basis of the assertion that the petitioner-Bhubaneswar Development Authority (B.D.A.) which has registered under the Service Tax Act for providing "Renting of Immovable Property Services", classifiable under erstwhile Section 65(105)(zzzz) read with Section 65(66) and 65(67) of the Finance Act, 1994 and thereafter, under Section 66-E of the Act and calling upon to submit their show-cause within 30 days of the receipt of the notice as to why service tax interest/penalty shall not be levied.

In the present set of circumstances of the case, any finding by the Court at this stage is likely to be prejudicial, either the petitioner-BDA or the Service Tax Authority. At a stage where demand-cum-show cause notice has been issued to the BDA, various grounds have been indicated in the show cause notice as to why the

Service Tax Authority are seeking to apply the extended period of limitation to the facts and circumstances of the case. Further, in view of the fact that although it appears that an agreement was signed between the BDA and M/s. Unitech Ltd. on 14.3.2008, the same was admittedly registered only on 30.9.2010 and the consequences thereof are the matters to be determined in the light of the submissions that may be advanced by the petitioner in course of such determination.

In view of the judgment of the Hon'ble Supreme Court referred hereinabove, in the case of Collector of Central Excise, Hyderabad (supra), the issue itself, i.e. as to whether the extended period of limitation would apply, is yet to be determined by the adjudicating authority itself at the first instance. Consequently, without expressing any finding on the issues raised in course of the argument, we dismiss the writ application but allow the petitioner a further period of 30 days from today to file show cause reply and also to participate in such proceeding. The petitioner is at liberty to raise all such contentions and the Commissioner shall deal with the matter strictly in accordance with law without in any manner being influenced by any observation made hereinabove and reach in an independent conclusion both on fact and legal issues raised. With the aforesaid observations and directions, the writ application stands dismissed.

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20. Section 2(c) and 12

M.V. Jayarajan Vs. High Court Of Kerala & Anr., **2015 STPL (Web) 75 SC (SC) (DB)**

Vikramajit Sen & C. Nagappan ,JJ.

Date of Judgment -30-1-2015

Issue

Contempt – Conviction upheld

Relevant Extract

Contempt of Courts Act, 1971,– Constitution of India, Articles 19(1) (b), 19(1) (a) and 19(1)(d) and 19(3) – Contempt of Court – Criminal Contempt – Conviction – Sentence – Appeal against – Right to expression – Appellant delivered a speech in a public meeting at Kannur, Kerala allegedly convened in connection with a hartal organised to protest against the hike in petroleum prices and criticized the Judgment of the High Court banning hartal – Appellant is an advocate and also an ex-member of the Legislative Assembly – He is fully aware that while he has the right of freedom of speech of expression, this postulates a temperate and reasoned criticism and not a vitriolic, slanderous or abusive one; this right of free speech certainly does not extend to inciting the public directly or insidiously to disobey Court Orders – Appellant intended to lower the dignity of Court, to obstruct and impede its functioning and not merely to criticise its pronouncement which was not to his liking – His conduct leaves him unquestionably guilty of the offence of Contempt of Courts, calling for him to be punished for his illegal act – He has shown no remorse or contrition for his conduct – Instead, he has vainly etymologised the Sanskrit origin of 'sumbhan', fully aware of the fact that in its slang, especially to the rural and rustic persons he was addressing, it conveyed a strong abuse – Judges expect, nay invite, an informed and genuine discussion or criticism of judgments, but to incite a relatively illiterate audience against the Judiciary, is not to be ignored – It was, not the Petitioner's province, as exercising his freedom of speech, to advise that "if those judges have any self respect, they should resign and quit their offices" – The impugned Judgment has correctly and condignly convicted the Appellant for committing contempt of Court and ordered his incarceration – While affirming the impugned Judgment, the sentence of six months imprisonment reduced to that of simple imprisonment for a period of four weeks.

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21. Sec.4

Binoy & Anr. Vs. State Of Kerala. **2015 STPL (Web) 107 SC (SC)(DB)**

M. Yusuf Eqbal & Shiva Kirti Singh, JJ.

Date of Judgment -13-2-2015

Issue

Probation of Offenders – Not granted

Relevant Extract

Probation of Offenders Act, 1958, Section 4 – Penal Code, 1860, Section 323, 324 and 452 – Conviction – Sentence – Probation – Serious allegation of use of sharp weapon such as sword by the accused persons who chased the injured and then caused incised injuries on their persons – Even then the High Court showed leniency by altering conviction under Section 308 IPC to one under Section 324 IPC and reduced sentence of three years to six months for Section 324 IPC and further reduced sentence of six months each under Section 323 IPC and three years each under Section 452 IPC to R.I. for a period of three months each under Sections 452 and 323 IPC -Only plea for showing leniency was a claim that the appellants have got aged mother – Held that in the facts and circumstances, the view taken by the trial court for not extending the Probation of Offenders Act cannot be faulted.

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22. Sec. 43

Jai Balaji Jyoti Steels Ltd. Vs. Deputy Commissioner of Sales Tax and Ors.

IN THE *HIGH COURT OF ORISSA AT CUTTACK . W.P. (C) No. 23473 OF 2013*

Manu/OR/0034/2015

I. Mahanty & B.N. Mahapatra, JJ.

Date of Judgment -10.02.2015

Issue

Legality / validity of the order of assessment.

Relevant Extract

Petitioner's case in a nutshell is that the petitioner at the relevant time was a registered dealer under the provisions of the OVAT Act. For the tax period 01.04.2006 to 30.03.2011, the petitioner had been assessed under Section 42 of the OVAT Act vide assessment order dated 30.03.2011. The petitioner has not been assessed under the OVAT Act under Sections 39, 40, 42 and 44 for the period 01.04.2011 to 25.05.2011. Opposite Party No. 2, STO, Investigation Unit, Rourkela Circle-2, Panposh visited the place of business of the petitioner-Company on 20.05.2011. On the date of inspection, without carrying on weighment of the physical stock, Investigating Officer alleged suppression of sale/purchase turnover. Opposite party No. 2 without actual verification of the books of account and physical stock at the time of visit wanted production of accounts at his office for which notice in Form VAT 401 was issued to the petitioner fixing the date to 27.05.2011. In course of inspection, opposite party No. 2 seized note books, files, documents vide seizure list dated 20.05.2011. Opposite party No. 2 submitted the ex-parte report alleging suppression of purchase/sale turnover against the petitioner suggesting assessment of escaped turnover and tax for the aforesaid tax period. Thereafter, proceeding under Section 43 of the OVAT Act for the tax period 01.04.2008 to 20.05.2011 was initiated by issuing notice dated 28.03.2012 in Form VAT 307 fixing the date for production of regular books of account and documents to 10.05.2012. On the date fixed, i.e., 10.05.2012, the petitioner appeared through

Advocate and filed an application for supply of copies of documents seized by opposite party No. 2 on 20.05.2011. The petitioner has also applied to the Assessing Officer for grant of copy of the order sheet and copy of the statement of the Assistant General Manager (Commercial), Sri S. Ladia recorded during inspection and to supply the reasons of reopening the assessment. Opposite party No. 1-Deputy Commissioner of Sales Tax, Rourkela- II Circle, Panposh without granting copies of the seized documents and statements merely adjourned the proceeding from time to time and ultimately on 17.07.2013 the impugned order of assessment was passed raising tax and penalty to the tune of Rs. 28,43,57,055.00. Hence, the present writ petition.

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

"(i) Whether in the facts and circumstances of the case, the Assessing Officer is justified in insisting production of books of account before supplying the certified copy of seized document and reason for reopening the assessment?

(ii) Whether reasonable opportunity of hearing has been afforded to the petitioner and thereby the principle of natural justice has been duly complied with before passing the impugned order of assessment?

(iii) Whether opposite party No. 1-Assessing Officer is justified in passing the impugned order ex parte?

(iv) Whether the Assessing Officer has passed the impugned assessment order assigning basis/reasoning for determination of the escaped turnover and tax due thereon and thereby the principle of natural justice has been duly complied with?

(v) Whether the Assessing Officer is justified in accepting and relying on the allegations raised in the report in absence of any explanation furnished by the dealer to rebut the same despite availing several opportunities?

(vi) Whether in the facts and in the circumstances of the case, it would be appropriate/legally permissible to set aside the ex parte assessment order and direct the Assessing Officer to return the seized document of the petitioner and after granting an opportunity of hearing to the petitioner and examining the regular books of account with reference to the seized documents to redo the assessment and by that no prejudice will be caused to the interest of the State?

(vii) Whether the prayer of the petitioner to grant it liberty to prefer appeal in case it fails to succeed in the present writ petition can be accepted?"

Law is well-settled that the Assessing Officer has to assign reasons in support of its determination of escaped turnover and the tax sought to be levied thereon. But where the Assessing Officer concurs with the conclusions, which are based on materials as expressed by the Inspecting Officer and he has no additional material to record its findings, in its order, the said order cannot be vitiated merely because it concurs with reasons assigned by the Inspecting Officer to determine the escaped turnover and levying tax thereon. There is no quarrel over the legal proposition that there should be some reasoning recorded for declining or granting relief. The Hon'ble Supreme Court in the case of Shukla and Brothers (supra) held that requirement of recording of reasoning necessarily does not mean a very detailed or lengthy order.

Admittedly, in the present case, an ex parte assessment order has been passed due to nonproduction of the books of account by the petitioner-dealer before the Assessing Officer for the purpose of examination of the same with reference to the seized documents. As stated above, the petitioner also did not produce its books of account before the Inspecting Officer. It may be relevant to mention here that the statute provides under which circumstances an ex parte order can be passed by the Assessing Officer. If such a power is not vested with the Assessing Officer then unscrupulous/dishonest businessmen who have indulged in clandestine business to evade tax shall escape from payment of legitimate tax due to the State, simply by not producing the books of account/documents for

verification with reference to the incriminating materials collected and refraining themselves from participating in the assessment proceeding on some plea or other. Needless to say that all ex parte orders need not be set aside by higher court/authority for giving further opportunity of hearing to the party against whom ex parte order has been passed. Whether an ex parte order is to be set aside for giving further opportunity of hearing or not, it always depend on facts and circumstances of each case. There are certain cases where if ex parte orders are set aside to give an opportunity of hearing to the aggrieved parties that may amount to granting a boon to such parties, as they would be able to achieve their unholy purpose and in that case the very purpose of passing ex parte order is frustrated.

Lastly, whether the prayer of the petitioner to give it liberty to prefer appeal in case it fails to succeed in the present writ petition on merit can be granted to the petitioner. The above prayer of the petitioner is misconceived and cannot be granted. Needless to say that if the High Court is called upon to decide the legality of an order of assessment on its own merit, it would be a futile exercise to relegate the petitioner-dealer to approach the statutory appellate authority after the High Court deciding the case on merit. Therefore, the plea of the petitioner that this Court can after adjudicating the merits of the issues involved grant liberty to the petitioner to avail statutory remedy is fallacious and such a prayer of the petitioner cannot be allowed. It may be relevant to note that when the above prayer was advanced by Mr. Sahoo, Senior Advocate in course of his argument, he was specifically asked as to whether he wants to withdraw the writ petition and approach the appellate authority, he categorically denied the same and persisted with the above prayer. For the reasons stated above, the writ petition is dismissed.

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23. ***Sec.24 & 31***

Indian Bank Vs. Manilal Govindji Khona. **2015 STPL (Web) 91 SC (SC)(DB)**

V. Gopal Gowda & C. Nagappan, JJ.

Date of Judgment - 3-2-2015.

Issue

Condonation of Delay.

Relevant Extract

Recovery of Debts due to Banks and Financial Institutions Act, 1993, Section 24 and 31 – Constitution of India, Article 227 – Execution of Decree – Public Auction – Sale Certificate – Application for setting it aside – Condonation of delay - Jurisdiction – The exercise of jurisdiction by the High Court for giving the direction to the Court Receiver to sell the mortgaged property even after the DRT was established at Mumbai – Held that the proceedings before the High Court were automatically transferred to DRT in view of Section 31 of the DRT Act – It was impermissible in law for the High Court to direct the Court Receiver to sell the property of the respondent in public auction by executing the Court decree, which action of the Court Receiver is void ab initio in law – The order of the DRT and the DRAT, in dismissing the condonation of delay application by the respondent holding that the same is barred by limitation and consequently dismissing Misc. Application liable to be set aside – The sale held to be untenable in law – High Court has rightly answered the legal contentions in favour of the respondent by giving valid and cogent reasons in the impugned judgment in exercise of its Judicial Review power.

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24. Sec. 19

Akshaya Kumar Parida and Ors. Vs. Union of India and Ors.

IN THE HIGH COURT OF ORISSA AT CUTTACK. W.P. (C) No. 5738 of 2008

MANU/OR/0022/2015

Amitava Roy, C.J., C.R. Dash and Dr. Akshaya Kumar Rath, JJ.

Date of Judgment - 03.02.2015

Issue

Whether the Central Administrative Tribunal constituted under the provisions of the Administrative Tribunals Act, 1985 has jurisdiction to condone the delay in the event an application for review is filed beyond the prescribed period of limitation.

Relevant Extract

Before we proceed, we deem it necessary to note the relevant provisions of the Administrative Tribunals Act, 1985 (hereinafter referred to as "the Act") with regard to the jurisdiction, power and authority of the Tribunal. Section 19 of the Act postulates that subject to the other provisions of the Act, a person aggrieved by any order pertaining to any matter within the jurisdiction of a Tribunal may make an application to the Tribunal for the redressal of his grievance. Section 21 of the Act deals with limitation in filing the original application. Sub-section (3) of Section 21 confers power on the Tribunal to condone the delay in filing the original application, if the applicant satisfies the Tribunal that he was prevented by sufficient cause in not filing the application within the period of limitation prescribed in the Act. Section 22 of the Act has a direct bearing on the issue in question. The same is quoted hereunder;

"22. Procedure and powers of Tribunals.-

(1) A Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by the principles of natural justice and subject to the other provisions of this Act and of any rules made by the Central Government, the Tribunal shall have power to regulate its own procedure including the fixing of places and times of its inquiry and deciding whether to sit in public or in private.

(2) A Tribunal shall decide every application made to it as expeditiously as possible and ordinarily every application shall be decided on a perusal of documents and written representations and [after hearing such oral arguments as may be advanced.

The Act is a special law. Rule 17 of the Rules provides for filing of review application, which is different from the period prescribed by the Schedule as the Schedule to the Limitation Act. The Schedule to the Limitation Act does not contemplate any period of limitation for filing a review application before the Tribunal.

Neither Section 22 of the Act nor Rule 17 of the Rules contain any express rider on the power of the Tribunal to entertain an application for review after the expiry of the prescribed period of thirty days. The legislature has not excluded the applicability of Section 5 of the Limitation Act to Rule 17 of the Rules. In view of Section 29(2) of the Limitation Act, we have to examine whether Rule 17 of the Rules satisfies the twin conditions enumerated above for attracting the application of Section 29(2) of the Limitation Act. In view of the authoritative pronouncement of the apex Court in the case of Mukri Gopalan (supra), a situation wherein a period of limitation is prescribed by a special or local law for an application of review and for which no provision is made in the Schedule to the Act, the second condition for attracting Section 29(2) of the Act is attracted. From the enunciation of law laid down in Mukri Gopalan (supra), it must be held that in view of Section 29(2) of the Limitation Act, the Tribunal has the jurisdiction to entertain the application for condonation of delay filed under Section 5 of the Limitation Act. Rule 17 of the Rules does not take away the jurisdiction of the Tribunal to entertain and dispose of the application under Section 5 of the Limitation Act, since applicability of Section 5 of the Limitation Act has not been expressly excluded thereby.

Before parting with the case, we would like to observe that in Smt. Kanchana Badaseth , 2007 (II)OLR 365, the Bench relied upon a decision of the Apex Court in the case of K. Ajit Babu. In K. Ajit Babu (1997)6 SCC473 , the short question arose

for consideration was whether the application filed by the appellants under Section 19 of the Act was maintainable. The Apex Court held that often in service matters the judgments rendered either by the Tribunal or by the Court also affect other persons, who are not parties to the cases. In that context, the Apex Court held that ordinarily, right of review is available only to those who are party to a case. It was further held that right of review is available if such an application is filed within the period of limitation on the grounds mentioned in Order 47 of the Code of Civil Procedure. Thus K. Ajit Babu (supra) cannot be understood as laying a law that the Tribunal is dehors of its power in entertaining an application for review filed beyond the prescribed period of limitation, if the same is accompanied by an application under Section 5 of the Limitation Act.

The logical sequitur on the analysis made in the preceding paragraphs is that neither Section 22 of the Act nor Rule 17 of the Rules expressly excluded the applicability of Section 5 of the Limitation Act. In the event an application for review is filed beyond the period of limitation along with an application for condonation of delay and the applicant satisfies the Tribunal that he had sufficient cause for not preferring an application within the time, the Tribunal can condone the delay. Thus we hold that the decisions in Smt. Kanchana Badaseth (supra) and Rajayya Bisoi (96 (2003) CLT 230) are not the correct enunciation of law. Accordingly, the same are overruled. The reference is answered accordingly. The Registry is directed to place the matter before the assigned Bench**.**

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25. Secs.17 &29

Santosh Kumar Mohapatra and Ors. Vs. Union of India and Ors.

IN THE HIGH COURT OF ORISSA AT CUTTACK. W.A. No. 109 of 2014

MANU/OR/0029/2015

Amitava Roy, C.J. & Dr. Akshaya Kumar Rath, J.

Date of Judgment -11.02.2015

Issue

Clause 10 of the Letters Patent.

Relevant Extract

This appeal has been filed under Clause 10 of the Letters Patent against the judgment dated 12.2.2014 passed by the learned Single Judge in W.P.(C) No. 6355 of 2012 and batch of writ applications. By the said judgment, the learned Single Judge allowed the writ applications and quashed the list, for promotion of Office Assistants (Multipurpose Group 'B' Clerical) cadre to Officer JMG Scale-1, prepared by the respondent No. 4-Bank, vide Annexure 3, and directed the Bank to reassess the Performance Appraisal Report of Office Assistants (Multipurpose Group 'B' Clerical Cadre) and prepare a fresh list. It was, inter alia, directed that while preparing the said list, the Bank would consider the marks secured by the employees in the written test.

Respondent Nos. 5, 8, 11, 13, 19 and eleven others have filed Writ Application No. 6355 of 2012 contending that they were initially appointed as Junior Clerks in the erstwhile Puri Gramya Bank and subsequently promoted to the post of Senior Clerks. In the year 2007, Puri Gramya Bank was amalgamated with Dhenkanal Gramya Bank, whereafter Neelachal Gramya Bank was created. The posts of the petitioners were redesignated as Office Assistants (Multipurpose Group 'B' Clerical). After creation of Neelachal Gramya Bank on 30.8.2007, a provisional seniority list of the Office Assistants was prepared. While the matter stood thus, the Bank issued a notification on 11.6.2011 for promotion from the post of Office Assistant (Multipurpose Group 'B' Clerical) cadre to Officer JMG Scale-1 Cadre to = fill up 97 posts in accordance with Regional Rural Banks (Appointment and

Promotion of Officers and Employees) Rules 2010. As per the said notification, written test was conducted on 4.9.2011 and interview was held from 16.11.2011 to 19.11.2011. The petitioners were sanguine of their promotion, since they were seniors and blemishless service career. But then, the Bank had given promotion to the employees, who were juniors to them, basing upon their PAR, though they had secured less marks in the written test and interview. With this factual background they have prayed, inter alia, for a direction to the Orissa Gramya Bank (hereinafter referred to as 'Bank') to reconsider their cases of promotion by awarding suitable marks in the Performance Appraisal Report.

An affidavit has been filed by the Bank on 28.1.2015 stating therein that the process of the promotion was commenced with the publication of the relevant notification issued vide Circular No. 9 dated 31.5.2011. The PARs of the relevant years i.e., 2006-07 to 2010-11 of all the 231 candidates were not prepared in final form (up to the stage of final recommendation/assessment/gradings by the Reviewing Authority). Out of the said 231 candidates, PARs of 189 candidates were not prepared in all respects. A list has been appended, vide Annexure-4, to the said affidavit. It is further indicated that the exercise for incomplete and non-available PARs were made in 1st and 2nd week of June, 2014 in pursuance of the direction issued by the learned Single Judge on 7.5.2014 and the Selection Committee finalized the selection list on 14.6.2014. Accordingly, notification was made on 18.6.2014. It is further stated that while preparing the cases of unavailable and incomplete PARs, the reviewing authority had not reopened the cases of other candidates whose PARs were already prepared and had not moderated/upgraded the gradings recorded by the reporting authority. Out of 231 candidates, the reviewing authority had differed with the grades awarded by the concerned reporting authority in the case of PARs of 13 candidates, which were reviewed afresh. It is further stated that there were mistakes i.e., clerical errors in conversion of grades to marks in the PARs of 179 candidates. The said mistakes were detected while reassign the grades by the present reviewing authority in terms of

the direction issued by the learned Single Judge on 12.2.2014 and 7.5.2014. All the PARs of 231 candidates were reassessed/rechecked and necessary corrections were made in PARs of 179 candidates. It is further stated that after the judgment the next process of promotion was undertaken on 22.4.2014. The selection committee found suitable 105 numbers of candidates against 97 number of vacancies and, accordingly, notification was issued on 29.4.2014. The case of one candidate was kept in sealed cover due to pendency of the disciplinary proceeding. What is the more disquieting feature of the case is the admission of the Bank in the affidavit dated 28.1.2015. When the Bank admits serious irregularity and infirmity as stated supra, what more is required to be proved? The selection process consists of written test, interview and PARs. The marks awarded under the heading PARs is 30. On the date of consideration of the cases of the appellants vis-à-vis the contesting respondents for their promotion to the post of Office Assistants (Multipurpose Group 'B' Clerical) cadre to Officer JMG Scale-1, the PARs of 189 candidates out of 231 candidates were not prepared in all respects. Further, there were mistakes i.e., clerical errors in conversion of grades to marks in the PARs of 179 candidates.

In our considered opinion, on the basis of incomplete PARs and the clerical errors in conversion of grades to marks in the PARs of 179 candidates, the Departmental Promotion Committee constituted by the Bank committed a patent illegality in acting upon the incomplete PARs and awarding marks. The exercise undertaken by the committee was wholly unjustified and the same is detrimental to the future prospectus of 179 candidates. The committee was fully conscious of the aforesaid facts. In spite of that, for the reasons best known, it proceeded with selection leaving the future of most of the employees in a state of despair and uncertainty. In view of the analysis made in the preceding paragraphs, we are of the view that the judgment dated 12.2.2014 passed by the learned Single Judge warrants no interference of this Court. Accordingly, the appeal is dismissed.

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