

(2009) 10 OHC CK 0003
In the Orissa High Court
Case No : Writ Petition (C) No. 14407 of 2006

Ramesh Chandra Sahu

APPELLANT

Vs

Gagan Bihari Nayak and Another

RESPONDENT

Date of Decision : 09-10-2009

Acts Referred:

Contempt of Courts Act, 1971 — Section 19
Orissa Co-operative Societies (Amendment) Act, 2004 — Section 112(A)
Orissa Co-operative Societies Act, 1962 — Section 109(1), 67, 70
Orissa Co-operative Societies Rules, 1965 — Rule 70, 70(1), 70(6)

Citation : (2009) 10 OHC CK 0003

Hon'ble Judges : B.K. Patel, J

Bench : Single Bench

Advocate : Sashikanta Mishra, S. Pattnaik and S. Mishra, for the Appellant; V. Narasingha, A.G.A., for the Respondent

Final Decision : Allowed

Judgement

B.K. Patel, J.—This writ application involves interpretation of provision u/s 109 (1) (i) of the Orissa Cooperative Societies Act, 1962 (for short, "OCS Act"). The provision reads:

109. Appeals -(1), An appeal shall lie under this section against the following orders and decision, namely:

xxx xxx xxx

xxx xxx xxx

(i) an order of surcharge made by the Auditor-General u/s 67.

Learned Member, Cooperative Tribunal by order dated 16.1.2006 passed in T.A. No. 81 of 2004, copy of which is at Annexure-4 to the writ application, held that the above provision includes also an order made by Auditor General holding that the person proceeded against is not liable to pay any surcharge.

2. on consent, the matter was taken up for final disposal at the state of admission.

3. Brief facts of the case are as follows:

Petitioner is the ex-Managing Director of Keonjhar Gramodyoga Marketing Cooperative Society Limited (for short "the Society"), a society registered under the OCS Act. Audit report of the Society for the business year 1985-86 pointed out that the Petitioner was liable to pay a sum of Rs. 1,12,774.68 p. On the basis of the audit report Surcharge Proceeding No. 1 of 2004-05 was initiated by the Assistant Auditor General of the Cooperative Societies, Keonjhar Circle against the Petitioner u/s 67 of the OCS Act. In response to the notice the Petitioner appeared and participated in the Surcharge Proceeding, On conclusion of hearing by order dated 15.9.2004 passed by the Assistant Auditor General, Cooperative Societies, Keonjhar Audit Circle, copy of which is at Annexure-1 to the writ application, the Surcharge Proceeding was disposed of. The conclusions recorded by the Asst. Auditor General, Keonjhar Audit Circle in the said proceeding read:

The report was examined on the above context. Even if the Audit Report is taken for granted on administrative consideration its findings are not based on relevant adequate materials expressing willful, guilt, negligence misappropriation etc. of delinquent.

Given the above citations and the learned Advocate euphonic argument, the recoveries exhibited on the audit report of GMCS Keonjhar for the year 84-85 considered unmeritorious voidable allowed with treating Surcharge Proceeding non-maintainable in the eyes of law.

The audit report for the year 84085 modified to this extent and resultant to this order next audit report/reports shall be subject to preparation in the manner prescribed.(Sic)

Assailing the order of the Assistant Auditor General, Keonjhar Audit Circle, Opposite party No. 1 Manager-cum-Managing Director of the Society preferred T.A. No. 81 of 2004 before the learned Member, Cooperative Tribunal, Orissa, Bhubaneswar. The Petitioner appeared and filed preliminary objection assailing maintainability of the appeal. Upon hearing both sides learned Tribunal by order at Annexure-4 rejected the objection and held the appeal to be maintainable. In this writ application Petitioner has assailed the legality of the said order at Annexure-4.

4. Crux of the averments made by the Petitioner in the writ application is that an appeal u/s 109(1)(i) of the OCS Act lies only when an order directing payment of surcharge has been made. No appeal is contemplated when there is no order directing payment of surcharge.

5. Opposite party No. 1 has filed counter-affidavit asserting that u/s 109(1)(i)of the OCS Act any decision passed u/s 67 of the said Act in a surcharge proceeding is appealable.

6. Shri Mishra, learned Counsel for the Petitioner and Sri v. Narasingham, learned Counsel appearing for the opposite party No. 1 were heard at length in course of which each of them supported respective stand taken in the writ application and the counter affidavit upon reference to statutory provisions and authoritative judicial pronouncements. The following decisions were relied upon by the learned Counsel for the parties.

Chief Justice of Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others, ; Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another, ; N. Kannadasan v. Ajoy Khose: (2009) 7 SCC 1; Union of India and Anr. v. Deoki Nandan Aggarwal): AIR 1992 SC 96; Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. Vs. Custodian of Vested Forests, Palghat and another, ; State of Kerala Vs. Mathai Verghese and Others, ; Dilip Singh Rana v. State of U.P.: 1994 Lab IC 491; and Sumitomo Corporation Vs. CDC Financial Services (Mauritius) Ltd. and Others, .

7. Sub-section (1) of Section 109 of OCS Act provides for appeals against "orders" as well as "decisions". Clauses (a) to (c), (d- a) to (i) and (k) to (n) thereunder enumerate the "orders" whereas Clauses (d) and (j) thereunder enumerate the "decisions" which are appealable. For example, under Sub-clause (j) decision or award u/s 70 of the OCS Act is appealable. Clause (0) of Sub-section (1) of Section 109 of OCS Act provides that an appeal shall lie against any order or decision other than orders and decisions provided under Clauses (a) to (n) as prescribed. Therefore, obviously there has been a conscious distinction between "orders" and "decisions" under the OCS Act. So far as the present writ application is concerned, it relates to an order of surcharge made u/s 67 of the OCS Act.

8. Section 67 of the OCS Act provides for levy of surcharge. Section 67 occurs under Chapter-VIII of the OCS Act which provides for audit, enquiry, inspection and surcharge. Surcharge under the OCS Act is a direction made by the Auditor-General or a person authorized by him against a person to repay or restore money or property etc. Section 67 reads:

Surcharge- (1) If, in the course of any audit, enquiry, inspection or the winding up of a Society it is found that any person, who is or was entrusted with the organization or management of such Society or who is or has at any time been an Officer, Officer-bearer or employee of the Society, has made any payment contrary to this Act, Rules or the Bye-Laws, or has caused any deficiency in the assets of the Society by breach of trust, willful negligence or otherwise, or has misappropriated or fraudulently or unauthorisedly retained any money or other property belonging to the Society, the Auditor-General or a person authorized by him by an order in writing in that behalf, on his own motion or on the application of a liquidator, the Committee or any creditor, after giving the person concerned a reasonable opportunity of being heard, may make an order in the manner prescribed, requiring him to repay or restore the money or property or any part thereof, with interest as such rates, or to pay such contribution, costs or

compensation as he may consider just and equitable, and all such orders shall have effect without prejudice to any other action that may be lawfully taken against him:

Provided that no proceedings under this Section shall be initiated after the expiry of a period of four years from the date any act or omission as aforesaid is first detected during audit, inspection, inquiry or the winding up of a Society, as the case may be.

(2) Notwithstanding anything to the contrary in Sub-section (1), any authority competent to initiate, institute or dispose of any proceedings under this Section as it stood prior to the date of commencement of Section 35 of the Orissa Co-operative Societies (Amendment) Act, 1991 shall continue to be so competent until appointment of the Auditor-General and upon such appointment, all proceedings pending before any such authority as on the date of the said appointment shall stand transferred to the Auditor-General who shall dispose of the same in accordance with law.

9. Rule 70 of the Orissa Cooperative Societies Rules, 1965(For short, "the OCS Rules") provides for procedure to be adopted in a surcharge proceeding. Rule 70 reads:

Procedure of Surcharge - (1) Where a surcharge proceeding is initiated u/s 67 of the Act, the Auditor-General or the person authorized by him shall issue a notice to the person concerned furnishing him with particulars of payment made contrary to Act, rules and bye-laws or the deficiency caused in the assets of the society by breach of trust willful negligence or otherwise, or the sum or property belonging to the society misappropriated, fraudulently or unauthorisedly retained by him and the extent of his liability involved therein, and calling upon him to put a statement in his defence within fifteen days of date of issue of the notice.

(2) Notice under Sub-rule (1) shall be accompanied by copy of the relevant portion of the audit report, enquiry report of liquidator's report, as the case may be.

(3) The person concerned shall furnish along with his statement a list of document and witness which he would like to produce.

(4) The Auditor-General or the person authorized by him may allow the person concerned to look into the relevant records of the Society, if required for furnishing an explanation.

(5) The Auditor-General or the person authorized by him shall receive and record such evidence as may be necessary and relevant.

(6) The Auditor-General or the person authorized by him may thereupon record a decision.

(7) The Auditor-General or the person authorized by him also provide in his decision, for the payment of costs of the proceedings under this Rule or any part

of such costs, as he may think just.

(8) The Auditor-General or the person authorized by him shall furnish a copy of the decision under Sub-rule (6) of the party concerned within 7 days from the date of decision.

10. Thus it is observed that in Section 67 of the OCS Act the word "order" has been used whereas in Sub-rule (6) of Rule 70 of the OCS Rules the word "decision" has been used. Decision is required to be passed u/s 67 of the OCS Act read with Sub-rule (6) of Rule 70 of OCS Rules regarding liability of a person proceeded against in any surcharge proceeding initiated on the basis of audit, enquiry report or inspection report or upon winding up of a Society after due enquiry and after giving opportunities of being heard. Such decision may be an order directing the person to pay or restore money or property upon determination of liability or may be a decision to the effect that the person proceeded against is not liable to pay or restore any money or property to the Society. Such distinct use of words "order" and "decision" has to be borne in mind while interpreting the provision in sub-clause(i) of Sub-section(1) of Section 109 of the OCS Act under which what has been made appealable is "an order or surcharge made" u/s 67 of the OCS Act.

11. It is well settled that if the language or the phraseology employed by the legislation is precise and plain and thus by itself proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow. Other rules of interpretation are to be resorted to only when the language used by the legislature is not plain and precise.

12. In Chief Justice of Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others, the Hon"ble Apex Court has laid down:

The primary principle of interpretation is that a constitutional or statutory provision should be construed "according to the intent of they that made it" (Cok). Normally, such intent is gathered from the language of the provision. If the language or the phraseology employed by the legislation is precise and plain and thus by itself., proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow. But if the words used in the provisions are imprecise, protean, or evocative or can reasonably bear meaning more than one, the rule of strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. In such a case, in order to ascertain the true meaning of the terms and phrase employed, it is legitimate for the Court to go beyond the arid literal confines of the provisions and to call in aid other well-recognized rules of construction, such as its legislative history, the basic scheme and framework of the statute as a whole, each portion throwing light on the rest, the purpose of the legislation, the object sought to be achieve, and the consequences that may flow from the adoption of one in preference to the other possible interpretation.

Where two alternative constructions are possible, the Court must choose the one

which will be in accord with the other parts of the statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion, or friction, contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme and purpose of the enactment. These canons of construction apply to the interpretation of our Constitution with greater force, because the Constitution is a living, integrated organism, having a soul and consciousness of its own. The pulse beats emanating from the spinal cord of the basic framework can be felt all over its body, even in the extremities of its limbs. Constitutional exposition is not mere literary garniture, nor a mere exercise in grammar. As one of us (Chandrachud J. as he then was) put it in His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, "while interpreting words in a solemn document like the Constitution, one must look at them not in a school-masterly fashion, not with the cold eye of a lexicographer, but with the realization that they occur in "a single complex instrument in which one part may throw light on the other" so that the construction must hold a balance between all its parts.

13. In Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another, the Hon"ble Apex Court has held:

The normal rule of interpretation is that the words used by the legislature are generally a safe guide to its intention. Lord Reid in *West-Minster Bank Ltd. v. Zang*, 1966 AC 182 observed that "no principle of interpretation of statutes is more firmly settled than the rule that the Court must deduce the intention of Parliament from the words used in Act." Applying such a rule, this Court observed in *G. Narayanaswami Vs. G. Pannerselvam and Others*, at p.2290 that "where the statute's meaning is clear and explicit, words cannot be interpolated." What is true of the interpretation of an ordinary statute is not any the less true in the case of a constitutional provision, and the same rule applies equally to both. But if the words of an instrument are ambiguous in the sense that they can reasonably bear more than one meaning, that is to say, if the words are semantically ambiguous, or if a provision, if read liberally, is patently incompatible with the other provisions of that instrument, the Court would be justified in construing the words in a manner which will make the particular provision purposeful. That, in essence is the rule of harmonious construction."

Now, it is undoubtedly true that where the language of an enactment is plain and clear upon its face and by itself susceptible to only one meaning, then ordinarily that meaning would have to be given by the Court. In such a case the task of interpretation can hardly be said to arise. But language at best is an imperfect medium of expression and a variety of significance may often lie in a word of expression. It has, therefore, been said that the words of a statute must be understood in the sense which the legislature has in view and their meaning must be found not so much in a strictly grammatical or etymological propriety of language, nor in its popular use, as in the subject or the occasion on which they are used and the object to be attained. It was said by Mr. Justice Holmes in

felicitous language in *Town v. Eisner* (1917) 245 US 418 that "a word is not a crystal, transparent "and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the stime in which it is used." The words used in a statute cannot be read in isolation; their colour and content are driven from their context and, therefore, every word in a statute must be examined in its context. And when I use the word "context", I mean it in its widest sense "as including not only other enacting provisions of the same statute, but its preamble, the existing statute of the law, other statutes in *pari materia* and the mischief which the statute was intended to remedy." The context is of the greatest importance in the interpretation of the words used in a statute. "It is quite true", pointed out by Judge learned Hand in *Halvering v. Gregory*, 69 F 2nd 809 "that as the articulation of a statute increases, the room for interpretation must contract; but the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularly can even obviate recourse to the setting in which all appear and which all collectively create." Again, it must be remembered that though the words used are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing, be it a statute, a contract, or anything else, it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that a statute always has some purpose or object to accomplish whose sympathetic and imaginative discovery is the surest guide to its meaning. The literal construction should not obsess the Court, because it has only *prima facie* preference, the real object of interpretation being to find out the true intent of the law maker and that can be done only by reading the statute as an organic whole, with each part throwing light on the other and bearing in mind the rule in *Heydon's case* (1854) 76 ER 637 which requires four things to be "discerned and considered" in arriving at the real meaning; (1) what was the law before the Act was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy Parliament has appointed; and (4) the reason of the remedy. There is also Anr. rule of interpretation which is equally well settled and which seems to follow as a necessary corollary, namely, where the words, according to their literal meaning "produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification", the Court would be justified in "putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear." Vide *River War Commers, v. Adamson*, (1877)2 AC 743.

14. In *N. Kannadasan v. Ajoy Khose*): (2009) 7 SCC 1 the Hon"ble Apex Court has pointed out:

Construction of a statute, as is well known, must subserve the tests of justice and reason. It is a well settled principle of law that in a given case with a view to give complete and effective meaning to a statutory provision, some words can be read into; some words can be subtracted. Provisions of a statute can be read down (although sparingly and rarely).

15. In *Union of India and Anr. v. Deoki Nandan Aggarwal*): AIR 1992 SC 96 it has been held by the Hon''ble Supreme Court:

It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities.

16. In *Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. Vs. Custodian of Vested Forests, Palghat and another*, , the Hon''ble Apex Court has observed:

It is said, indeed rightly, that in seeking legislative intention, Judges not only listen to the voice of the legislature but also listen attentively to what the legislature does not say.

17. In *State of Kerala Vs. Mathai Verghese and Others*, , Hon''ble Apex Court has held:

The High Court cannot do so for the Court can merely interpret the section; it cannot re-write, recast or redesign the section. In interpreting the provision the exercise undertaken by the Court is to make explicit the intention of the legislature which enacted the legislation. It is not for the Court to reframe the legislature for the very good reason that the powers to "legislate" have not been conferred on the Court.

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A Court can make a purposeful interpretation so as to "effectuate" the intention of the legislature and not a purposeless one in order to "defeat" the intention of the legislators wholly or in part.

18. Learned Member, Cooperative Tribunal appears to have taken recourse to purposive interpretation of Clause (i) of Sub-sec (1) of Section 109 of the OCS Act. According to him in case of the provision is interpreted to mean that only affirmative order directing payment of surcharge is appealable and negative order holding that person proceeded against is not liable to repay or restore any money or property of the Society is not appealable, it would be adverse to the interest and welfare of the Society and its primary members. However, decision on surcharge either way is required to be passed by the Auditor General or his nominee on examination of audit or other reports which are tentative. Surcharge Proceeding envisages a full-fledged enquiry to verify the authenticity of

allegations made in such reports.

19. It has been observed by the Allahabad High Court in *Dilip Singh Rana v. State of U.P.*: 1994 Lab IC 491:

The audit report could not be used as substantive evidence of the genuineness or bona fide nature of the transactions referred to in the accounts. Audit is official examination of the accounts in order to make sure that the accounts have been properly maintained according to the prescribed mode. Audit report is a statement of facts pertaining to the maintenance of accounts coupled with the opinion of the Auditor in respect thereof based on those facts. In "A Concise Dictionary of Law" (Oxford University Press) it is stated that an auditor's report must state whether or not in the auditor's opinion, the accounts have been properly prepared and given a true and fair view of the Company's financial position. If the audit shows that the accounts are not properly maintained, it may give rise to a reasonable suspicion of even belief that some wrong has been committed in respect of the matters to which the accounts relate. But the commission of that wrong cannot be proved to the opinion of the Auditors contained in the audit report.

It has to be proved like any other fact by relevant and admissible evidence. In words and phrases, Volume IV-A, it is stated at page 577 that "Audit" means formal examination and verification of accounts, vouchers and other records and the result of such an examination. The duty of an Auditor is verification and not detection (see in re: *Kingston Cotton Mill Company (No. 2)* (1896) 2 Ch 279). In Halsbury's Laws of England the duty and function of an Auditor appointed to audit the accounts of a Company are described in the following words:

"It is the duty of an Auditor to verify not merely the arithmetical accuracy of the balance sheet, but its substantial accuracy and to see that it includes the particulars required by the articles and the statute, and contains a correct representation of the state of the Company's affairs. While, therefore, it is not his duty to consider whether the business is prudently conducted, he is bound to consider and report to the shareholders whether the balance sheet shows the true financial position of the Company. To see this, he must examine the books and take reasonable care to see that their contents are substantially accurate.

20. It is also pertinent to observe that by the Orissa Cooperative Societies (Amendment) Act, 2004 (Act 11 of 2004) Section 112(A) has been inserted into the OCS Act in order to enable the Auditor General to scrutinize the records or proceeding u/s 67 of the OCS Act pending before or disposed of by any authority subordinate to him and in which appeal has not been filed. The Auditor General may also make a reference to the Cooperative Tribunal such matters with his views for adjudication and final decision under Sub-section (1) of Section 109 of the OCS Act. Provisions u/s 112(A) of the Amendment OCS Act reads:

The Auditor General of Co-operative Societies, Orissa of his own motion or on application by any person may, call for and examine the records of any.

proceedings u/s 67 of the Act, pending before any authority subordinate to him or disposed of by such authority in which appeal has not been filed and may, after giving the parties a reasonable opportunity of being heard, make a reference within a period of four years from the date of his knowledge, to the Co-operative Tribunal with his views for adjudication and final decision under Sub-section (1) of Section 109 of the Act.

21. As has been observed in *Sumitomo Corporation Vs. CDC Financial Services (Mauritius) Ltd. and Others*, , relied upon by the learned Counsel for the Petitioner, if there is no bar in any statute, there is no difficulty in filing a suit. On the other hand, in the case of appeals for its maintainability there must be a specific provision/clear authority of law. In the present case, despite use of word "decision" in some of the clauses in Sub-section (1) of Section 109 of the OCS Act and also in Rule 70 of the OCS Rules, the expression in Clause (i) of Sub-section (1) of Section 109 of the OCS Act is "an order of surcharge made". In case interpretation assigned to the provision by Petitioner is accepted, the provision would mean to include "an order of surcharge not made" also. Instead of using the expression "decision on surcharge" or "order on surcharge" or simply "order u/s 67", legislature has consciously used the expression "an order of surcharge made". When an order or decision is made by the Auditor General u/s 67 of the OCS Act holding a person proceeded against to be not liable to repay or restore any money or property, it cannot be said that an order of surcharge has been made. The provision, as it stands, cannot be construed to include an order of surcharge not made by the Auditor General u/s 67 of the OCS Act.

22. Learned Counsel for the opposite party No. 1 in course of argument submitted that it shall not be reasonable to hold that the order passed by an authority shall be amenable to appeal only when positive direction is made. In reply, it is rightly contended by the learned Counsel for the Petitioner that provision u/s 109(1)(i) of OCS Act is not the solitary instance postulating appeal against positive orders only. For example, u/s 19 of the Contempt of Courts Act, 1971, an appeal lies against an order or decision of High Court to punish for contempt. No appeal is maintainable against an order of discharge of notice of contempt or dropping proceeding for contempt or rejection of the application for initiating contempt proceeding. In this context, decisions in *Baradakanta Mishra Vs. Justice Gatikrushna Misra*, Chief Justice of the Orissa High Court, and *State of Maharashtra Vs. Mahboob S. Allibhoy and another*, may be referred to. Therefore, in view of clear and unambiguous expression used in clause(i) of Sub-section(1) of Section 109 of OCS Act, this contention deserves to be mentioned for rejection only.

23. In view of the above, learned Member, Cooperative Tribunal is found to have clearly fell into error in passing the impugned order holding the order in Annexure-1 to be appealable. Therefore, the order in Annexure-4 as well as proceeding in T.A. No. 81/04 are quashed.

The writ application is allowed. No cost.