THE INDIAN LAW REPORTS
(CUTTACK SERIES)

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

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

JULY - 2018

Pages : 1 to 192

Edited By

BIKRAM KISHORE NAYAK, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

Published by **:** High Court of Orissa.
At/PO-Chandini Chowk, Cuttack-753002
Printed at - Odisha Government Press, Madhupatna, Cuttack-10

Annual Subscription : ₹ 300/-

ORISSA HIGH COURT, CUTTACK

CHIEF JUSTICE

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

PUISNE JUDGES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ADVOCATE GENERAL

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

NOMINAL INDEX

ACTS

Acts & No.

1950	Constitution of India, 1950
1973-2…..	Code of Criminal Procedure, 1973
1908-5…..	Code Of Civil Procedure, 1908
1986-68....	Consumer Protection Act, 1986
1986-29….	Environment (Protection) Act, 1986
1956-78….	Hindu Adoption & Maintenance Act, 1956
1860-45….	Indian Penal Code, 1860
1881-26….	Negotiable Instruments Act, 1881
1951-1…....	Orissa Estate Abolition Act, 1951
1960-16….	Orissa Land Reforms Act, 1960
1988-49….	Prevention Of Corruption Act,1988

RULES:- 1. Orissa Civil Service (Rehabilitation Assistance) Rules, 1990

SUBJECT INDEX

———

2018 (II) ILR - CUT- 1 (S.C.)

UDAY UMESH LALIT, J & DEEPAK GUPTA, J.

CIVIL APPEAL NO. 5838 OF 2018

(Arising out of SLP (C) NO. 12472 OF 2018)

With

CIVIL APPEAL NO.5839 OF 2018

(Arising out of SLP (C) No.13166 of 2018)

&

CIVIL APPEAL NOS. 5840-5842 OF 2018

(Arising out of SLP(C) Nos.13567-13569 OF 2018)

U.P.P.S.C., THROUGH ITS CHAIRMAN & ANR. ……...Appellant (s)

.Vs.

RAHUL SINGH & ANR. ..……Respondent(s)

ACADEMIC QUESTION – Extent and power of the Court to interfere in matters of academic nature – Held, the Constitutional Courts must exercise great restraint in such matters and should be reluctant to entertain a plea challenging the correctness of the key answers as Judges cannot take on the role of experts in academic matters – Unless, the candidate demonstrates that the key answers are patently wrong on the face of it, the courts cannot enter into the academic field, weigh the pros and cons of the arguments given by both sides and then come to the conclusion as to which of the answer is better or more correct – When there are conflicting views, then the court must bow down to the opinion of the experts – Judges are not and cannot be experts in all fields and, therefore, they must exercise great restraint and should not overstep their jurisdiction to upset the opinion of the experts. (Paras 12 to 14)

Case Laws Relied on and Referred to :-

1. (1983) 4 SCC 309 : Kanpur University, through Vice Chancellor & Ors. vs. Samir Gupta & Ors.
2. (2018) 2 SCC 357 : Ran Vijay Singh and Others vs. State of Uttar Pradesh and Ors.

For Appellant (s) : Mr. Shrish Ku. Misra
For Respondent(s) : Mr. Badri Prasad Sing (Caveat)

JUDGMENT Date of Judgment: 14. 06 2018

DEEPAK GUPTA, J.

Applications for impleadment are allowed.

2. Leave granted.

3. These appeals are being disposed of by a common judgment since they arise out of one judgment delivered by the High Court of Allahabad on 30.03.2018.

4. Briefly stated, the facts necessary for the decision of this case are that the appellant U.P. Public Service Commission (for short 'the Commission') issued an advertisement on 22.02.2017 inviting applications for filling up vacancies in the

Upper Subordinate Services of the State. The selection is conducted through a three stage test consisting of preliminary written examination, main examination and interview. Those candidates who clear the preliminary examination are entitled to appear in the main examination.

5. The preliminary examination consisted of two papers namely General Studies-I and General Studies-II. We are in this case concerned only with the General Studies-I paper which carried 200 marks and consists of 150 objective type questions with multiple choice answers. After the preliminary examination was conducted, key answers were published by the Commission. Many persons including the petitioners before the Allahabad High Court contended that some of the key answers were incorrect or that some of the questions had more than one correct answer.

6. It is not disputed before us that the Commission initially constituted two separate expert committees; one comprising of 15 experts and the other comprising of 18 experts. This was done even before the key answers were displayed on the official website of the Commission. After these two committees gave their expert opinion the key answers were uploaded on the official website of the Commission during the period 18.11.2017 to 23.11.2017. Objections to the key answers were to be submitted by 24.11.2017.

7. The Commission received 962 objections. The Commission constituted a committee consisting of 26 members to consider the objections raised by the candidates. This 26 member expert committee examined all the objections over a period of two days and, thereafter, on the basis of the recommendations of this committee 5 questions were deleted and the key answers of 2 questions were changed. As a consequence the result was declared on the basis of 145 questions. Thereafter, various candidates filed writ petitions in the Allahabad High Court wherein challenge was raised to the correctness of the key answers in respect of 14 questions. The High Court examined these questions and after elaborate discussion and reasoning negatived the prayer of the petitioners in respect of 11 questions but in respect of one question the High Court held that the question should be deleted; in respect of another question it held that there were two correct answers and in respect of one more question it disagreed with the view of the Commission and accepted the submission of the petitioners that the answer given in the key was incorrect. This judgment is under challenge in these appeals.

8. In the appeal filed by the Commission it has been urged that the High Court transgressed its jurisdiction and went beyond the scope of judicial review available in such cases and it should not have overruled the view of the Commission which was based on the report of two committees of experts. On the other hand one of the original writ petitioners in his appeal claims that as far as the question where the High Court has held more than one answer is correct, the same should be deleted

and in respect of another question it is urged that the High Court wrongly accepted the answer of the Commission.

9. What is the extent and power of the Court to interfere in matters of academic nature has been the subject matter of a number of cases. We shall deal with the two main cases cited before us.

10. In ***Kanpur University, through Vice Chancellor and Others*** vs. ***Samir Gupta and Others*** [1], this Court was dealing with a case relating to the Combined Pre Medical Test. Admittedly, the examination setter himself had provided the key answers and there were no committees to moderate or verify the correctness of the key answers provided by the examiner. This Court upheld the view of the Allahabad High Court that the students had proved that 3 of the key answers were wrong. Following observations of the Court are pertinent:-

> "**16**……..We agree that the key answer should be assumed to be correct unless it is proved to be wrong and that it should not be held to be wrong by an inferential process of reasoning or by a process of rationalization. It must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well-versed in the particular subject would regard as correct……"

The Court gave further directions but we are concerned mainly with one that the State Government should devise a system for moderating the key answers furnished by the paper setters.

11. In ***Ran Vijay Singh and Others*** vs. ***State of Uttar Pradesh and Others***[2], this Court after referring to a catena of judicial pronouncements summarized the legal position in the following terms:-

> **"30.** The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions.
>
> They are:
>
> **30.1.** If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;
>
> **30.2.** If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;
>
> **30.3.** The court should not at all re-evaluate or scrutinise the answer sheets of a candidate—it has no expertise in the matter and academic matters are best left to academics;
>
> **30.4.** The court should presume the correctness of the key answers and proceed on that assumption; and
>
> **30.5.** In the event of a doubt, the benefit should go to the examination authority rather than to the candidate."

We may also refer to the following observations in Paras 31 and 32 which show why the Constitutional Courts must exercise restraint in such matters:-

> **"31.** On our part we may add that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheet. If an error is committed by the examination authority, the complete body of candidates suffers. The entire examination process does not deserve to be derailed only because some candidates are disappointed or dissatisfied or perceive some injustice having been caused to them by an erroneous question or an erroneous answer. All candidates suffer equally, though some might suffer more but that cannot be helped since mathematical precision is not always possible. This Court has shown one way out of an impasse — exclude the suspect or offending question.
>
> **32.** It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above, there is interference by the courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination — whether they have passed or not; whether their result will be approved or disapproved by the court; whether they will get admission in a college or university or not; and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of uncertainty results in confusion being worse confounded. The overall and larger impact of all this is that public interest suffers."

12. The law is well settled that the onus is on the candidate to not only demonstrate that the key answer is incorrect but also that it is a glaring mistake which is totally apparent and no inferential process or reasoning is required to show that the key answer is wrong. The Constitutional Courts must exercise great restraint in such matters and should be reluctant to entertain a plea challenging the correctness of the key answers. In ***Kanpur University*** case (supra), the Court recommended a system of - (1) moderation; (2) avoiding ambiguity in the questions; (3) prompt decisions be taken to exclude suspected questions and no marks be assigned to such questions.

13. As far as the present case is concerned even before publishing the first list of key answers the Commission had got the key answers moderated by two expert committees. Thereafter, objections were invited and a 26 member committee was constituted to verify the objections and after this exercise the Committee recommended that 5 questions be deleted and in 2 questions, key answers be changed. It can be presumed that these committees consisted of experts in various

subjects for which the examinees were tested. Judges cannot take on the role of experts in academic matters. Unless, the candidate demonstrates that the key answers are patently wrong on the face of it, the courts cannot enter into the academic field, weigh the pros and cons of the arguments given by both sides and then come to the conclusion as to which of the answer is better or more correct.

14. In the present case we find that all the 3 questions needed a long process of reasoning and the High Court itself has noticed that the stand of the Commission is also supported by certain text books. When there are conflicting views, then the court must bow down to the opinion of the experts. Judges are not and cannot be experts in all fields and, therefore, they must exercise great restraint and should not overstep their jurisdiction to upset the opinion of the experts.

15. In view of the above discussion we are clearly of the view that the High Court over stepped its jurisdiction by giving the directions which amounted to setting aside the decision of experts in the field. As far as the objection of the appellant - Rahul Singh is concerned, after going through the question on which he raised an objection, we ourselves are of the *prima facie* view that the answer given by the Commission is correct.

16. In view of the above discussion we allow the appeal filed by the U.P. Public Service Commission and set aside the judgment of the Allahabad High Court. The appeals filed by Rahul Singh and Jay Bux Singh and Others are dismissed. All pending applications stand disposed of.

2018 (II) ILR - CUT- 5 (S.C.)

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

CRIMINAL APPEAL NO.803 OF 2018
(ARISING OUT OF SLP(CRL.) NO.10030 OF 2016)

KISHAN RAO .....Appellant

.Vs.

SHANKARGOUDA .....Respondent

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 and 139 – Proceeding under – Accused took the plea that the cheque was stolen – Presumption of debt or liability by the court on the basis of evidence adduced by complainant – Accused led no rebuttal evidence to discard such presumption – Convicted – Confirmed in appeal – In criminal revision High Court held that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability – No basis for such finding – Held, the High court exceeded its revisional jurisdiction – Order of conviction confirmed.

"The trial court after considering the evidence on record has returned the finding that the cheque was issued by the accused which contained his signatures. Although, the complainant led oral as well as documentary evidence to prove his case, no evidence was led by the accused to rebut the presumption regarding existence of debt or liability of the accused. The High Court has not returned any finding that order of conviction based on evidence on record suffers from any perversity or based on no material or there is other valid ground for exercise of revisional jurisdiction. There is no valid basis for the High Court to hold that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. The appellant has proved the issuance of cheque which contained signatures of the accused and on presentation of the cheque, the cheque was returned with endorsement "insufficient funds". Bank official was produced as one of the witnesses who proved that the cheque was not returned on the ground that it did not contain signatures of the accused rather it was returned due to insufficient funds. We are of the view that the judgment of High Court is liable to be set aside on this ground alone." (Paras 15 & 20)

Case Laws Relied on and Referred to :-

1. 2010 (11) SCC 441 : Rangappa vs. Sri Mohan.
2. 2015 (3) SCC 123 : Sanjaysinh Ramrao Chavan vs. Dattatray Gulabrao Phalke & Ors.
3. 2009 (2) SCC 513 : Kumar Exports vs. Sharma Carpets.
4. 1999 (2) SCC 452 : State of Kerala vs. Puttumana Illath Jathavedan Namboodiri.

For Appellant : Mr. M.A. Krishnamoorthy

JUDGMENT Date of Judgment : 02.07.2018

ASHOK BHUSHAN, J.

This appeal has been filed against the judgment and order of the High Court dated 18.03.2016 by which judgment, Criminal Revision Petition filed by the respondent-accused was allowed by setting aside the order of conviction and sentence recorded against the accused under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "Act 1881"). The parties shall be hereinafter referred to as described in the Magistrate's Court.

2. Brief facts of case are:

The appellant(complainant) and the respondent (accused) were known to each other and had good relations. Accused approached the complainant for a loan of Rs.2,00,000/- for the purpose of his business expenses and promised to repay the same within one month. On 25.12.2005, complainant had paid sum of Rs.2,00,000/- as a loan. For repayment of the loan accused issued post dated cheque dated 25.01.2006 in the name of complainant for the amount of Rs.2,00,000/-. The cheque was presented for collection at Bank of Maharashtra Branch at Gulbarga which could not be encashed due to insufficient funds. At the request of the accused the cheque was again represented on 01.03.2006 for collection which was returned on 02.03.2006 by the Bank with the endorsement "insufficient funds".

3. A notice was issued by the complainant demanding payment of s.2,00,000/- which was received by the accused on 14.03.2006 to which reply was sent on 31.03.2006. A complaint was filed by the appellant alleging the offence under Section 138 of the Act, 1881. Cognizance was taken by the Magistrate. Accused

stated not guilty of the offence, hence, trial proceeded. In order to prove the guilt, the complainant himself examined as PW.1 and examined two other witnesses PW.2 and Pw.3. He filed documentary evidence Exhs.P1 and P6, statement of the accused was recorded under Section 313 Cr.P.C. Thereafter, the case proceeded for defence evidence. Accused neither examined himself nor produced any evidence either oral or documentary. In the reply to the notice which was sent by the complainant, it was alleged that the said cheque was stolen by the complainant. The complainant was cross-examined by the defence. In the cross-examination defence denied accused's signatures on the cheque. The trial court rejected the defence of the accused that cheque was stolen by the complainant. The trial court drew presumption under Section 139 of the Act, 1881 against the accused. Accused failed to rebut the presumption by leading any evidence on his behalf. The offence having been found proved, the trial court convicted the accused under Section 138 of the Act, 1881 and sentenced him to pay a fine of Rs.2,50,000/- and simple imprisonment for six months.

4. The appeal was filed by the accused against the said judgment. The Appellate Court considered the submissions of the parties and dismissed the appeal by affirming the order of conviction.

5. Criminal Revision was filed by the accused in the High Court. The High Court by the impugned judgment has allowed the revision by setting aside the conviction order. The High Court held that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. Complainant aggrieved by the judgment of the High Court has come in this appeal.

6. Learned counsel for the appellant submits that the offence having been proved before the trial court by leading evidence, the conviction was recorded by the trial court after appreciating both oral and documentary evidence led by the appellant which order was also affirmed by the Appellate Court. There was no jurisdiction in the High court to re-appreciate the evidence on record and come to the conclusion that accused has been able to raise a doubt regarding existence of the debt or liability of the accused. He submits that the High court in exercise of jurisdiction under Section 379/401 Cr.P.C. can interfere with the order of the conviction only when the findings recorded by the courts below are perverse and there was no evidence to prove the offence against the accused. It is submitted that in exercise of the revisional jurisdiction the High Court cannot substitute its own opinion after re-appreciation of evidence.

7. It is submitted that the presumption under Section 139 was rightly drawn against the accused and accused failed to rebut the said presumption by leading evidence. There was no ground for setting aside the conviction order.

Although, the respondent was served but no one appeared at the time of hearing.

9. We have considered the submissions of the appellant and perused the records.

10. The trial court after considering the evidence on record has returned the finding that the cheque was issued by the accused which contained his signatures. Although, the complainant led oral as well as documentary evidence to prove his case, no evidence was led by the accused to rebut the presumption regarding existence of debt or liability of the accused.

11. This Court has time and again examined the scope of Section 397/401 Cr.P.C. and the ground for exercising the revisional jurisdiction by the High Court. In ***State of Kerala vs. Puttumana Illath Jathavedan Namboodiri, 1999 (2) SCC 452,*** while considering the scope of the revisional jurisdiction of the High Court this Court has laid down the following:

> *"5.....In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinizing the impugned judgment of the High Court from the aforesaid standpoint, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the respondent by reappreciating the oral evidence....."*

12. Another judgment which has also been referred to and relied by the High Court is the judgment of this Court in ***Sanjaysinh Ramrao Chavan vs. Dattatray Gulabrao Phalke and others, 2015 (3) SCC 123.*** This Court held that the High Court in exercise of revisional jurisdiction shall not interfere with the order of the Magistrate unless it is perverse or wholly unreasonable or there is non-consideration of any relevant material, the order cannot be set aside merely on the ground that another view is possible. Following has been laid down in paragraph 14:

> *"14.....Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court under Sections 397 to 401 CrPC is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or*

where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction."

13. In the above case also conviction of the accused was recorded, the High Court set aside the order of conviction by substituting its own view. This Court set aside the High Court's order holding that the High Court exceeded its jurisdiction in substituting its views and that too without any legal basis.

14. Now, we proceed to examine order of the High Court in the light of the law as laid down in the above mentioned cases. The High Court itself in paragraph 40 has given its reasons for setting aside the order of conviction, it has observed that though perception of a person differs from one another with regard to the acceptance of evidence on record but in its perception and consideration, the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. It is relevant to notice what has been said in paragraph 40 of the judgment which is to the following effect:

"40. In view of the above said "facts and circumstances, though perception of a person differs from one another with regard to the acceptance of evidence on record but in my perception and consideration, the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability particularly with reference to the alleged transaction dated 25.12.2005 as alleged by the complainant. Hence, in my opinion the High Court has full power to interfere with such judgment of the Trial Court as subject matter exactly falls within the parameters of Section 397 of the Code and also guidelines of the Apex Court as noted in the above said decisions. Therefore, I am of the considered opinion the Trial Court and the First Appellate Court have committed serious error in merely proceeding on the basis of the presumption under Section 139 of the Act and also on the basis that, the accused has not proved his defence with reference to the loss of cheque etc. Hence, I answered the point in the affirmative and proceeded to pass the following:

ORDER

The revision petition is hereby allowed. Consequently, the judgment and sentence passed by the III-Addl. Civil Judge (Jr.Dn.) & JMFC, Kalaburagi in C.C.No.1362/2006 which is affirmed by Fast Track Court – 1 at Kalaburagi in Cr.A.No.46/2009 are hereby set aside. Consequently, the accused is acquitted of the charges levelled against him under Section 138 of N.I.Act. If any fine amount is deposited by the accused/petitioner, the same is ordered to be refunded to him...."

15. The High Court has not returned any finding tha order of conviction based on evidence on record suffers from any perversity or based on no material or there is other valid ground for exercise of Revisional jurisdiction. There is no valid basis for the High Court to hold that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. The appellant has proved the issuance of cheque which containedsignatures of the accused and on presentation of the cheque, the cheque was returned with endorsement "insufficient funds". Bank official was produced as one of the witnesses who proved that the cheque was not returned on the ground that it did not contain signatures of the

accused rather it was returned due to insufficient funds. We are of the view that the judgment of High Court is liable to be set aside on this ground alone.

16. Even though judgment of the High Court is liable to be set aside on the ground that High Court exceeded its revisional jurisdiction, to satisfy ourselves with the merits of the case, we proceeded to examine as to whether there was any doubt with regard to the existence of the debt or liability of the accused.

17. Section 139 of the Act, 1881 provides for drawing the presumption in favour of holder. Section 139 is to the following effect:

> *"**139.Presumption in favour of holder.-** It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."*

18. This Court in ***Kumar Exports vs. Sharma Carpets, 2009 (2) SCC 513,*** had considered the provisions of Negotiable Instruments Act as well Evidence Act. Referring to Section 139, this Court laid down following in paragraphs 14, 15, 18 and 19:

> ***"14.** Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.*
>
> ***15.** Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable), and (3) "conclusive presumptions" (irrebuttable). The term "presumption" is used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".*
>
> ***18.** Applying the definition of the word "proved" in section 3 of the Evidence Act to the provisions of sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.*
>
> ***19.** The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence*

fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."

19. This Court held that the accused may adduce evidence to rebut the presumption, but mere denial regarding existence of debt shall not serve any purpose. Following was held in paragraph 20:

*"**20....**The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist..."*

20. In the present case, the trial court as well as the Appellate Court having found that cheque contained the signatures of the accused and it was given to the appellant to present in the Bank of the presumption under Section 139 was rightly raised which was not rebutted by the accused. The accused had not led any evidence to rebut the aforesaid presumption. The accused even did not come in the witness box to support his case. In the reply to the notice which was given by the appellant the accused took the defence that the cheque was stolen by the appellant. The said defence was rejected by the trial court after considering the evidence on record with regard to which no contrary view has also been expressed by the High Court.

21. Another judgment which needs to be looked into is ***Rangappa vs. Sri Mohan, 2010 (11) SCC 441.*** A three Judge Bench of this Court had occasion to examine the presumption under Section 139 of the Act, 1881. This Court in the aforesaid case has held that in the event the accused is able to raise a probable defence which creates doubt with regard to the existence of a debt or liability, the presumption may fail. Following was laid down in paragraphs 26 and 27:

***"26.** In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat, (2008) 4 SCC 54, may not be correct However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the xistence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant.*

***27.** Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay*

in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard or proof."

22. No evidence was led by the accused. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two courts below, we do not see any basis for the High court coming to the conclusion that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. How the presumption under Section 139 can be rebutted on the evidence of PW.1, himself has not been explained by the High court.

23. In view of the aforesaid discussion, we are of the view that the High Court committed error in setting aside the order of conviction in exercise of revisional jurisdiction. No sufficient ground has been mentioned by the High Court in its judgment to enable it to exercise its revisional jurisdiction for setting aside the conviction.

24. In the result, the appeal is allowed, judgment of the High Court is set aside and judgment of trial court as affirmed by the Appellate Court is restored.

2018 (II) ILR - CUT- 12

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

W.P.(C) NO. 3202 OF 2018

TARUN MOHANTY .....Petitioner

.Vs.

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

LEGAL MAXIM – *Ut res megis valeat quam perrat* – Meaning thereof – It is better for a thing to have effect than to be made void – Govt. circular/notification granting certain benefits – Held, has to be construed on the basis of plain language used in it to give effect to the intention of the Government – The liberal constructions of written documents are to be made because of the simplicity of the laity, and with a view to carry out the intention of the parties and uphold the document; and words ought to be made subservient, not contrary, to the intention.

Case Laws Relied on and Referred to :-

1. AIR 1993 SC 1601 : Food Corporation of India v. M/s. Kamdhenu Cattle Feed Industries.
2. 1996 (6) SCC 593 : Common Cause v. Union of India.
3. AIR 1990 SC 1031 : Mahabir Auto Stores v. Indian Oil Corporation.
4. AIR 1997 SC 1483 : Shiv Sagar Tiwari v. Union of India and Ors.

For petitioner : M/s P.C. Nayak & S.K. Rout,
For opp. parties : Mr. B.P. Pradhan, Addl. Govt. Adv.
M/s R.K. Mohapatra & N. Mohapatra.

JUDGMENT Decided on : 09.04.2018

VINEET SARAN, C.J.

The petitioner is an 'A' class contractor registered under PWD Contractors' Registration Rules, 1967, so also is opposite party no.4. The Superintending Engineer, Eastern Circle (R&B), Balasore, on behalf of Governor of Odisha, invited public tender, vide Bid Identification No. SEEC(R&B)-06/2017-18 dated 23.11.2017, for several works including the one at serial no.4, i.e., "Construction of H.L. Bridge over Raigudi Nallah at 80/575 Km on Sergarh-Nilgiri-Kaptipada-Udala-Baripada-Midanapur Road (SH-19) for the year 2017-18" with estimated cost of Rs.3,81,89,339.00 paise. The last date of submission of bid was 22.12.2017 up to 5.00 PM. The date of opening of technical bid cover was 27.12.2017 at 4.00 PM. Pursuant to such tender call notice, 13 bidders participated including the petitioner as well as opposite party no.4. The petitioner, having complied with all criteria, qualified in the technical bid. Thereafter, price bid was opened on 12.02.2018 and it was found that the petitioner was 1st lowest tenderer and the opposite party no.4 was 5th lowest tenderer. Therefore, in normal course, the petitioner, being the L-1, should have been given the tender. Instead of doing so, the bid of opposite party no.4, who belonged to scheduled caste, was treated as lowest, after granting the benefit of 10% price preference under the State Government notification/circular dated 11.10.1977, and opposite party no.4 was awarded with the tender, hence this application.

2. Mr. P.C. Nayak, learned counsel appearing for the petitioner contended that since the license of opposite party no.4, which was of 'A' class contractor, does not indicate that the license has been given to a scheduled caste person, he would not be entitled to the benefit of the circular dated 11.10.1977. The submission is that the provision of noting the caste in the license is only upto 'B' class contractor and, as such, since the license of 'A' class and above contractors do not have the provision of mentioning the caste, hence the intention of the Government was to give the benefit of the circular dated 11.10.1977 only to contractors upto 'B' class and not above.

3. Per contra, learned Addl. Government Advocate, as well as Sri R.K. Mohapatra, learned counsel appearing for opposite party no.4 have submitted that the benefit of the circular dated 11.10.1977 is to be given to all classes of contractors, which is for the benefit of Scheduled Caste and Scheduled Tribe contractor, without any limitation with regard to category/class of the contractors.

4. We have heard Sri P.C. Nayak, learned counsel for the petitioner, as well as Sri B.P. Pradhan, learned Addl. Government Advocate appearing for State opposite parties no.1 to 3 and Sri R.K. Mohapatra, learned counsel for opposite party no.4

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

5. On the basis of the pleadings available on record and the contentions raised by learned counsel for the parties, two questions emerge for consideration; firstly, whether the notification/circular dated 11.10.1977 would be applicable only up to 'B' class contractors and not for 'A' class, special-class and super-class contractors; and secondly, whether the opposite party no.4 had provided the requisite information under Schedule-G of the tender call notice relating to existing commitments and ongoing works, and as such his bid should have been technically disqualified or not.

6. For better appraisal, the circular/notification dated 11.10.1977 is reproduced below:

> ***"Guidelines to Works Department Government Instructions***
>
> ***Grant of Concession to Schedule Caste And Scheduled Tribe Contractors***
>
> *The question of providing certain concessions to S.C. and S.T. Contractors regarding award of works had engaged the attention of Govt. for some time past. On the basis of the recommendation of the Committee of Chief Engineers it has now been decided to allow the following facilities to individual S.C. and S.T. Contractors/Private Limited Companies/ and partnership farms in which atleast 51% of the share are held by members of Scheduled Caste and Scheduled Tribe for execution of PWD Works.*
>
> *The Scheduled Caste and Scheduled Tribe applicants desirous of enrolling themselves as contractors may furnish solvency certificate to the extent of 50% only of the amount of solvency* ***prescribed for various classes of Contractors*** *under Rule 7 of the PWD Contractors registration rules 1967.*
>
> *If the tender of the following type of Scheduled Caste and Scheduled Tribe Contractors is within 10% of the rate quoted by the lowest tender for any work, the work may8 be considered for award to him/them at the lowest tenders rate in the relaxation of Rule 18 of the O.G.F.R. Vol.-I and Para 3.5.14 of the OPWD Code.*
>
> ***(a) Individual registered Contractors belongs to the S.C. and S.T.***
>
> *(b) Private Limited companies in which atleast 51% of the share are held by member of Scheduled Caste and/or Scheduled Tribe.*
>
> *(c) Partnership Farms in which atleast 51% of the share are held by members of Scheduled Caste and/or Scheduled Tribes.*
>
> *The security deposit (earnest money initial security and performance security) at half the usual rate may be deposited realized by/from the Scheduled Caste or Scheduled Tribe Contractors coming under the categories upto 'B' Class only as against the prescribed percentage under Rule 13 of the PWD Contractors registration rules. The above concession will take effect from date of issue of the resolution."*
>
> ***(emphasis supplied)***

7. In the second paragraph of the said circular, it is clearly mentioned that the benefit of 50% of the amount of solvency is to be provided for all class of Scheduled Caste and Scheduled Tribe applicants. In the said circular, it is provided that relaxation could be given if "individual registered contractors belongs to the

scheduled caste and scheduled tribe". From this, it would be clear that the registered contractor belonging to Scheduled Caste and Scheduled Tribe category are to be given the benefit of the circular. It is not stated that individual contractor registered as Scheduled Caste and Scheduled Tribe contractors are to be given the benefit. What is required is that the individual contractor should be registered with the Department/Government, and should belong to Scheduled Caste or Scheduled Tribe category. In the present case, it is not disputed that opposite party no.4 is a registered contractor and also belongs to Scheduled Caste category. As such, he would be covered under the said circular.

8. There is no provision in the circular dated 11.10.1977 providing for the benefit to be given to the registered contractors of the category upto 'B' class contractors. The only additional concession given to the Scheduled Caste and Scheduled Tribe contractors upto category of 'B' class is with regard to security deposit, which would be only 50% of the usual rate. The second paragraph of the circular dated 11.10.1977 makes it clear that the benefit under the same would be available to all classes of contractors. Merely because certain additional benefit is given to Scheduled Caste and Scheduled Tribe contractors upto 'B' class category would not mean that the remaining benefits under the circular would not be given to the contractors of category 'A' class and above.

9. The further submission of learned counsel for the petitioner is that the benefit under the circular should not be given to contractors of category 'A' class and above because such contractors are well to do and take contracts of high valuation and thus do not deserve to be given such concession. The same is not worthy of acceptance. The circular does not make any distinction between various classes of Scheduled Caste and Scheduled Tribe contractors with regard to the benefits to be given to them. Certain additional benefits have been provided for categories upto 'B' class, which question is not involved in the present case. In the present case, the question involved is with regard to grant of 10% price preference, which, in our opinion, would be available to all classes of contractors, including the opposite party no.4, who is a 'A' class contractor.

10. The circular/notification dated 11.10.1977 has to be construed on the basis of plain language used in it. Therefore, the notification must be construed as to give effect to the intention of the Government as disclosed by the circumstances with the help of the maxim *ut res megis valeat quam perrat* (It is better for a thing to have effect than to be made void). The liberal constructions of written documents are to be made because of the simplicity of the laity, and with a view to carry out the intention of the parties and uphold the document; and words ought to be made subservient, not contrary, to the intention.

11. Giving the plain meaning attached to the notification itself and as discussed above, in our view, the first submission of learned counsel for the petitioner that the

opposite party no.4, being an 'A' class contractor, would not be entitled to the benefit of the circular dated 11.10.1977, is not acceptable.

12. In ***Shiv Sagar Tiwari v. Union of India and Ors.,*** AIR 1997 SC 1483, the apex Court held that whatever procedure the Government proposes to follow in accordance with the tender must be clearly stated in the tender notice. The consideration of the tender received and procedure followed in the matter of acceptance of tender should be transparent, fair and open. Similar view has also been taken in ***Common Cause v. Union of India***, 1996 (6) SCC 593**.** The powers of judicial review in the arena of contractual jurisdiction has been widened, as has been held by the Supreme Court in ***Mahabir Auto Stores*** *v.* ***Indian Oil Corporation***, AIR 1990 SC 1031, as well as ***Food Corporation of India*** *v.* ***M/s. Kamdhenu Cattle Feed Industries***, AIR 1993 SC 1601.

13. With regard to the second submission that in the prescribed Schedule-G, the opposite party no.4 has only submitted details of the works which he had completed up to the year 2015, and has not given the details of the "existing commitments and ongoing works", we are of the opinion that since no averment has been made in the writ application to the effect that the petitioner has any ongoing work, details of which he ought to have provided, the second submission made by learned counsel for the petitioner with regard to non-furnishing of requisite details in Schedule-G is also not worthy of acceptance.

14. For the foregoing reasons, we do not find any merit in this writ petition and accordingly the same is dismissed. However, there shall be no order as to costs.

2018 (II) ILR - CUT- 16

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

W.P.(C) No. 9890 of 2018

DIBYA JYOTI NANDA ……..Petitioner

.Vs.

CENTRAL BOARD OF SECONDARY-EDUCATION (CBSE) & ANR. ……..Opp. Parties

ACADEMIC QUESTION – Petitioner appeared in NEET examination conducted by the CBSE for admission in MBBS Course – After publication of result, the petitioner found error of not awarding mark to a correct answer – Reason stated that it was an error by computer – Whether court can interfere in such a situation – Held, Yes.

"This Court is very much conscious about its power of interference in award of marks in the examination conducted by the CBSE, i.e., NEET (UG)-2018. But considering the nature of marks awarded, as discussed above, this Court cannot sit as a mute spectator and cannot tie its hands when it finds that gross illegality and irregularity has been committed on

the basis of procedure adopted by the authority, which is arbitrary and capricious. In case where mistake is glaring, the Court has got every power to step into the issue when it pricks its conscience that an illegality has been done to a candidate. Even though the petitioner has answered correctly by blacking the correct answer, but no mark has been award or rather negative mark has been awarded on flimsy ground of computer evaluation because of voltage fluctuation or presence of the dust particles or some spots found in the OMR sheets, by which a negative mark has been awarded to the petitioner. Marks awarded by the computer cannot be taken into consideration as absolute. Because of the machinery error if some wrong has been committed, in such case the human analysis should be made to the answer given by a candidate. In the present case, on verification of the OMR sheet of the petitioner, the mistake committed by the computer in evaluation of marks to Question No.146 is apparent and admitted by the opposite parties. The same cannot be condoned or ignored by the Court on the casual explanation given by the opposite party that the mistake by the computer could have been because of voltage fluctuation or dust particles on the OMR sheet. It is a serious matter which affects the educational career of a student, and once such a glaring mistake has been brought to the notice of this Court and not been properly explained by the authorities, this Court cannot shut its eyes and let the student suffer."

(Paras 15 & 16)

Case Laws Relied on and Referred to :-

1. (2012) 1 SCC 157 : Sanchit Bansal v. Joint Admission Board.
2. (2009) 11 SCC 726 : All India Council for Technical Education v. Surinder Kumar Dhawan.

For Petitioner : M/s. S.J. Nanda, P.K. Mishra & N. Panda.

For Opp. Parties : M/s. T.N. Pattanayak & M. Ojha.

JUDGMENT Decided on : 24.07.2018

VINEET SARAN, CJ.

On 20.07.2018, this Court directed that the matter to be listed today as Shri T.N. Pattanayak, learned counsel for the opposite party-CBSE had request to allow the Director, NEET, CBSE to appear before this Court to explain the discrepancy in the marking/evaluation of the OMR answer sheet of the petitioner. Since this case was not placed in the regular list, a mention was made by Shri T.N. Pattanayak, learned counsel for opposite party no.2-CBSE in the morning hour that the Director, NEET is present as the date was fixed to today and, on his request, the case is taken up as a Special Notice matter in presence of learned counsel for the petitioner.

2. The brief facts of this case are that the petitioner had appeared NEET (UG)-2018 Examination conducted by the CBSE for admission in MBBS Course. He was allowed registration no.40236074, roll no.50990308 and test booklet no.2281248, having examination centre at St. Xaviers High School, Mahima Nagar, Naya Bazar, Cutack. The date of examination was 06.05.2018. He was issued with an admit card to appear at such examination. The petitioner performed the examination to his satisfaction and ultimately the CBSE published the result of the NEET (UG)-2018 in due time. CBSE, in its website on 25.05.2018, also published the answer key of questions, so also OMR sheet of the candidates for verification, as well as for appeal, in case of any error was found by the candidates. The petitioner, on verification, found two errors and challenged the same on payment of requisite fees.

The petitioner specifically challenged that the answer as per the CBSE answer key in respect of question no.146 (Chemistry) was option no.4 and he blackened the said option no.4, but mark against the said question was not awarded to him. Secondly, in Physics from question no.1 to 45 was answered by the petitioner and on re-consideration of the questions, OMR sheet and answer key, the petitioner is entitled to get 102 marks, but in the result published on 05.06.2018, he was awarded with only 97 marks. Even though the petitioner filed objection, the same was not considered in proper perspective. Finding no other way out, the petitioner approached this Court by filing the present application.

3. Shri S.J. Nanda, learned counsel appearing for the petitioner contended in course of hearing that besides blackening of the circle of the option in the OMR sheet, which the petitioner had given for answers to Questions No.61, 146 and 147, there were certain dot marks in other option columns, because of which, though the answer to Question 147 was accepted and taken as correct, but the answers to Questions No.61 and 146 were negated, even though dot marks (as noticed by this Court vide order dated 13.07.2018 after having examined the original OMR sheet) with regard to Questions No.61 and 146 were lesser than the one in the answer to Question No.147. Thus, it is contended that the petitioner is entitled to get mark against question no. 61 and question no. 146 so as to enable him to score higher marks so that he can get better institution for admission. It is further contended that on the basis of the result published, the petitioner had also taken admission to the VSS Medical College, Burla, but in the event the marks will be enhanced, he may exercise his option for up-gradation of institution and prosecute the studies in a better institution than the present one. Therefore, being aggrieved by the evaluation of his answer script, which was on OMR sheet, the petitioner has filed this writ petition claiming that the answer to Questions No.61 and 146 have wrongly not been evaluated and negative marks awarded, even though the answers to Question No.146 was correct.

4. Shri T.N. Pattanayak, learned counsel appearing for the CBSE, with reference to counter affidavit, contended that Clause-4 of Chapter-7 of the Information Bulletin deals with rules for re-checking/re-evaluation of answer sheets and reasons thereof are stated therein. Chapter-7 deals with post examination activities and declaration of result, wherein provision for display of OMR sheets and responses on website is provided for. The answer key of the CBSE is also displayed to challenge the respective questions they are dissatisfied with. It is further contended that 108 questions comprising of 45 questions from Physics, 45 from Chemistry and 90 from Biology i.e. (45 Zoology and 45 Botany) and there are 4 marks allocated for each correct answer and 1 mark is deducted for each incorrect answer. On the basis of performance of the candidate, the result has been accordingly prepared and as per such instruction, the candidate has secured 97 marks in Physics, 122 marks in Chemistry and 133 marks in Biology. The opposite parties, by public notice dated 24.05.2018, invited objections to the responses marked by the

candidates in the OMR sheets, answer key and the test booklet of the candidates. It is contended that when the result was published on 04.06.2018, the marks awarded to the petitioner was very much in consonance with his performance. Therefore, this Court should not interfere with the marks awarded to the petitioner in the NEET (UG)- 2018 examination.

5. We have heard Shri S.J. Nanda, learned counsel for the petitioner and Shri T.N. Pattanayak, learned counsel appearing for CBSE. Pleadings between the parties having been exchanged, with their consent, the matter is being finally disposed of at the stage of admission taking into consideration its urgency.

6. While assessing and evaluating the answer key of the NEET examination, it has been allegedly found by CBSE that the petitioner, while marking his responses by blackening the oval circles on the OMR sheet against question no. 61 and question no.146, has given two responses as there are dot marks in other option also. Consequentially, the negative marking has been done as per instructions in the Information Bulletin. It is not disputed that if the answer to Question No.61 is evaluated as per the blackening of the option given by the petitioner, the answer would still remain wrong and the petitioner would thus be awarded minus 1 mark. However, answer to Question No.146 has also been negated by the opposite party-NEET, CBSE and the petitioner has been awarded minus 1 mark merely because there were some dots in another option, besides the one which was blackened by the petitioner, and the petitioner has been awarded minus 1 mark, whereas the answer given by the petitioner by blackening his option was correct and he ought to have been awarded plus 4 marks. In the case of Question No.147, the blackening of the option given by the petitioner was correct, whereas there were more dot marks in the other option than the one which was blackened by the petitioner, but that answer is admittedly taken as correct and the petitioner has been correctly awarded plus 4 marks.

7. The dispute in the present case is that the petitioner has been awarded minus 1 mark to Question No.146. By order dated 10.07.2018, the original OMR sheet of the petitioner was directed to be placed before us, as the photocopy filed by the petitioner along with the writ petition (which was obtained by him through the website of the CBSE) was not very clear. On examining the original OMR sheet of the petitioner, which was placed before us by Shri Bikash Arora, Asst. Secretary, NEET Unit of CBSE, this Court on 13.07.2018 passed a detailed order, which is reproduced as under:

> *"In compliance to Court's order dated 10.7.2018, the original OMR sheet has been placed before us.*
>
> *2. We have noticed from the said original OMR sheet that in response to the question no. 61, answer is clear as there is complete blackening of option no.1. There is a dot or two on the option no.3 of the said question, and thus, negative mark has been given for such question. Further with regard to questions no.146 and 147, there are some dot marks in other option beside the one which has been totally blackened. The question no. 147 had been evaluated*

as per the option of the petitioner given by blackening of the entire circle, even though there is a bigger dot mark in the other option than that of question no.61. However, in the case of question no. 146, where there also is admittedly a small dot mark in the other option, even when the option no. 4 had been totally blackened, the petitioner has been awarded negative mark. From a bare perusal of the order sheet, the defect in question nos. 146 and 147 is the same, whereas question 147 has been found to be in order but for question 146 negative mark has been awarded for the same defect.

3. Sri Pattnaik, learned counsel for the opposite party, however, could not justify the rejection of the option given by the petitioner with regard to questions no. 61 and 146, especially when the option given by the petitioner with regard to question no. 147 had been accepted.

4. Sri Bikash Arora, Asst. Secretary, NEET Unit of CBSE, Delhi is present in Court and has submitted that this is a mistake by the Computer for which CBSE is unable to do anything.

At this stage, Sri Pattnaik sought time to seek further instruction in this regard as it cannot be denied that there has been discrepancy in the evaluation of OMR sheet of the petitioner.

5. On his request, list this matter on 16.7.2018 amongst the top five cases under the heading "Fresh Admission".

8. Then on 16.07.2018, this Court passed the following order:

"An affidavit of the Asst. Secretary, CBSE has been filed today, in which no explanation with regard to discrepancy noticed by this Court in its order dated 13.07.2018 has been given

On 13.07.2018, this Court passed a detailed order after examining the OMR sheet, which was placed before this Court. On that date, the Asst. Secretary, NEET Unit of CBSE, Delhi was present in Court and had submitted that "this is a mistake by the Computer for which CBSE is unable to do anything". Sri T.N. Pattnaik, learned counsel appearing for the opposite parties-CBSE had on that date sought time to seek further instructions, as it could not be denied that there has been discrepancy in evaluation of OMR sheet of the petitioner.

Today Sri Pattnaik, learned counsel for the CBSE has, on having received telephonic instruction from Dr. Sanyam Bhardwaj, Director NEET unit of CBSE, Delhi, made a statement that the Director, NEET shall file an affidavit in this regard by 20.07.2018 and shall also be present in Court to explain the discrepancies. Sri Pattnaik has, on having received instruction, further stated that till 20.07.2018 further round of counseling all over India shall not be held, as the same has already been stayed by the Madurai Bench of the Madras High Court.

In view of the aforesaid statement given by Sri Pattnaik, we are not passing any interim order at this stage, as it has already been stated that no further counseling all over India will take place till next date i.e. 20.07.2018.

List on 20.07.2018 amongst top five fresh admission cases."

9. Thus the matter was adjourned to 20.07.2018, which was on the request of Shri T. Pattanayak, learned counsel for the CBSE, to enable the Director, NEET to be present in Court.

10. The matter was again adjourned on 20.07.2018 for today, when an affidavit has been filed by Shri Sanyam Bhardwaj, Director (Academic & NEET) CBSE, who also is present in Court.

11. Shri Sanyam Bhardwaj, Director (Academic & NEET) CBSE has addressed this Court to explain the discrepancies. Unfortunately, he has not brought the original OMR sheet of the petitioner which was examined by this Court on 13.07.2018, but has agreed with the observation made by us in our order dated 13.07.2018. He has, however, stated that the discrepancy/mistake is because of the evaluation by the computer, which could have been because of power fluctuation or because of there being dust particles, which may have spread over OMR sheet, which could have happened because of working of large number of scanners at the same time. He has further stated that if this Court interferes in this matter, it would open a pandora box as a large number of petitions could be filed.

12. In the affidavit filed today, he has tried to explain the discrepancy in sub-paragraphs-(xvi), (xvii), (xviii) & (xix) to paragraph-3, which are reproduced below:

> *"(xvi) In case of the method of giving correct responses, the information is given in Chapter 5 of the Information Bulletin at page no.16 by giving examples of marking the answers.*
>
> *(xvii) In case of the petitioner question no.61, 146 & 147, these all falls under the category of 0 to 8 of the wrong method of marking answers, accordingly all should be evaluated as per rule position i.e. if more than one circle is darkened or if the response is marked in any manner as shown above heading indicating wrong method shall be treated as wrong way of marking. More than one answer indicated in the question will be treated as incorrect response and will be negatively marked.*
>
> *(xviii) As per the said rule number scanning both the scanners have read the question number 61 & 146 as multiple answers and thus -1 marks per question has been deducted. However, in case of question no.147 corrected one i.e. 3, has been picked up by both scanners and thus +4 marks have been awarded to the petitioner, thus being the wrong method of marking answer.*
>
> *(xix) Even during the challenge of the responses by the petitioner as petitioner was awarded 4 marks, the benefit has been given to the petitioner by not reducing 4 marks from the total and there after deducting 1 mark as wrong method of answer. With this the petitioner has get the benefit of 5 marks."*

13. In ***All India Council for Technical Education v. Surinder Kumar Dhawan***, (2009) 11 SCC 726 the apex Court, while considering the Court's role in academic matters, has firmly expressed its opinion to the effect that if it is a question of educational policy or an issue involving academic matter, the Courts keep their hands off. If any provision of law or principle of law has to be interpreted, applied or enforced, with reference to or connected with education, the Courts will step in.

14. In ***Sanchit Bansal v. Joint Admission Board***, (2012) 1 SCC 157, the Supreme Court broadened further the area of interference and observed that the Courts will interfere if they find all or any of the following: (i) violation of any enactment, statutory rules and regulations; (ii) mala fide or ulterior motives to assist or enable private gain to someone or cause prejudice to anyone or (iii) where the procedure adopted is arbitrary and capricious.

15. This Court is very much conscious about its power of interference in award of marks in the examination conducted by the CBSE, i.e., NEET (UG)-2018. But

considering the nature of marks awarded, as discussed above, this Court cannot sit as a mute spectator and cannot tie its hands when it finds that gross illegality and irregularity has been committed on the basis of procedure adopted by the authority, which is arbitrary and capricious. In case where mistake is glaring, the Court has got every power to step into the issue when it pricks its conscience that an illegality has been done to a candidate. Even though the petitioner has answered correctly by blacking the correct answer, but no mark has been award or rather negative mark has been awarded on flimsy ground of computer evaluation because of voltage fluctuation or presence of the dust particles or some spots found in the OMR sheets, by which a negative mark has been awarded to the petitioner. Marks awarded by the computer cannot be taken into consideration as absolute. Because of the machinery error if some wrong has been committed, in such case the human analysis should be made to the answer given by a candidate.

16. In the present case, on verification of the OMR sheet of the petitioner, the mistake committed by the computer in evaluation of marks to Question No.146 is apparent and admitted by the opposite parties. The same cannot be condoned or ignored by the Court on the casual explanation given by the opposite party that the mistake by the computer could have been because of voltage fluctuation or dust particles on the OMR sheet. It is a serious matter which affects the educational career of a student, and once such a glaring mistake has been brought to the notice of this Court and not been properly explained by the authorities, this Court cannot shut its eyes and let the student suffer.

17. A casual submission made by the Director, NEET, CBSE, that if this Court interferes in this matter it would open a Pandora box, should not hold the Court back from granting relief in a genuine case where discrepancy in evaluation of marks has been found and not explained by the authorities.

18. Therefore, in view of the facts of this case and the law laid down by the apex Court, as discussed above, and applying the same to the factual aspects of the case in hand, since there has admittedly been discrepancy in evaluation of marks in OMR sheet of the petitioner, which is arbitrary and capricious, this Court deems it proper to interfere with the same in greater interest of justice, equity and fair play.

19. Accordingly, this writ petition is allowed to the extent that the petitioner shall be awarded plus 4 marks for Question No.146 instead of minus 1 mark, which was awarded because of the wrong evaluation of the answer sheet by the computer. There shall be no change in the evaluation of marks with regard to all other questions including Question Nos.61 and 147. The change in mark shall be communicated to the Chairman, OJEE at the earliest, but not later than a week, so that the petitioner can exercise his option for up-gradation of his institution to prosecute his studies in MBBS course in better institution than that of the present one. This order is being passed in the particular facts of this case and may not be treated as a precedent.

2018 (II) ILR - CUT- 23

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

W.P.(C) NO. 355 OF 2018

M/S. PREMIUM SERUMS & VACCINES PVT. LTD. & ANR. .....Petitioners

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Article 14 – Tender matter – Writ petition challenging rejection of tender on the ground of a minor mistake in bid document with regard to a date – Bids of other bidders having more serious nature of mistakes have been considered – Held, rejection not proper as the bid of the petitioner should have been treated equally with other bidders.

"The authority cannot and could not act arbitrarily, unreasonably and discriminatorily in the matter of awarding contract in favour of certain parties after ignoring similar, or may be more vital, shortcomings in cases of others and not giving the same benefit to the petitioner. Applying the said principle to the present context, on perusal of the records, it appears that in the name of defect, in respect of other bidders, being peripheral in nature, their bids have been accepted, whereas on the ground of putting a wrong date in the Format-T5, the bid of the petitioner has been rejected and it has been ousted from participating in the bids, when similarly situated persons have been allowed to participate. This action of the authority amounts to arbitrary, unreasonable and discriminatory treatment made against the petitioner, and thereby, it violates Article 14 of the Constitution of India." *(Paras 18 & 19)*

Case Laws Relied on and Referred to :-

1. 2017 (SUPP-II) OLR 818 : Nestor Pharmaceuticals Ltd. -v- State of Odisha.
2. AIR 2016 SC 3814 : (2016) 8 SCC 622 : Central Coalfields Limited -v- SLL-SML (Joint Venture consortium)
3. (1991) 3 SCC 273 : AIR 1991 SC 1579 : M/s. Poddar Steel Corporation -v- M/s. Ganesh Engineering Works & Ors.
4. 2013 (6)Supreme 521:Rashmi Metaliks Ltd.-v- Kolkata Metropolitan Development Authority
5. (2006) 11 SCC 548 : B.S.N. Joshi & Sons Ltd. -v- Nair Coal Services Ltd. & Ors.

For Petitioners : Mr. M.R. Mohapatra, Senior Adv.
M/s S.Mohanty, S.K. Routray, L.Mohapatra, S.Pattnaik & A. Dash.

For Opp. Parties : Mr. S.P. Mishra, Advocate General,
Mr. B.P. Pradhan, Addl. Govt. Adv.
Mr. R.K. Mohanty, Senior Advocate,
M/s M.R Mohanty, A.K. Panigrahi and L.K. Behera,
M/s B.P. Tripathy, S.Kaveti, R. Acharya, T. Barik and A. Pati,
M/s Yuvraj Parekh, S. Sahoo, D.Nayak and S.K. Behera.

JUDGMENT Date of Hearing : 21.06.2018 Date of Judgment : 27.06.2018

Dr. B.R. SARANGI, J.

Odisha State Medical Corporation Limited (OSMCL)-opposite party no.2 is a Government of Odisha Enterprise. It acts as an independent agency for the

department of Health and Family Welfare, Government of Odisha for timely procurement of quality medicines, surgical equipments, instruments, etc. through competitive bidding process. It is managed by a Board of Directors duly constituted by Government of Odisha. The opposite party no.2-OSMCL on 05.08.2017, vide Bid Reference No. OSMCL/2017-18/DRUGS-DHS/02, issued notice inviting online bids through e-portal from the eligible bidders for supply of drugs and medical consumables for the year 2017-18 on rate contract basis for a period of one year from the date of approval of tender. The date and time for pre-bid meeting was fixed to 17.05.2017 at 11.00 AM. The online bid submission was to start from 23.08.2017 at 3.00 PM and end on 08.09.2017 at 5.00 PM. The submission of tender documents and EMD amount (as per Section-IV of tender documents) was to start from 08.09.2017 at 5.00 PM and end on 15.09.2017 at 11.00 AM. The date and time of opening of online technical bid was fixed to 15.09.2017 at 11.00 AM and, the date and time of opening of price bid was to be informed to the qualified bidders later on. But subsequently, opposite party no.2-OSMCL issued a corrigendum, vide Bid Reference No. OSMCL/2017-18/DRUGS-DHS/02 at Annexure-3, revising the closing date for online submission of bid to 15.09.2017 at 5.00 PM, closing date and time for submission of tender documents and EMD amount (Hard Copy) as per Section-IV of tender documents to 25.09.2017 at 11.00 AM and opening date for online technical bid to 25.09.2017 at 11.00 AM.

2. Pursuant to the tender notice referred to above, petitioner no.1, along with 118 others, including M/s VINS Bioproducts Ltd.-opposite party no.3 and M/s Bharat Serums and Vaccines Ltd.-opposite party no.4, submitted its tender documents through online process on 13.09.2017. On receipt, the bid of the petitioner had been enlisted at serial no.85, bidder no. 699215 in the bid list prepared by opposite party no.2. Petitioner no.1 had submitted its bid for supply of three items, namely, (1) Code No. D23002 (Injection Snake Venom Antiserum); (2) Code No. D23008 (Injection Snake Venom Antiserum); and (3) Code No. 23010 (Equine Rabies Immunoglobulin), as per tender document. At the time of submission of its bid, petitioner no.1 has wrongly put the date "14.09.2017" on bid documents, such as details of the item quoted, details of the EMD submitted, Format-T5, etc., though it has accepted online bid on "13-Sept. 2017 03.18 pm". Pursuant to the proceeding of tender evaluation committee meeting held on 11.12.2017, a communication was made by opposite party no.2 on 20.12.2017 to petitioner no.2 through his e-mail that the technical bid of petitioner no.1 has been rejected on the ground that Format-T5 (declaration form) of petitioner no.1, i.e., M/s Premium Serums & Vaccines Pvt. Ltd., Mumbai was not accepted and reason for rejection has been cited under Annexure-IB vide serial no.8 which is that "*the declaration form (T5) is not in order i.e. the declaration is notarized earlier than the deponents affidavit in format T5*." In response to such communication, petitioner no.2, on the very same date, i.e., 20.12.2017 filed a clarification regarding document Format-T5, but the same was not taken into consideration, hence this writ application.

3. Mr. M.R. Mohapatra, learned Senior Counsel appearing along with Mr. S. Mohanty, learned counsel for the petitioners strenuously urged that even though petitioner no.2 has promptly responded by filing a representation on 20.12.2017 explaining that the Format-T5 has been notarized on "11.09.2017", but wrongly the date has been put as "14.09.2017". It is further contended that while completing the documentation, before uploading, all the documents have been given the date as it was on "14.09.2017". So in the Format-T5, which was notarized on "11.09.2017", the date of bidder has been mentioned as "14.09.2017", though the uploading was done on "13.09.2017". As such, since the opposite parties have acknowledged that uploading was done on "13.09.2017", certainly Format-T5 has been notarized on "11.09.2017" and as such there is a mistake of putting the date as "14.09.2017". This fact has also been clarified by way of filing representation on "21.12.2017" that it is an inadvertent mistake and for that reason the technical bid of petitioner no.1 should not have been cancelled. To substantiate his submission, he has relied upon ***Nestor Pharmaceuticals Ltd. v. State of Odisha***, 2017 (SUPP-II) OLR 818.

4. Mr. S.P. Mishra, learned Advocate General appearing along with Mr. B.P. Pradhan, learned Addl. Government Advocate contended that since there is an urgency in the matter of procurement of medicines, the same should be taken up on priority basis, as it has been stalled by virtue of the interim order passed by this Court and the State Government is facing lot of difficulties by not procuring the life saving drugs for the general public. Therefore, in the interest of public, the matter should be heard and disposed of as expeditiously as possible. It is further contended that so far as award of contract is concerned, it is within the domain of opposite party no.2, which has issued such tender call notice. As such, validity of such tender and decision of rejection of the bid of petitioner no.1 can only be elucidated by opposite party no.2 and the State Government has no say in the matter, but stated that the decision taken by opposite party no.2 should not be interfered with. To substantiate his contention he has relied upon the judgment of the apex Court in ***Central Coalfields Limited v. SLL-SML (Joint Venture consortium)***, AIR 2016 SC 3814 : (2016) 8 SCC 622.

5. Mr. R.K. Mohanty, learned Senior Counsel appearing along with Mr. A.K. Panigrahi, learned counsel for opposite party no.2, justifying the order of rejection of the bid of petitioner no.1, stated that no illegality or irregularity has been committed by the authority concerned by taking such decision. He laid emphasis on the document in Format-T5, the declaration form of Part-1 of technical bid, which stipulates that the bidder has to furnish the requisite information as is sought for in the said form by way of affidavit. Therefore, filing of Format-T5 is not an empty formality and as such the said form could not have been signed by the Notary anterior to the date on which authorized signatory of petitioner no.1 company executed his signature. The very document (Format-T5) manifests that it has been notarized on "11.09.2017" and authorized signatory of the petitioner no.1 company signed thereafter on "14.09.2017". Therefore, the alleged oath cannot be accepted,

resulting in the T5 form as a spurious one. Therefore, the tender evaluation committee is justified in rejecting the bid of petitioner no.1 on the ground that the same was not in order, which does not warrant interference of this Court at this stage.

6. Mr. B.P. Tripathy, learned counsel for opposite party no.3 contended that the petitioner-company submitted Format-T5 document wherein the declaration submitted by it was notarized on "11.09.2017" but the date put was "14.09.2017" and the plea taken that the same was put inadvertently is an afterthought. It is further contended that T5 declaration form, which is under Section-VII of the tender documents, needs to be submitted in form of an affidavit executed before the Executive Magistrate/ Notary Public on Rs.10/- non-judicial stamp paper. As the petitioner-company has not furnished the said T5 declaration form as per the required norms of the oaths and such declaration has been notarized in a fraudulent manner, the opposite party no.2 is justified in not accepting the same. More particularly, the said document is attested in absence of the deponent is tell tale and the said document is incomplete in absence of the solemn affirmation. Furthermore, the said transaction of oath has not been entered in oath register because the numbering of the affidavit has also not been reflected. Therefore, he prays for dismissal of the writ application on that ground.

7. Mr. Yuvraj Parekh, learned counsel appearing for opposite party no.4 stated that notice was issued to opposite party no.4 fixing 28.06.2018 as the date for appearance, but having come to know that the matter has been fixed to be taken up on 21.06.2018, he has appeared but could not file any counter affidavit. He, however, supported the arguments advanced by opposite parties no.2 and 3 and contended that since opposite party no.4 stands on similar footing like that of opposite party no.3, the authorities are justified in rejecting the bid of petitioner no.1, therefore seeks for dismissal of the writ application.

8. Having heard learned counsel for the parties and perused the records, and as the matter is very urgent in nature, with the consent of learned counsel appearing for the respective parties, the same is being disposed of at the stage of admission.

9. For just and proper adjudication of the case, the relevant provisions of the e-tender document for supply of drugs and medical consumables for the year 2017-18 in Annexure-2 series are extracted hereunder:-

"Section-II

General Definitions & Scope of Contract

xx *xx* *xx*

"2.1.7. ***Responsibility of verification of contents of Tender Document.***

Bidders shall examine all instructions, forms, terms and specifications in the Tender Document and verify the same mentioned in the table of contents are contained in the 'Bid document'. Failure to furnish any information required by the Tender Document and submission of an offer not substantially responsive to it in every respect shall result in the summary rejection of bids, without any notice.

SECTION-VI
GENERAL CONDITIONS OF CONTRACT

6.4 ***Guidelines for Preparation of Bid***

xx *xx* *xx*

6.4.6 Bidder shall submit a declaration letter as per Format T5 signed by the bidder or the authorized representative and shall enclose it as part of the technical bid as a proof of having read and accepted the terms and conditions of the bid document.

xx *xx* *xx*

6.11 Rejection of Bids:

6.11.1 The bids shall be rejected in case the bidder fails to meet the pre-qualification criteria as specified in Clause 5.2 of Section V.

6.12 Notices

xx *xx* *xx*

6.12.13 Result of the responsiveness of the technical bids and minor infirmities/clarifications sought.

xx *xx* *xx*

6.17 List of Documents in Bid Submission

xx *xx* *xx*

6.17.7 Format –T5 (Declaration Form)

Format-T5

(To be submitted in ***Part-I Technical Bid****)*
(In terms of Cl. No. ***5.2*** *and* ***6.39.8*** *of Bid Document)*

DECLARATION FORM

(Affidavit before Executive Magistrate/Notary Public on ***10*** *Rupees non-judicial stamp paper)"*

10. In compliance of the aforementioned provisions and satisfying the conditions stipulated in the e-tender documents, the petitioner no.1 submitted its bid and as required in Format-T3, it has submitted details of the EMD in respect of three items, such as, (1) D23002 [Inj. Snake Venom Antiserum (Polyvalent) with diluents 10 ml/Via (Lyphillised, Powder form)], (2) D23008 [Inj. Snake Venom Antiserum (polyvalent) 10 ml./vial (liquid form)], and (3) D23010 [Equine Rabies Immunoglobulin 1500 IU/5 ml (Rabies Immunoserum)]. So far as Format-T5 (the declaration form) is concerned, though Notary has signed on "11.09.2017", but the date has been put by the bidder as "14.09.2017" and uploaded on 13.09.2017. Thereafter, on 20.12.2017 at 4.44 PM, the petitioner no.1 was informed that its bid for the tender in question has been rejected during technical evaluation by the duly constituted committee for the reasons indicated in Annexure-IB. The proceedings of the tender evaluation committee meeting was held on 11.12.2017 at 11.00 AM in the Tender Conference Hall of OSMC, Bhubaneswar regarding evaluation of technical bids for the procurement and supply of drugs and consumables (Group-I) on rate contract basis for the financial year 2017-18. During evaluation of technical bid, it has been stated as follows:

"*The submitted T-5 declaration form was scrutinized by HR and Admin Division. The details of the scrutinizing reports were placed before the Technical Evaluation Committee basing*

upon which clarification notices were issued to the firms. In this regard, the opinion of Legal Advisor, OSMC has also been obtained. The committee after thread bare discussion unanimously decided to accept the T-5 declaration form of all the technically qualified bidders as the defects pointed out in other cases were peripheral in nature, except in case of one firm i.e. M/s. Premium Serums & Vaccines Pvt. Ltd., Mumbai which was not accepted." (emphasis supplied)

The decision taken in the said meeting is reproduced hereunder:-

*"**Decision Taken :***

- *Based on above evaluation the committee has recommended to **open the price bids** of the **technically qualified bidders** (for the items for which they are technically qualified) as mentioned at **Annexure-ID** on **Dt. 21/12/2017 at 11:00 AM,** with intimation to the qualified bidders through e-tender portal"*

In the list of firms rejected during technical evaluation for the tender of drugs and medical consumables (Gr-I) 2017-18 at Annexure-IB at serial no. 8 the reason for rejection of petitioner no.1 has been mentioned as follows:

"The declaration form (T5) is not in order i.e. the declaration is notarized earlier than the deponents affidavit in format T5."

Immediately on the very same date, i.e., on 20.12.2017, the petitioner no.2 made representation and on 21.12.2017 again a representation was filed, enclosing letter from the Notary confirming that the notarization has happened as per the system.

11. The sequence of the events as mentioned above, clearly indicate that Format-T5 document has been notarized on "11.09.2017", but the date has been put by the bidder as "14.09.2017". However, there is no doubt with regard to factum that on the basis of the tender summary report dated 30.12.2017 in Annexure-4, the petitioner no.1 had submitted its documents on "13.09.2017 at 3.18 pm", but its technical bid has been rejected and status has been updated on 20.12.2017 at 4.40 pm. The relevant information available in Annexure-4 is quoted below:-

Sl. No.	***Bidder Number***	***Bidder Name***	***Submitted Date***	***Status***	***Status Updated on***
xx	*xx*	*xx*	*xx*	*xx*	*xx*
85.	*699215*	*Premium Serums and Vaccines Private Limited*	*13-Sep-2017 03:18 PM*	*Rejected-Technical*	*20-Dec-2017 04.40 PM*
xx	*xx*	*xx*	*xx*	*xx*	*xx*

Once the bid document has been received by opposite party no.2 on "13.09.2017 at 3.18 PM", the question of putting of date "14.09.2017" by the bidder in the Format-T5 document may not be said to be done after Notary has notarized on "11.09.2017". It may be a mistake on the part of the bidder by putting the date "14.09.2017" when receipt of documents had already been acknowledged by the authority on

"13.09.2017 at 3.18 PM". As per the proceedings of the tender evaluation committee under Annexure-6 series, the details of the scrutinizing reports were placed before the technical evaluation committee basing upon which clarification notices were issued to the petitioner no.1 and subsequently, it has been stated that the opinion of the legal adviser of the OSMC has also been obtained. The committee, after thread bare discussion, unanimously decided to accept the T-5 declaration form of all the technically qualified bidders, as the defects pointed out in other cases were ***peripheral in nature***, except in case of M/s. Premium Serum & Vaccines Pvt. Ltd., Mumbai (petitioner no.1 herein) which was not accepted.

12. Considering the urgency of the matter, when it was heard on 20.06.2018, in order to find out the factum that how the committee, after thread bare discussion, unanimously decided to accept the T-5 declaration form of all the technically qualified bidders, as the defects pointed out in other cases were peripheral in nature, except the petitioner no.1, to examine the same this Court directed the learned counsel appearing for opposite party no.2 to place the relevant record before the Court on 21.06.2018. In compliance of the same, records were produced before this Court to examine the factum of acceptance of T-5 declaration form of all the technically qualified bidders, as the defects pointed out in other cases were peripheral in nature.

13. This Court perused the list of firms rejected in Technical Evaluation for the Tender of Drugs & Medical Consumables (GR-I) 2017-18. On sample testing of the list of firms rejected in Technical Evaluation, this Court examined the tenders submitted by 119 bidders and sporadic examination in respect of the firms at serial no. 11, 15, 18, 19, 20, 23, 24, 25, 26, 55, 57, 61, 62, 67, 74, 85, 89, 90, 97, 98 were taken into consideration and found that even if the date of notary sign is missing, the declaration submitted in Format- T5 of tender document has been accepted and in some cases even where it is not in regular non judicial stamp paper, as required by the tender document, still the same has been considered. This material omission and commission, so far it relates to Format–T5, has been ignored and the said documents have been accepted by the technical evaluation committee, whereas in respect of petitioner no.1 there is error in putting the date correctly, on that ground it has been rejected.

14. As per the proceedings of the tender evaluation committee, the clarification notice would have been issued to the petitioner no.1-company so as to give an opportunity to clarify the same before rejecting its T5 declaration form. If on the plea of peripheral in nature, the defective T5 declaration forms of other bidders have been accepted, there is no valid justifiable reason not to accept the T5 declaration form of petitioner no.1. More particularly, the tender evaluation committee, while accepting the T5 declaration form of other tenderers stating that the defects pointed out being a peripheral in nature, the declaration form of petitioner no.1 has not been accepted and as such the bid of the petitioner has been rejected on the ground that its

declaration Format T5 was not in order, that is to say the declaration T5 form of petitioner no.1 was notarized earlier than the deponent's affidavit in Format-T5. This ground of rejection is absolutely presumptive one, inasmuch as the contention raised that Format-T5 submitted by the petitioner is a spurious document, that inference cannot be drawn at this stage merely on the ground that the bidder signature date has been put as "14.09.2017" and the Notary has singed on "11.09.2017". But it is admitted fact of the parties that the petitioner no.1 has submitted documents on "13.09.2017", receipt of which has been acknowledged at 3.18 P.M. Therefore, if the tender documents have been received by the authority concerned on "13.09.2017 at 3.18 hours", such presumption that the bidder has singed on 14.09.2017 may not be a correct approach, rather, the date put may a mistake on the part of the bidder in the T5 declaration form.

15. If major mistakes committed by other bidders have been ignored on the plea that the defects pointed out were peripheral in nature and if on examination of all records, this Court finds that there were gross mistakes which have been ignored on peripheral grounds, the reason for which the bid of petitioner no.1 has not been accepted cannot sustain in the eye of law. As such, it clearly appears that the date so available in the Format- T5 may be a bona fide mistake, as the bid documents were admittedly submitted on "13.09.2017".

16. In ***Nestor Pharmaceuticals Ltd.*** (supra) relying upon the judgments of the apex Court in ***M/s. Poddar Steel Corporation v. M/s. Ganesh Engineering Works and others,*** (1991) 3 SCC 273 : AIR 1991 SC 1579; ***Rashmi Metaliks Ltd. Kolkata Metropolitan Development Authority,*** 2013 (6) Supreme 521; and ***B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others*** (2006) 11 SCC 548, this Court held that the deviation, if any, from the tender conditions could not be classified as that of an essential condition of the tender document, and is only to be treated as merely ancillary or subsidiary with the main object to be achieved by the condition.

17. In ***Central Coalfields Limited*** (supra), on which reliance was placed by the learned Advocate General, it has been held inter alia that whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

18. The principle laid down by the apex Court, as mentioned above, there is dispute to the extent indicated, but such principle should be applicable equally to all the bidders which participated in the bid itself. The authority cannot and could not

act arbitrarily, unreasonably and discriminatorily in the matter of awarding contract in favour of certain parties after ignoring similar, or may be more vital, shortcomings in cases of others and not giving the same benefit to the petitioner.

19. Applying the said principle to the present context, on perusal of the records, it appears that in the name of defect, in respect of other bidders, being peripheral in nature, their bids have been accepted, whereas on the ground of putting a wrong date in the Format-T5, the bid of the petitioner has been rejected and it has been ousted from participating in the bids, when similarly situated persons have been allowed to participate. This action of the authority amounts to arbitrary, unreasonable and discriminatory treatment made against the petitioner, and thereby, it violates Article 14 of the Constitution of India.

20. In view of such position, we are of the considered opinion that instead of rejecting the bid of petitioner no.1 on the ground of submission of defective T5 declaration form by putting a wrong date as "14.09.2017" by the bidder when document has been submitted as "13.09.2017" at 3.18 PM" cannot be held to be justified. Therefore, we direct that the technical bid documents of petitioner no.1 should be taken into consideration at par with similarly situated bidders, whose bids have been accepted by holding that defects pointed out were peripheral in nature. As petitioner no.1 stands on the same footing with the other bidders, whose technical bids having defects have been accepted, there is no justifiable reason to reject the bid of petitioner no.1 and oust it from the competition, as it is the prime objective of the opposite party no.2 to get best price and best commodity as per the competitive bid issued by it. Therefore, the decision taken, so far it relates to the petitioner no.1, by tender evaluation committee dated 11.12.2017 communicated on 20.12.2017 in Annexure-6 series, is hereby quashed. The opposite party no.2 is directed to consider the bid documents of petitioner no.1 treating its T5 declaration form as coming within the ambit and scope of "defect of peripheral in nature" and allow its bid along with other bidders in the technical bid. Considering the urgency in the matter, this Court directs that the opposite party no.2 shall take steps as expeditiously as possible, preferably within a period of two weeks hence, in the interest of public at large.

21. The writ petition is allowed to the extent indicated above. No order to costs.

22. The original file received pursuant to order dated 20.06.2018 shall be returned to the counsel appearing for opposite party no.2 after pronouncement of the judgment.

2018 (II) ILR - CUT- 32

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

OJC NO. 13031 OF 1999

UNION OF INDIA & ORS. ……..Petitioners

.Vs.

BISHNU CHARAN MALLICK ……..Opp. Party

DISCIPLINARY PROCEEDING – Writ petition by Union of India challenging the order passed by CAT – The Opposite party was a Deputy Postmaster – Not accounted for certain savings bank deposits and withdrawal – Charge memo served after five years – Delinquent sought for certain documents for his defence – Documents not supplied but stated to have inspected by the delinquent – Whether there has been compliance of the principles of natural justice – Held, No.

"It is well settled principle of law laid down by the apex Court that the Tribunal or the Court cannot sit as an appellate authority over the findings of disciplinary authority. The duty of the Tribunal or Court is not to re-appreciate the evidence on record, but to review whether the decision making process has been correctly made. If there are procedural lapses affecting the principles of natural justice in finalization of a departmental proceeding, then the Tribunal or Court would be justified in interfering with the order of the disciplinary authority. Applying the said principle to the present context, it appears that the disciplinary authority has not given opportunity of hearing to the opposite party to make out his written statement of defence by going through the relevant papers and documents, thereby there is gross violation of principles of natural justice." *(Paras 8 & 9)*

Case Laws Relied on and Referred to :-

1. AIR 1998 SCW 2898 : State of Uttar Pradesh v. Satrughan Lal.

For Petitioner : Central Government Counsel

For Opp. Party : M/s. G.P. Samal, S.K. Biswal, N. Mishra, P.K. Panda and D. Bhakat.

JUDGMENT Decided on : 23.07.2018

DR. B.R. SARANGI, J.

Petitioner no.1-Union of India, and its functionaries-petitioners no.2 and 3 have filed this application challenging the order dated 05.03.1999 passed by the Central Administrative Tribunal, Cutack Bench, Cuttack in O.A. No.464 of 1992 by which the Tribunal quashed the order dated 30.06.1992 passed by petitioner no.2 directing for recovery of a sum of Rs.15,000/- from the opposite party for the loss sustained by the department because of his negligence and misconduct, while he was working as Deputy Postmaster, Jajpur Head Post Office.

2. The factual matrix of the case in hand is that the opposite party, while he was in-charge of Deputy Postmaster, Jajpur Head Post Office during the period 1986-1987, was supervising the Savings Bank Account work. During the said

period, he did not account for the Savings Bank deposits and/or withdrawals entered in the Pass Books No.34552 and 345233 on different dates. Consequentially, an amount of Rs.15,000/- was to be recovered from the opposite party and rest amount was to be recovered from other erring officials. As such lapses were detected, a disciplinary proceeding was initiated against the opposite party and ultimately vide order dated 30.06.1992, petitioner no.2 ordered for recovery of a sum of Rs.15,000/- in 30 monthly equal instalments from the opposite party which was challenged before the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.464 of 1992. Learned Tribunal, by order dated 05.03.1999, quashed the order dated 30.06.1992 passed by petitioner no.2 on the ground that adequate opportunity was given to the opposite party. Hence this writ petition.

3. Learned Central Government Counsel appearing for the petitioners strenuously contended that the opposite party, having failed to discharge his duty causing loss to the Government, is responsible for dereliction in duty. As such, the consequential direction for recovery of a sum of Rs.15,000/-, which was given by following a disciplinary proceeding, cannot be said to be illegal or irregular.

4. Learned counsel for the opposite party, on the other hand, states that the opposite party is not liable to pay any amount demanded by the authority pursuant to order dated 30.06.1992 and such amount has been determined without affording opportunity of hearing, thereby there is gross violation of principles of natural justice. Therefore, the Tribunal is well justified in passing the impugned order quashing the order dated 30.06.1992 passed by petitioner no.2 directing for recovery of the amount from the opposite party, as he is no way concerned with such amount. It is further contended that challenging the order passed by the learned Tribunal even when the petitioners filed this writ petition, no interim order was passed by this Court. In the meantime, on attaining the age of superannuation, the opposite party has already superannuated from service. Therefore, the opposite party seeks for dismissal of the writ petition.

5. We have heard learned counsel for the parties and perused the records. With the consent of learned counsel for the parties, the matter is being disposed of finally at the stage of admission.

6. Admittedly, the opposite party, while working as Deputy Postmaster in Jajpur Head Post Office during the period 1986-87, did not account for the Savings Bank deposits and withdrawals resulting pecuniary loss to the department. Consequentially, a disciplinary proceeding was initiated and he was served with a charge-sheet allowing him to submit his written statement of defence. But, in order to submit written statement of defence, the petitioner requested for inspection of certain documents and to take the extracts of the same. The same was rejected by the disciplinary authority. Again the petitioner moved the disciplinary authority to make available the documents and to give personal hearing. But, without giving him opportunity of hearing, the order for recovery of a sum of Rs.15,000/- was passed,

thereby there is a denial of opportunity of hearing to explain his defence. Consequentially, there was gross violation of the principles of natural justice, for which the proceeding so initiated was vitiated.

7. On perusal of records, it also appears that the statement of imputation was recorded on 20.03.1992, which relates to certain transaction of the year 1987 reflected in the relevant register pertaining to deposits and withdrawal of certain Pass Book accounts. It is not possible on the part of an employee to remember or call those entries/transactions in the year 1992. In order to make out an efffective defence, the opposite party would certainly seek assistance of those particulars. When he represented for giving him an opportunity to inspect and, if necessary, to take extract of those documents, such request of the opposite party was by the disciplinary authority without application of mind. The reasons assigned in the counter affidavit are that during the fact finding enquiry conducted by A.S.P.O. in January, 1991, the opposite party had occasion to peruse the documents, therefore, the opposite party could not have made request to peruse the documents and extract thereof. As such, rejection of the request of the opposite party by the disciplinary authority cannot be said to be not in compliance of the principles of natural justice.

8. It is well settled principle of law laid down by the apex Court that the Tribunal or the Court cannot sit as an appellate authority over the findings of disciplinary authority. The duty of the Tribunal or Court is not to re-appreciate the evidence on record, but to review whether the decision making process has been correctly made. If there are procedural lapses affecting the principles of natural justice in finalization of a departmental proceeding, then the Tribunal or Court would be justified in interfering with the order of the disciplinary authority.

9. Applying the said principle to the present context, it appears that the disciplinary authority has not given opportunity of hearing to the opposite party to make out his written statement of defence by going through the relevant papers and documents, thereby there is gross violation of principles of natural justice.

10. In ***State of Uttar Pradesh v. Satrughan Lal***, AIR 1998 SCW 2898, the apex Court held that opportunity of hearing based on principles of natural justice has to be an effective opportunity of hearing and not mere pretence.

11. In view of such position, learned Central Administrative Tribunal has not committed any illegality or irregularity in passing the impugned order dated 05.03.1999 in Annexure-1 so as to warrant interference of this Court at this stage. More particularly, the incident is of the year 1987 and the Tribunal has passed the judgment on 05.03.1999. The petitioners have approached this Court in the year 1999 and in the meantime more than 19 years have elapsed. This being a year old case and as such opportunity of hearing having not been granted to the opposite party, we do not find any illegality or irregularity in the impugned order dated 05.03.1999 passed by the learned Central Administrative Tribunal, Cuttack Bench, Cuttack to warrant our interference.

12. Accordingly, the writ petition is liable to be dismissed and the same is hereby dismissed. No order as to cost.

2018 (II) ILR - CUT- 35

INDRAJIT MAHANTY, J & BISWAJIT MOHANTY, J.

JCRLA NO. 05 OF 2005

HIRARAM GOND ……. .Appellant

.Vs.

STATE OF ORISSA ……Respondent

INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction and sentence for life upon wrong appreciation of evidence – No eye witness to the occurrence – Circumstances to connect the appellant with the crime not enough – Conviction set aside.

"To summarise, for the reasons as indicated earlier, P.W.1 cannot be treated as an eye-witness to the occurrence. The versions of P.Ws.1, 2 and 3 destroy the credibility of report under Ext.1. With regard to the status of eye sight of P.W.1, the same cannot be said to be good in the background the statements made by P.Ws.1 and 3. It is safer to accept the version of P.W.3 on the same, as he happens to be a close relative of P.W.1 rather than the version of P.W.4, who is a co-villager with no proof of having close contact with the family of P.W.1. With regard to the evidence of P.W.9 relating to leading to discovery the same cannot be accepted for reasons indicated earlier. Thus, the findings of the learned trial court that P.W.1 is an eye-witness is clearly on account of wrong appreciation of facts and similarly the acceptance by the learned trial court that M.O.I was recovered pursuant to disclosure statement of appellant cannot be accepted. Only incriminating materials that have been found are the evidence of the doctor, namely, P.W.6 and chemical examination report under Ext.10. While the doctor speaks about cause of death due to head injury and testifies that such injuries are possible with the help of M.O.I, the chemical report under Ext.10 indicates presence of human blood belonging to Group 'A' on the stick. But as indicated earlier, we are not willing to believe that the lathi was discovered because of the information given by the appellant. In such background, the above two circumstances are not enough to connect the appellant with the crime." *(Para 7)*

For Appellant : Mr. Pulakesh Mohanty
For Respondent : Mr. Janmejaya Katkia (Addl. Govt. Adv.)

JUDGMENT Date of Judgment: 02.07.2018

B. MOHANTY, J.

This Jail Criminal Appeal is directed against the judgment and order dated 10.11.2004 passed by the learned Addl. Sessions Judge, Nabarangapur-camp at Umerkote in Criminal Trial No.13 of 2002 corresponding to Criminal Trial No.197 of 2002 of the Sessions Judge, Koraput-Jeypore.

By the above noted judgment, the appellant has been convicted under Section 302 of IPC and has been sentenced to undergo imprisonment for life.

2. The case of the prosecution is that the deceased Ghasiram Gond was in the habit of returning home in an unconscious condition and used to pick up quarrel with his wife (P.W.1) every day. On 23.6.2002, around 8.00 P.M., the deceased came home after taking liquor. The appellant who happens to be the adopted son of the deceased and P.W.1 gave him lathi blows causing bleeding injuries on the head. The adoptive mother (P.W.1) tried to intervene but her husband died at the spot. The wife of the deceased (P.W.1) told the matter to Sukudu Gand and the matter was reported to the police and accordingly the police took up investigation and submitted charge sheet.

3. The prosecution in order to bring home charges examined as many as nine witnesses. P.W.1 is the wife of the deceased and adoptive mother of the appellant. P.Ws.2 and 3 are the relatives of P.W.1. P.W.4 is a co-villager. P.W.5 is a witness to the inquest. P.W.6 is the doctor, who conducted the autopsy. P.W.7 proved the command certificate. While P.W.8 is the scribe of the FIR under Ext.1, P.W.9 happens to be the Investigating Officer. From the side of the prosecution, 10 documents were exhibited and the lathi was marked as M.O.I.

The plea of the appellant was complete denial. Further during his examination under Section 313 Cr.P.C., the appellant answered most of the questions in negative. He has not examined anybody from his side nor has he exhibited any document.

Learned trial court after analysing the evidence, came to hold that the prosecution has succeeded in establishing its case and accordingly convicted the appellant under Section 302 IPC.

4. Mr.Pulakesh Mohanty, learned counsel for the appellant submitted that the learned court below has fallen into a fundamental error in treating P.W.1 as an eye-witness whereas in fact she was never an eye-witness to the occurrence. Secondly, he submitted that the learned trial court has committed serious error of law in coming to a conclusion that the weapon of offence was recovered at the instance of accused particularly when no disclosure statement has been proved. Further, the seizure of weapon of offence under Ext.8 wherein it has been noted that the same was seized pursuant to the information given by the appellant cannot be treated to be a disclosrure statement as the same has not been supported by any of the witnesses to seizure, namely, Iswar Gond and Rajkumar Pradhan. In fact, the prosecution has not examined the above named two witnesses for reasons best known to it. Therefore, according to Mr. Mohanty, there is nothing to show that the weapon of offence was in fact recovered at the instance of the appellant. Relying on the above submissions, he prayed that the impugned judgment be set aside. Lastly, he submitted that after remaining in custody for more than 15 years, he has been prematurely released.

5. Mr. Katkia, learned Addl. Government Advocate, on the other hand, defended the impugned judgment being legally right. However, he admitted that the appellant has already been released as per the order of the Addl. D.G. of Police passed during April, 2018.

6. In order to appreciate the submissions of both the learned counsel, we think it proper to scan the evidence on record.

At the outset, it may be noted here that none has disputed about the homicidal nature of death of the decased.

P.W.1, who happens to be the wife of the deceased has stated that on the date of occurrence, the deceased came home in an inebriated condition and the appellant gave three blows to him causing bleeding injuries on his head. Though she tried to intervene, the deceased fell down at the spot and died. She told this incident to P.W.4 and some villagers like P.Ws.2,3 and others and the matter was reported to the police. In her cross-examination, she stated that she was cooking at the time of occurrence and admitted that the outside of the house was not visible from inside. She denied a suggestion that she has not seen the assault on her husband. Though at the first instance, she admitted in the cross-examination that she was not able to see properly due to poor eye sight, however, she denied a suggestion that she was not able to see articles situated at a distance of 50 feet in dark night. She further testified that her husband fell down at a distance of 50 feet from her. In her cross-examination, she has further stated that she cannot say as to who scribed the FIR and what are the contents of FIR. She also testified that FIR was never read over and explained to her and also that she did not go to Police Station to file the report. With regard to eye sight, she denied a suggestion that she was not able to see properly due to poor eye sight. She identified the lathi with which the appellant gave blow to her husband. The same was marked as M.O.I.

P.W.2 is a relative of P.W.1 and is a post occurrence witness. Though he says that report was filed at their behest at Police Station and he signed the same, however, in his cross-examination he admits that he does not know about the contents of FIR under Ext.1 which was never read over and explained to him and he signed Ext.1 as per the direction of the police.

P.W.3 also happens to be a close relative of P.W.1. He is also a post occurrence witness, who has stated that after hearing about the occurrence, he went to the house of the deceased and found the husband of P.W.1 lying dead. He has acknowledged the presence of P.W.4 when he reached there. He has testified that the cloth of late Ghasiram was stained with blood. More importantly he has deposed that P.W.1 had told him that while she was cooking food, hearing the sound, she came out and found the appellant there and the deceased lying with bleeding injuries. In his cross-examination, he has stated that P.W.1 has poor eye sight and she was not able to see properly and she told him that she did not know who assaulted her

husband and that she was inside the house. She further told him that nobody was there when she came out and found her husbabnd lying with injuries. During cross-examination, no suggestion has been given to him that P.W.1 never told him about the things which he has stated in examination-in-chief as being told by P.W.1.

P.W.4 is a co-villager, who testifies that P.W.1 told him that the appellant assaulted her husband and went away. He went to the house of Ghasiram in the morning and found him dead with bleeding injuries on his head. In the cross-examination, P.W.4 has stated that the eye-sight of P.W.1 to be good and P.W.1 told him to call her relatives.

P.W.6 is the doctor, who conducted the autopsy and found two external injuries and concluded that the cause of death of the deceased was due to head injury and the mode of death was homicidal. He also stated that the injuries suffered by the deceased were possible by stick (M.O.I). In his cross-examination, he has also stated that the injuries on the head of the deceased could be possible by fall from a tree or from a roof of the house.

P.W.8 is the scribe of the F.I.R., who testified that on the requests of P.Ws.1,2 and 3, he wrote the report under Ext.1. He also proved his signature under Ext.1. He denied a suggestion that he wrote the report as directed by the police.

P.W.9 is the I.O., who deposed that he arrested the appellant and forwarded him to the court and while in custody the appellant confessed his guilt and stated that he has kept the weapon of offence concealed and that he would give recovery of the same and then he led P.W.9 to his house and gave recovery of lathi from his kitchen room which was accordingly seized vide Ext.8 and M.O.I is the seized lathi. He also seized the wearing apparels of the appellant and the deceased. He also proved the chemical examination report. In his cross-examiantion, he has stated that the kitchen of the deceaed was on an open verendah which was closed from three sides. He also admitted that his investigation did not reveal any enmity between the appellant and the deceased. He also denied a suggestion that the appellant never confessed before him and never led to his house giving recovery of lathi.

7. An analysis of evidence of the prosecution witnesses reveals as follows:

Though the evidence of P.W.1 at the first blush gives an impression that she is an eye-witness to the occurrence, however, the fact that she was cooking at the time of occurrence and her admission that outside of the house was not visible from inside and that she was not able to see properly make it clear that she cannot be treated as an eye-witness to the occurrence. With regard to the status of her eye sight, she has blown hot and cold. Such conduct of P.W.1 again lowers her credibility as a witness. Further in her cross-examination, she has stated that she cannot say as to who scribed the FIR and what are the contents of the FIR. She has also stated that it was not read over and explained to her and that she did not go to Police Station to file the report. However, P.W.2 in his testimony has stated that they

filed the report at Police Station to which P.W.1 has given her thumb impression and the same was also signed by both P.Ws.2 and 3. Further, though P.W.2 himself has proved the FIR under Ext.1, but however he has stated that he signed the report under Ext.1 as directed by police. In his cross-examination, he also says that he does not know about contents of Ext.1 and the same was never read over and explained to him. Strangely, P.W.3 maintains total silence on Ext.1. All these show disowning of FIR by P.Ws.1, 2 and 3.

The evidence of P.W.3, who happens to be the nephew of P.W.1 shows that P.W.1 came to the spot after hearing the sound and found the deceased lying with bleeding injuries in presence of the appellant. He also has stated that P.W.1 told him that she did not know who has assaulted her husband. He also testified that P.W.1 has a poor eye sight and was not able to see properly. Though P.W.1 has not stated that she told about the incident to P.W.3 like P.W.4, however, during cross-examiantion, no suggestion has been put to P.W.3 that P.W.1 has never told all the things which he has testified to have been told by P.W.1 in his examination-in-chief. In any case since P.W.3 has stated that P.W.1 has poor eye sight, this creats a doubt as to P.W.1 being an eye-witness to the occurrence.

The evidence of P.W.4 to some extent corroborates the evidence of P.W.1 with regard to P.W.1 having told him about the incident. But the version of P.W.4 with regard to eye-sight of P.W.1 being good cannot be accepted in preference to version of P.W.3 inasmuch as P.W.3 is a close reltive and is supposed to know better about the eye sight of P.W.1 than a co-villagers like P.W.4 particulry when there is nothing in evidence to show that P.W.4 is a close neighbour having intimate contact with the family of P.W.1.

Though P.W.9 speaks of confession by the appellant before him while in custody and leading him to recovery of concealed weapon of offence, however, he has not testified that the appellant had confessed before him that he had concealed the weapon of offence in a particular place. Further his testimony is that the appellant gave recovery of lathi from his kitchen room. This is not enough to fasten the appellant with criminal liability. As indicated earlier, P.W.9 has not said that the appellant told him about concealment of weapon of offence at a particular place/spot inside the kitchen room. Thus had a search been conducted in the kitchen room, the lathi could have been easily seized. Further, the prosecution has not proved any disclosure statement made by the appellant though with regard to the same, there has been some indications in the seizure list under Ext.8. But even then the two seizure witnesses, namely, Iswar Gond and Rajkumar Pradhan, who have appended their signatures to Ext.8 have also not been examined by the prosecution. In such background, it is difficult to believe that pursuant to a disclosure statement the I.O. recovered the weapon of offence under M.O.I. Further in his cross-examination he has admitted that his investigation did not reveal any enmity between the appellant and deceased.

To summarise, for the reasons as indicated earlier, P.W.1 cannot be treated as an eye-witness to the occurrence. The versions of P.Ws.1, 2 and 3 destroy the credibility of report under Ext.1. With regard to the status of eye sight of P.W.1, the same cannot be said to be good in the background the statements made by P.Ws.1 and 3. It is safer to accept the version of P.W.3 on the same, as he happens to be a close relative of P.W.1 rather than the version of P.W.4, who is a co-villager with no proof of having close contact with the family of P.W.1. With regard to the evidence of P.W.9 relating to leading to discovery the same cannot be accepted for reasons indicated earlier. Thus, the findings of the learned trial court that P.W.1 is an eye-witness is clearly on account of wrong appreciation of facts and similarly the acceptance by the learned trial court that M.O.I was recovered pursuant to disclosure statement of appellant cannot be accepted. Only incriminating materials that have been found are the evidence of the doctor, namely, P.W.6 and chemical examination report under Ext.10. While the doctor speaks about cause of death due to head injury and testifies that such injuries are possible with the help of M.O.I, the chemical report under Ext.10 indicates presence of human blood belonging to Group 'A' on the stick. But as indicated earlier, we are not willing to believe that the lathi was discovered because of the information given by the appellant. In such background, the above two circumstances are not enough to connect the appellant with the crime.

8. In such background, the Jail Criminal Appeal succeeds and is allowed accordingly and it is directed that the appellant be set at liberty forthwith if his incarceration is not required in connection with any other case. L.C.R. be sent back forthwith.

2018 (II) ILR - CUT- 40

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

CRA NO. 93 OF 1999

BHIKARI NAIK & ANR. ……..Appellants

.Vs.

STATE OF ODISHA ……Respondent

(A) INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction – Evidence of eye witness with regard to the number of assault and the consequential injury – Not found to be correct as per postmortem report – Major difference regarding the injuries and number of assault – Held, in view of such discrepancy the evidence of eye witness P.W.3 cannot be trust worthy. (Para 8)

(B) CRIMINAL TRIAL – Case and Counter case – No corroboration of the fact regarding the assault made by the appellants on the deceased – P.W.3 is the relative of the father of the deceased and P.W.4 is the

cousin of Pitambar, who is an accused in the counter case – P.Ws. 3, 4 and 5 are silent about the counter case, which was occurred on the same day morning – Thus, it appears that prosecution has suppressed the genesis of the case – Conviction set aside.

"In view of the vital discrepancy regarding the assault made by the appellants on the deceased and the spot map as reveals from the records, the place of occurrence and the evidence of the witnesses that after the assault the appellants ran away from the spot where the dead body was found is improbable. The prosecution has suppressed the fact regarding registration of the counter case on the same day and death of wife and son of appellant No.2 due to burn injuries. Taking into consideration all the above, this Court is of the opinion that the prosecution has not able to prove the charges beyond reasonable doubt. Hence the appellants cannot be found guilty of the charges under Sections 302 / 34 of I.P.C. Accordingly, this Court sets aside the impugned judgment of conviction and sentence."

(Paras 10 & 14)

For Appellant : M/s. D.Nayak, S.Swain, D.P.Pradhan, M.Mohanty, R.K.Pradhan and A.Samantaray.

For Respondent : Addl. Government Advocate

JUDGMENT Date of Judgment : 25.04.2018

S.PANDA, J.

This appeal has been filed by the appellants challenging the judgment dated 16.12.1998 passed by the learned Sessions Judge, Keonjhar in S.T Case No.143 of 1994 convicting the appellants under Sections 302 / 34 of I.P.C. and sentencing them to undergo imprisonment for life.

2. The case of the prosecution is that on 18.07.1994 in the early morning Bishnu Naik – P.W.1 (informant) while returning after attending the call of nature from the field, heard shouting of the villagers that Kurubali, the daughter of Mohan Naik has been murdered over the land of one Draupadi Nayak. Then he rushed to the spot and found that Kurubali was lying dead over that land with bleeding injury on her head, back of neck, left chest and hands. There were profuse bleeding from the injuries and nearby one bloodstained knife was lying. At a close distance from the dead body one red Saya, Blouse, one water pot, one earthen pot, one broken earthen pot were lying and patches of blood were also found there. Pramila-P.W.3, Kusei Naik-P.W.4, Dhara Naik, Hari Naik, who were at the spot informed him that at about 6.00 A.M. appellant No.1-Bhikari Naik assaulted the deceased with a spade and appellant No.2-Rankaratan Naik assaulted with a knife and ran away. P.W.1 rushed to the Village Chaukidar to inform him about the incident. Thereafter he came to Patna Police Station along with the Chaukidar and lodged an oral report, which was reduced to writing and was treated as First Information Report by the A.S.I. at 9.00 A.M. In the said report it was stated that there was land dispute between Mohan Naik, the father of Kurubali and the accused persons since one year and they had ill feeling. On the basis of the aforesaid First Information Report, Patna P.S. Case No.45 of 1994 was registered. The dead body was sent for post mortem examination and the weapon of offences was seized. On completion of

investigation and on receipt of the post mortem report, charge sheet was submitted against both the appellants under Sections 302 / 34 of I.P.C.

3. The prosecution in order to bring home the charges, during trial examined as many as ten witnesses and exhibited several documents, which were marked as Exts.1 to 21. The prosecution also proved two material objects i.e. Spade-M.O.I and Knife-M.O.II. Out of the witnesses examined by the prosecution P.W.1 is the Informant. P.W.2 is the Grama Rakhi. P.W.3 is the friend of the deceased. P.W.4 is related to deceased and has claimed to be an eyewitness to the occurrence. P.W.5 is the stepmother of the deceased and has claimed to be the post occurrence witness. P.W.6 is the witness to the inquest. PW.7 is the father of the deceased. P.W.8 is the Doctor, who had conducted the postmortem examination. P.W.9 is the A.S.I. of Police before whom the informant has orally reported the incident, which was reduced to writing and registered as Patna P.S. Case No.45 of 1994 and investigation of the case was taken up at 9.00 A.M. On the same day, he has also recorded the statement of P.W.5, Matia Naik and Mahura Naik. However, Matia and Mahura were not examined as charge sheet witnesses. P.W.10 is the Investigating Officer.

4. The appellants defence plea was one of complete denial. It was pleaded by appellant No.1-Bhikari Naik that there was land dispute amongst them and that a proceeding under Section 107 of Cr.P.C. was pending. However, he has denied about the occurrence. It was also pleaded by him that on the date of occurrence Pitambar, Hrushi and Chandan Naik set fire to his house for which his daughter-in-law and grandson were burnt and died. He further pleaded that his daughter Suryamani was also assaulted by Hrushi Naik while she was escaping from the house. Appellant No.2-Rankaratan Naik has taken the plea of *alibi.* The appellants neither examined any witnesses nor exhibited any document.

5. The learned Sessions Judge after threadbare discussion of the materials available on record, convicted the appellants for commission of the offences punishable under section 302 read with Section 34 I.P.C. and sentenced them to undergo imprisonment for life.

6. Learned counsel appearing for the appellants submits that the prosecution has mainly relied on the evidence of P.Ws.3 and 4, who claimed to be the eyewitnesses however, their evidence suffers from serious infirmity and material contradiction as such they were not eyewitnesses to the occurrence. He further submitted that there was land dispute between the parties and on the date of occurrence, the relatives of the deceased set fire to the house of the appellants for which the wife and son of appellant No.2 were burnt and died. On the basis of such allegation Patna P.S. Case No.46 of 1994 was registered. He also submitted that the trial court should have scrutinized the evidence of P.Ws.3 and 4 with cautious and in absence of such independent witness and corroboration, the prosecution case should not have been accepted. Hence, the impugned judgment is not sustainable in law and need to be set aside.

7. Learned Addl. Government Advocate while supporting the impugned judgment passed by the trial court submits that there is ample evidence both oral and documentary to prove the motive behind the murder of the deceased by the appellants. The prosecution has proved that the appellants have intentionally committed murder of the deceased. He further submits that the charges framed against the appellants are well established by the prosecution from the evidence on record. As such the trial court rightly convicted them under Sections 302 / 34 of I.P.C. Hence, the impugned judgment need not be interfered with.

8. Considering the rival submissions of the parties and after going through the L.C.R, it reveals that prosecution has examined P.W.3 as an eyewitness. She had deposed that appellant No.2 suddenly came with a knife and stabbed on the back of the deceased and then appellant No.1 gave stroke with the blunt side of Spade on the head of the deceased. The deceased started running but fell on the way and again both the appellants assaulted her. In her cross-examination she has stated that she saw the incident from a distance of about 20 cubits and from that place she came to the deceased and found that she was dead. She has further stated that appellant No.2 gave three to four blows with knife on the neck, throat and belly of the deceased and appellant No.1 gave 10 to 12 blows to the deceased with Spade. The evidence of P.W.3 regarding number of assault made by the assailants and the injury sustained by the deceased, it reveals from the postmortem report that there was major difference regarding the injuries and number of assault made with knife and blunt side of the spade. In view of such discrepancy the evidence of P.W.3 cannot be trust worthy.

9. P.W.4 is also cited by the prosecution as an eyewitness to the occurrence. In her evidence she had deposed that on the date of occurrence she along with deceased and P.W.3 had gone to fetch water from one Nala. They were returning with water. At that time she was in the front, deceased was in the middle and P.W.3 was at the back. On hearing falling sound of the water pot, she turned back and found that appellant No.2 was stabbing and appellant No.1 was assaulting the deceased with the Spade. However, she has not stated before the Police regarding falling sound of water pot and she looked back and found the assailants of the deceased ran away. The said fact was confronted to the Investigating Officer-P.W.10, who has produced the First Information Report and the Case Diary before the Court on 20.07.1994.

10. P.W.5, who is stepmother of the deceased had deposed that hearing the shouts of P.W.3 and P.W.4, she ran to the spot and found appellant No.2 was running towards the field and appellant No.1 was running with Spade. She also saw that the deceased was lying dead and a knife was lying near the dead body. She was examined by P.W.9, the A.S.I. of Police, who has registered the First Information Report and it was confronted to him that P.W.5 has not stated before him that hearing shout of P.Ws.3 and 4 she reached the spot and saw the assailants ran away

towards their house with the weapon of offence. As such there was no corroboration of the fact regarding the assault made by the appellants on the deceased. P.W.3 is the relative of the father of the deceased and P.W.4 is the cousin of Pitambar, who is an accused in the counter case bearing Patna P.S. Case No.46 of 1994. P.Ws.3, 4 and 5 are silent about the counter case, which was occurred on the same day morning. Thus, it appears that prosecution has suppressed the genesis of the case.

11. P.W.8 is the Doctor, who has conducted the postmortem examination over the dead body of the deceased. He has stated that the deceased has received four injuries, which are sharp cutting injury and stab injury on the head and chest respectively.

12. P.W.9, who is the A.S.I. of Police has stated that he has examined six persons after registration of the First Information Report. However, such persons were not cited as charge sheet witnesses. Neither he has examined the informant nor P.Ws.3 and 4, who supposed to be the witnesses to the occurrence. In his cross-examination he was confronted that P.W.5 did not state before him that hearing the shout of Pramila and Kusai she reached the spot and saw appellant No.1 was running towards his house with Spade and appellant No.2 running towards the field.

13. P.W.10, who is the Investigating Officer, in cross-examination has stated that there is a case and counter case between the parties. He has further stated that Patna P.S. Case No.46 of 1994 was registered on the date of occurrence. The occurrence of that case took place after the occurrence of the present case. He has further stated that P.W.4 has not stated before him that she looked back on hearing the falling sound of a water pot. It appears that the counter case bearing Patna P.S. Case No.46 of 1994 was registered by the same Investigating Officer. However, he has not reflected about the same in the Case Diary of the present case.

14. In view of the vital discrepancy regarding the assault made by the appellants on the deceased and the spot map as reveals from the records, the place of occurrence and the evidence of the witnesses that after the assault the appellants ran away from the spot where the dead body was found is improbable. The prosecution has suppressed the fact regarding registration of the counter case on the same day and death of wife and son of appellant No.2 due to burn injuries. Taking into consideration all the above, this Court is of the opinion that the prosecution has not able to prove the charges beyond reasonable doubt. Hence the appellants cannot be found guilty of the charges under Sections 302 / 34 of I.P.C. Accordingly, this Court sets aside the impugned judgment of conviction and sentence passed by the learned Sessions Judge, Keonjhar in S.T. Case No.143 of 1994 and acquits the appellants from the charges.

15. The appellants who are on bail pursuant to order dated 21.04.2005, their bail bonds be cancelled and they be set at liberty forthwith in case their detention is not required in any other case. L.C.R. be sent forthwith. The Criminal Appeal is accordingly allowed.

2018 (II) ILR - CUT- 45

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

CRA NO. 198 OF 1999

KEDA BEHERA & ANR. ……..Appellants

.Vs.

STATE OF ODISHA ……..Respondent

A) CRIMINAL TRIAL – Confessional statement of accused is that the deceased committed suicide – Postmortem report says the cause of the death was due to asphyxia due to strangulation – Cross examination of Doctor rules out suicide – Held, the death of the deceased was homicidal. (Para 7)

(B) CODE OF CRIMINAL PROCEDURE,1973 – Section 164 read with Rule-49 of GRCO (Volume-I, Criminal) – Judicial Confession – Mode of recording – Allegation by defense that sufficient time was not given for reflection – Records reveal otherwise – Held, analyzing and comparing the facts and ratio decided in the aforesaid two cases as well as the case at hand, we are of the opinion that the appellants in the instant case have been given sufficient time for their reflection and the confession was voluntary. (Para 10)

(C) CRIMINAL TRIAL – Judicial confession – Corroboration – Importance of – Held, corroboration assumes great importance when the accused retracts from the confession made – No corroboration in material particulars to the judicial confession made by the appellants – Impugned judgment of conviction and sentence is not sustainable. (Para 12)

Case Laws Relied on and Referred to :-

1. (2011) 48 OCR (SC) 504 : Rabindra Kumar Pal @ Dara Singh –v- Republic of India.
2. AIR 1978 SC 1248 : Shankaria -v- State of Rajastan.
3. 1975 CLT 1144 : State of Orissa -v- Suruji Dei and another.
4. 2001 (II) OLR 447 : Gobinda Chandra Chinera -v- State of Orissa.

For Appellants : M/s D.P. Dhal, A.K. Acharya, S.K. Tripathy, P. Uttarkabat, M.K. Dash, S. Mohapatra

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

JUDGMENT Date of Judgment: 17.07.2018

K.R. MOHAPATRA, J.

Appellants in this appeal, seek to assail the judgment and order of conviction and sentence dated 27.07.1999 passed by learned Sessions Judge, Sonepur in Sessions Case No.1/12 of 1999 (arising out of GR Case No.87 of 1998 of the Court of SDJM, Birmaharajpur) convicting the appellant No.1, namely, Keda Behera under Section 201, IPC and sentencing him to undergo RI for three years as well as convicting the appellant No.2, namely, Sasthi Behera for committing offence under

Sections 302 and 201, IPC and sentencing him to undergo imprisonment for life for committing offence under Section 302, IPC and to undergo RI for seven years for committing offence under Section 201, IPC. It was further directed that the sentences against the appellant No.2 shall run concurrently.

2. One Sripati Dalai (informant/PW-1) lodged information before the Birmaharajpur Police Station stating that at about 4.00 PM on 07.08.1998, he had gone to his paddy field to bring back the bullocks. At that time, he saw that body of a lady was floating in the well situated at his Mahulmal paddy field. Her legs and hands were tied. Thereafter, he came back and informed the villagers about the same. The villagers along with the appellant No.1 identified the dead body to be of Seema Behera, the elder daughter of Keda Behera (appellant No.1). The body was decomposed. Suspecting murder of Seema, PW-1 lodged the FIR (Ext.4). On receipt of the FIR, Birmaharajpur P.S. Case No.63(8) dated 17.08.1998 was registered under Sections 302/201, IPC against unknown person. Since the FIR disclosed a cognizable offence, the OIC, Birmaharajpur P.S. (PW-14) took up investigation.

Upon receiving information, Investigating Officer (PW-14) visited the spot and examined the informant (PW-1). As it was night by then, he instructed Constable, Sri B.D Sahu and Gramarakhi, Sri Purna Chandra Haripal to guard the dead body. On the next morning, he again visited the spot; examined the witnesses present there; made inquest over the dead body in presence of the witnesses; prepared inquest report (Ext.6); and sent the dead body to District Headquarters Hospital, Sonepur preparing dead body challan (Ext.5) for postmortem. He also seized a rope and a stone lying near to the well of PW-1 vide seizure list Ext.7. On the same day at 2.00 PM, the I.O. seized the wearing apparels of deceased Seema Behera vide seizure list Ext.8. On 04.09.1998, the I.O. received the postmortem report (Ext.1) and on the same day he arrested both the appellants and forwarded them to Court on 05.09.1998 and made a prayer to record the confessional statement of both the appellants. Accordingly, learned SDJM, Birmharapur (PW-13) recorded the confessional statements of appellants on 07.09.1998. The said confessional statements of the appellants are marked as Exts.2 and 3. On his transfer, PW-14 handed over the investigation to ASI, Rabindra Kumar Panda (PW-12), who did not examine any other witness. On completion of the investigation, he submitted charge-sheet under Sections 302/201/34, IPC against the appellants. Accordingly, the appellants faced trial.

3. In support of its case, prosecution examined as many as fourteen witnesses. Apart from the aforesaid witnesses, prosecution also relied upon PWs-2 to 6, who are the witnesses to a part of occurrence and PWs-7 to 10, who are the witnesses to the inquest. PW-11 is the Doctor, who conducted the postmortem. The prosecution also relied upon the aforesaid documentary evidence as well as MOs, viz. rope, stone, saree, blouse and saya of the deceased marked as MOs.I to V respectively.

Although the confessional statements of the appellants were recorded under Section 164 Cr.P.C. by PW-13, they retracted from their confession during the trial and pleaded their innocence.

4. During trial, PWs-2 to 10 did not support the case of the prosecution and were declared hostile. However, relying upon the materials on record including confessional statements (Exts.2 & 3), learned Trial Court convicted the appellant No.1 under Section 201 IPC and appellant No.2 under Sections 302 and 201 IPC and sentenced them as above.

Be its stated here that, appellant No.1 is the father of the deceased and appellant No.2 is the brother of the deceased. The confessional statements of appellants reveal that on the ill-fated date, i.e., on 14.08.1998, which was the day of Janmastami, there was a quarrel between the appellant No.2 and the deceased and appellant No.2 assaulted the deceased. Subsequently, when appellant No.2 had been to Ulunda market for selling salt, deceased-Seema committed suicide by hanging herself. Being frightened, both the appellants tied the dead body with a rope and dumped it in the well of PW-1 at Mahulmal paddy field.

5. Learned counsel for the appellants, contended that the confessional statements of the appellants under Section 164 Cr.P.C. were recorded under coercion. It was not an voluntary one. Learned Magistrate (PW-13) did not follow the procedure as enumerated under Rule-49 of General Rules and Circular Orders (GRCO) (Volume-I, Criminal). There is no eyewitness to the occurrence. PWs-2 to 6, who claimed to be eyewitnesses to a part of the occurrence, do not support the case of the prosecution. PWs-7 to 10, who alleged to be witnesses to the inquest also do not support the case of the prosecution. Except the confessional statements, no material is available on record to bring home the charge against the appellants. Neither the mother and sister-in-law (wife of appellant No.2) of the deceased nor the witnesses who allegedly guarded the dead body after it was recovered, were examined. The impugned judgment of conviction and sentence is based on surmises and conjectures. No reason has been assigned by the learned trial Court to convict the appellant No.2 under Section 302 IPC. Further, no material is available on record, either direct or indirect, to establish that the appellant No.2 had committed murder of his sister, namely, Seema Behera. Likewise, when the allegation against both the appellants are identical, there is no reason to convict the appellant No.2 under Section 302 IPC, when the appellant No.1 has been convicted under Section 201 IPC only. As such, he prayed for setting aside the impugned judgment.

6. Mr.S.S.Mohapatra, learned Additional Standing Counsel for the State supported the impugned judgment and contended that the confessional statements have been recorded following the procedure laid down under Rule-49 of GRCO (Volume-I, Criminal). Although the witnesses do not support the case of the prosecution and retracted from their statements made before Police under Section 161 Cr.P.C., learned trial Court has rightly convicted them relying upon the

confessional statements recorded by PW-13. He further contended that the appellants being the family members of the deceased, had the special means of knowledge about the cause of death of the deceased and onus is on them to discloses the circumstances under which the death of Seema occurred. According to the confessional statements, the death of the deceased occurred on 14.08.1998. Neither the family members nor the appellants ever intimated the matter to the Police, which casts serious doubt on their conduct. The circumstances as well as the confessional statements made by the appellants under Section 164 Cr.P.C. are sufficient to bring home the charges against the appellants. As such, the impugned judgment of conviction and order of sentence needs no interference.

7. PW-11, the doctor who conducted the postmortem examination, opined as under:-

> *"1)There was a ligature mark on the neck. It was distinct and horizontal and was at the level of thyroid cartileg encircling the neck completely. It was visible as a brownish red groove with a size of 1/2 . The skin was already pilled up. The sub-cutaneous tissue, the muscle mass beneath the ligature mark were stained deeply due to the extravation of blood. The thyroid cartileg with the superior cornu (both) was fractured, the rings of larynx were fractured and the carotid arteries were disrupted. The ligature mark was anti-mortem in nature."*
>
> *2) Both the hands were tied with ropes at the wrist crossing each other and were tied as such to the body around the abdomen and back.*
>
> *3) There was no internal injury on the body of the deceased Seema Behera. The cause of the death of Seema Behera was due to asphyxia due to strangulation. Ext.1 is my report and ext.1/1 was my signature therein."*

In cross-examination, he also ruled out the possibility of suicide of the deceased. Thus, taking into consideration the opinion of PW-11 and in absence of any materials to the contrary, we are constrained to hold that the death of the deceased was homicidal.

8. The next question that crops up for consideration is whether the confession of the appellants made under Section 164 Cr.P.C. and recorded by learned SDJM, Birmaharajpur (P.W.13), was following due procedure of law. Section 164 Cr.P.C. provides procedure of recording of confessional statement of an accused by a Magistrate. In the light of Section 164 Cr.P.C., Rule-49 of GRCO (Volume-I, Criminal) sets out the procedure and precaution to be taken by a Magistrate while recording a confessional statement. The relevant portion of Rule-49 required for our discussion reads as follows:-

> "**49. (i) Time for reflection to confessing accused**- The recording of the confession of an accused person immediately on his production by the Police should be avoided. Ordinarily, he should be allowed a few hours for reflection, free from the influence of the Police, before his statement is recorded. The Police should not be allowed to be present when a confession is recorded.
>
> **(ii) Confession to be recorded in open Court**- Confession should be recorded in open Court and during the Court hours except when unusual circumstances require a different

procedure as, for instance, when an open record would be detrimental to the public interest or when the recording of the confession in open Court is rendered impracticable by reason of the fact that the Court is closed for two or more successive days on account of holidays.

(iii) Precautions to be followed before recording confession- A Magistrate recording a confession should satisfy himself in every reasonable way that the confession is made voluntarily. It is not necessary actually to invite complaints of police ill-treatment, though of these, if spontaneously made, cognizance should be promptly taken of the same. However, it should be made clear to the prisoner that the making or withholding of a statement is within his discretion any indication of use of improper pressure should be at once investigated.

(iv) Certificate about the genuineness of the confession-The Magistrate should question a confessing prisoner with a view to ascertaining exact circumstances in which the confession was made and the connection of the Police with it, in other words the Court should record the confessions inasmuch detail as possible with a view to obtaining materials from which its genuineness can be judged and to testing whether it is freely made or is the outcome of suggestion. To the certificate required by Section 164 of the Criminal Procedure Code, the Magistrate should add a statement in his own hand, of the grounds on which he believes that the confession is genuine, of the precautions which he took to remove accused from the influence of the Police and of the time, if any given to him for reflection [vide Form No. (M)2].

(v) Warning to the confession accused- The Magistrate should formally warn the accused though not necessarily in set words, that anything said by him will be taken down and may therefore be used as evidence against him, even if he retracts the same."

In the case of ***Rabindra Kumar Pal @ Dara Singh –v- Republic of India***, reported in (2011) 48 OCR (SC) 504, Hon'ble Supreme Court discussing leading case laws on recording of confessional statements of accused by the Magistrate and analyzing the provisions made under Section 164 Cr.P.C., came to hold as under:-

"29) The following principles emerge with regard to Section 164 Cr.P.C.:-

(i) The provisions of Section 164 Cr.P.C. must be complied with not only in form, but in essence.

(ii) Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

(iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

(iv) The maker should be granted sufficient time for reflection.

(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.

(vii) Non-compliance of Section 164 Cr.P.C. goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.

(viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply his

judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open court.

(x) Confession of a co-accused is a weak type of evidence.

(xi) Usually the Court requires some corroboration from the confessional statement before convicting the accused person on such a statement."

9. Learned counsel for the appellants vehemently contended that the appellants were not provided with sufficient time for their reflection. It is contented that they were given only ten minutes for their reflection. It is not at all sufficient to come out of influence of Police to give a voluntary confessional statement. In order to test the veracity of such submission, we examined the trial Court record. It appears from the case record that on 05.09.1998 the appellants were produced before the learned SDJM, Birmaharajpur in GR Case No.87/98 (which was subsequently committed to the Court of Sessions and the instant Sessions Case has been registered). On that date, the Investing Officer made a prayer to record the confession of the appellants under Section 164 Cr.P.C. On query by learned Magistrate, the appellants expressed their desire of making confessional statement. In order to give sufficient time for their reflection and to come out of influence of Police, learned SDJM (PW-13) remanded them to judicial custody till 07.09.1998. On 07.09.1998, the appellants were again produced before the learned Magistrate. They were kept in Zima of Orderly of learned SDJM, namely, Sri K.K. Satapathy for further cool reflection of their mind. After about 10 minutes, appellant No.2 was called to the Court where no Police official/people or Advocates were present. After questioning about his willingness and reason to make confessional statement and observing all the formalities and/or cautions as prescribed under Section 164 Cr.P.C. and Rule 49 of GRCO (Volume-I, Criminal), learned Magistrate recorded the confession under Section 164 Cr.P.C. In the same manner, statement of appellant No.1 was also recorded. After recording of their confession under Section 164 Cr.P.C, the appellants were remanded to judicial custody. On examination of Exts.2 and 3, i.e. the confessional statements of the appellants 1 and 2 respectively, it appears that learned SDJM (PW-13) had put good numbers of clear and pointed questions to the appellants and he had taken all precautions as enumerated under Section 164, Cr.P.C., Rule 49 of the GRCO (Volume-I, Criminal) as well as the guidelines set out in the decision in the case of ***Rabindra Kumar Pal @ Dara Singh (supra***). In cross-examination, learned SDJM (PW-13), categorically deposed that the appellants did not confess before him to have killed the deceased. They only confessed that Seema Behera (the deceased) committed suicide. They also confessed before him (PW-13) that on the date of Janmastami in the morning on a trivial issue there was a quarrel between Seema and Sasthi (appellant No.2) during which Seema was assaulted by said Sasthi and in the evening, Seema committed suicide. He also deposed that the appellants have made their confessional statements

before him (PW-13) voluntarily. Apart from the above, it appears that the appellants in their statements under Section 313 Cr.P.C., also do not complain that their confessional statement under Section 164 Cr.P.C. was not voluntary.

In the case of ***Shankaria -v- State of Rajastan***, reported in AIR 1978 SC 1248, the situation and circumstances of recording the confession under Section 164 Cr.P.C., were similar to a large extent. In that case, learned Magistrate had hardly given 20 minutes to the appellant for reflection before recording his confession after being produced from judicial custody and in the facts and circumstances of that case, it was held that the accused were given sufficient time for reflection. The facts and circumstances of ***Shankaria (supra)*** are reproduced hereunder for better appreciation.

> "23. ……..The appellant was arrested by Shri S.P. Rathore, Superintendent of Police on June 3, 1974 at Bhatinda. He was then taken to Ganganagar in Rajasthan in connection with the investigation of 15 crimes of a similar pattern committed in Ganganagar District. The appellant remained in police custody upto June 12, 1974 on which date in the afternoon, he was brought by the police to Raisingh Nagar, where Shri Sukhdarshan Kumar Bansal, Judicial Magistrate First Class, was then holding his Court. Under the orders of the Magistrate, the appellant was committed to the judicial lock-up at Raisingh Nagar in the evening of June 12, 1974. Thereafter, he remained there in the judicial lock-up for two days more. On June 13, 1974, Shri Kashi Ram, Superintendent of Police, submitted an application to the Magistrate, requesting him to record the confession of the accused. On that application, the Magistrate passed an order to the effect that the accused be sent for from the judicial lock-up on the following day at 7 a.m. for recording his confessional statement. In compliance with the Magistrate's order, the appellant was brought from the judicial lock-up in the morning of June 14, 1974 and produced before the Magistrate. At 8.20 a.m., the Magistrate put some questions to the appellant by way of preliminary examination to ensure whether he wanted to make a confession voluntarily……
>
> 24. After this preliminary examination, the Magistrate started recording of the confessional statement at 8.45 a.m. After the completion of the statement (Ex. P-27) (which we have extracted earlier), at its foot, the Magistrate made a memorandum, which rendered into English…..
>
> 25. xx xx xx
>
> 26. Mr. S. K. Gambhir, appearing as amicus curiae, argued the case very thoroughly on behalf of the appellant. It is contended by him that the confession (Ex. P-27) was not voluntarily made but was 'the result of police pressure, inducement and coercion. According to him, this inference is deducible from these circumstances.
>
> (1) No explanation is forthcoming as to why the accused was brought all the way from Ganganagar to Raisingh Nagar for getting the confession recorded there. Possibly, the police did not want to give the appellant an opportunity of having independent advice which could more easily be available in the District town of Ganganagar rather than at the Sub-Divisional town, Raisinghnagar.
>
> (2) The Judicial Lock-up, Raisingh Nagar, being contiguous to the Police Station is almost a part of it. The appellant therefore, even on the 12th, 13th and 14th of June 1974, during the time when he was an inmate of the Judicial Lock- up, could not be said to be free from police surveillance and influence.

(3) The Magistrate hardly gave 20 minutes to the appellant for reflection before recording his confession. It is maintained that according to the ruling of this Court, the Magistrate should have given at least 24 hours to, the appellant, to think and decide while in the judicial lock-up, as to whether or not he should make a confession….."

After discussing the facts and circumstances of the case, the Hon'ble Supreme Court, while dealing with the sufficiency of time to be allowed for reflection of the accused making confessional statement, held as follows:-

"36. This takes us to Point No. (3). The argument is that the Magistrate should have given at least 24 hours to the appellant after his preliminary examination, to think over the matter, in Jail, free from fear of the Police.

37. It is true that the interval between the preliminary examination of the appellant and the recording of his confessional statement was about 15 minutes. But there is no statutory provision in Section 164 Cr. P.C or elsewhere, or even an executive direction issued by the High Court that there should be 'an interval of 24 hours or more between the preliminary questioning of the accused and the recording of his confession. The condition precedent for recording a confession by the Magistrate in the ;course of Police investigation is provided in Section 164(2) Cr.P.C. which mandates the Magistrate not to record any confession, unless upon questioning the accused person making it, he has reason to believe that it is being made voluntarily.

38. In the instant case, the Magistrate fully complied with the condition. He (Shri Bansal) has testified that before recording the confession he had fully satisfied himself that the accused wanted to make the confession voluntarily.

39. The large number of clear and pointed questions put by him to the appellant for this purpose and the answers given by the latter have been extracted in full earlier. Their perusal shows that the Magistrate had cogent reasons to believe that the confession was being voluntarily made.

40. Although the interval between the preliminary questioning of the appellant and his confession was about 15 minutes, the appellant had no less than 38 hours at his disposal, whilst he was in judicial custody free from fear or influence of the Police, to think and decide whether or not to make a confession. As noticed already, the appellant was brought from Ganganagar to Raisingh Nagar on June 12, 1974 because on that day no Magistrate competent to record the confession of the appellant was available at Ganganagar. The appellant was admitted to the Judicial Lock-Up Raising Nagar under the orders of the Magistrate about or after 4 p.m. on that date. Thereafter, the appellant continuously remained in the Judicial Lock-Up or judicial custody till his confession was recorded on June 12, 1974 from 8.45 a.m. onwards. The Magistrate, Shri Bansal was. aware that the appellant was continuously in judicial custody since the evening of June 12, for about 38 or 40 hours preceding the confession…..

41. xx xx xx

42. It will be seen that how much time for reflection should be allowed to an accused person before recording his confession, is a question which depends on the circumstances of each case. The object of giving such time for reflection to the accused, is to ensure that he is completely free from police influence. If immediately before the recording of the confession, the accused was in judicial custody beyond the reach, of the investigating police for some days, then such custody from its very nature, may itself be a factor dispelling fear or influence of the police from the mind of the accused. In such a case, it may not be necessary to send back the accused person for any prolonged period to jail or judicial lock-up….."

Further, in the case of ***State of Orissa Vs. Suruji Dei and another***, reported in 1975 CLT 1144, one of the accused persons who volunteered to make confessional statement before the Magistrate, was initially produced before the Magistrate on 30.04.1971 and was remanded to judicial custody. Again she was produced before the Magistrate on 03.05.1971 and the Magistrate allowed half an hour time for further reflection and then her confessional statement was recorded under Section 164 Cr.P.C. by the Magistrate. This Court held the same to be sufficient time for reflection of the accused to make confession.

10. Analyzing and comparing the facts and ratio decided in the aforesaid two cases as well as the case at hand, we are of the opinion that the appellants in the instant case have been given sufficient time for their reflection and the confession was voluntary.

11. As held in para-22 of ***Shankaria (supra***), when in a capital case, the prosecution demands a conviction, preliminary on the basis of the confession of the accused recorded under Section 164 Cr.P.C., the Court must apply a double test "(1) whether the confession was perfectly voluntary? (2) If so, whether it is true and trustworthy?". Thus, applying the aforesaid principle, the next question, therefore, arises whether the confession was true and trustworthy. As we have already discussed, the confession of both the appellants is based on their confession only. Thus, the truthfulness and reliability of such confession attaches a great importance to their conviction.

12. Although the appellants in their confession have stated that the deceased had committed suicide, the Medical Officer (PW-11) ruled out the possibility of suicide. Further, we have already held that the death was homicidal in nature. Thus, there appears some doubt with regard to the truthfulness in the confession made by both the appellants as they come up with a distorted confession. At the same time, no materials is available on record to come to a definite conclusion that the appellant No.2 (who has been convicted under Section 302 IPC), has committed the murder of his sister. Added to it, both the appellants retracted from their confession in the statements made under Section 313 Cr.P.C.

Learned Additional Standing Counsel vehemently urged that since the deceased was a family member of the appellants, her cause of death was within their special knowledge and burden lies on them to prove such facts under Section 106 of the Evidence Act. Since they (the appellants) have not discharged the burden of proof, adverse inference should be drawn against them. In our opinion, when both the appellants have made confession under Section 164 Cr.P.C., the rigors of Section 106 of the Evidence Act lose its significance. Moreover, the prosecution for the reasons best known to it, has not examined the mother and sister-in-law (wife of appellant No.2) in this case, who could have thrown some light. In view of the above, it is unsafe to record the conviction of the appellants on distorted confession.

Further, in the case of ***Gobinda Chandra Chinera Vs. State of Orissa***, reported in 2001 (II) OLR 447, it is held as under:-

> "10. …… There is no dispute that the judicial confession said to have been made before the Magistrate has been retracted by the appellant in his examination under Section 313 Cr.P.C. Law is well settled that a conviction can be based only on judicial confession if it is found to be voluntary and true. But in case of retracted judicial confession as a matter of prudence the Courts ordinarily look for corroboration from other sources…."

In the instant case, there is no corroboration in material particulars to the judicial confession made by the appellants. Corroboration assumes a great importance, when the accused retracts from the confession made. Learned trial Court has lost sight of this important aspect of the matter. In that view of the matter, we are of the considered opinion that the impugned judgment of conviction and sentence is not sustainable. Accordingly, the impugned judgment of conviction and sentence is set aside.

13. The appellant No.1 has been released on bail by this Court vide order dated 31.08.1999 in Misc. Case No.223 of 1999 and the appellant No.2 has been released by this Court on bail vide order dated 25.05.2000 passed in Misc. Case No.225 of 2000. Thus, their bail bond be cancelled and they be set at liberty forthwith. LCR be sent back immediately.

2018 (II) ILR - CUT- 54

S.K. MISHRA, J & DR. D.P. CHOUDHURY, J.

OJC NO.1099 OF 1997

BAURIBANDHU MANGARAJ ……..Petitioner

.Vs.

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

ORISSA ESTATE ABOLITION ACT, 1951 – Section 6 and 7 read with Section 5 of Shree Jagannath Temple Act, 1955 – Provisions under – Settlement of land of Shree Jagannath Temple – The land in question was first settled in favour of Lord Jagannath Bije Puri through the Marfatdar of Mahanta Shri Ram Prakash Das, Bada Akhada Math, Puri and subsequently the same land was directed to be recorded in the name of Lord Jagannath Mahaprabhu, Marfat Managing Committee – Plea that SJT Act not applicable when the land has already been settled under OEA Act – Question arises as to whether the petitioner Ram Prakash Das of Bada Akhada Math is the owner of the case land or Lord Shri Jagannath Mahaprabhu continues to be Landlord of suit property? – Held, when Lord Shree Jagannath Mahaprabhu is the owner and the petitioner-Math or Marfatdar claims as Marfatdar of deity, they are only caretaker – Can a caretaker take the plea of ownership of deity? It is not at all – It is reiterated that SJT Act being a special statute has over riding effect and gives the authority of vesting

of land with Lord Shree Jagannath Mahaprabhu represented through the Managing Committee of the Temple. (Paras 35 to 40)

Case Laws Relied on and Referred to :-

1. 2016 (I) OLR (SC) 209 : Shri Jagannath Temple Managing Committee -V- Siddha Math & Ors.
2. AIR 1967 SC 256 : Mahanta Shri Shrinivas Ramanuj Das -V- Suryanarayan Das & Anr.

For Petitioner : M/s. R. K. Dash, D.R. Swain, P. Prusty, N.K. Sahu & B. Swain

For Opp. Parties : Mr. Sougat Das, Addl. Standing Counsel
Mr. B.H. Mohanty, Senior Adv.
M/s.D.P. Mohanty, S.C. Mohanty, J.K. Bastia, R.K. Nayak & B. Das
M/s. S.P. Dash & A.K. Nath

JUDGMENT Date of Hearing: 26.06.2018 Date of Judgment:02.07.2018

DR. D.P. CHOUDHURY, J.

Challenge has been made to the order dated 2.6.1992 passed by the learned O.E.A. Collector, Nimapara in OEA Case No.307 of 1989.

FACTS

2. The adumbrated facts of the petitioner is that the case land is recorded as Debottar Lakhraj Bahel estate in the name of Lord Shri Jagannath Bije, Puri, through the Marfatdar of Mahanta Shri Ram Prakash Das, Bada Akhada Math, Puri. The Collector, Puri and Mahanta Shri Ram Prakash Dash filed Misc. Case No.543 of 1963 and Misc. Case No.1369 of 1965 under Section 13 (D) of the unamended provision of Chapter-11-A of the Orissa Estate Abolition Act, 1951 (hereinafter called as 'OEA Act') before the Tribunal for declaration that the suit property is trust estate. On the basis of the application, the Tribunal allowed the suit property as trust estate. It is further alleged inter alia that Lord Jagannath being ex-intermediary after vesting of the estate applied through petitioner for settlement of the case land in their favour under Sections 6 and 7 of the Orissa Estate Abolition Act (in short 'the Act'). After due procedure being followed, the case land was settled in favour of Lord Shri Jagannath through Marfatdar Mahanta Ram Prakash Dash of Bada Akhada Math. The entire income of the case land is spent for religious purposes. After the land was settled, the petitioner used to pay the rent and same has been accepted by the State. The settlement took place on 21.1.1984 and rent schedule was issued in favour of Shri Jagannath Mahaprabhu Bije, Puri Marfatdar Shri Ram Prakash Dash, Bada Akhada Math. Accordingly rent was paid.

3. Be it stated that, pursuant to the issuance of rent schedule, the suit land was recorded by Assistant Settlement Officer. While the matter stood thus, the opposite party being the Managing Committee Shri Jagannath Mahaprabhu, Puri filed O.E.A. Case No.370 of 1989 under Sections 6 and 7 of the Act. In that proceeding the O.E.A. Collector again passed order to record the suit land in favour of Shri

Jagannath Mahaprabhu marfat Managing Committee on the ground that under Section 5 of the Jagannath Temple Act (in short "the J.T. Act") the Managing Committee is the rightful intermediary to the property. The petitioner challenged such order stating that once the property has been already settled in favour of the Marfatdar petitioner, the O.E.A. Collector has no jurisdiction to resettle the same with the Management of the Temple-opposite party. On the other hand, the O.E.A. Collector has no jurisdiction to decide the lease afresh. Hence, the writ petition is filed to quash impugned order of the O.E.A. Collector, Puri.

4. Traversing the averments made in the writ petition, a counter affidavit has been filed on behalf of Shri Jagannath Mahaprabhu, opposite party no.3 and in the said counter affidavit, it is averred that Lord Shri Jagannath Mahaprabhu of Puri is the owner in possession of the case land. Since it was not physically possible to possess all the properties personally and manage the same effectively, as per the practice the Marfatdars were looking after the property for and on behalf of the Lord Shri Jagannath Mahaprabhu, who is perpetual minor. Accordingly, the case land was kept under the Marfatdarship of the petitioner.

5. Be it stated that, Lord Shri Jagannath Mahaprabhu was an intermediary and when the intermediary vested in the year 1962-1963, a set of Marfatdars filed application under Chapter II-A of the Orissa Estate Abolition Act, 1951 for declaration that the estate of Lord Shri Jagannath Mahaprabhu was a Trust Estate. The Mahanta of Bada Akhada Math, the petitioner filed such an application and the applications were allowed in favour of the Deity. In 1972-1973, when Chapter II-A of the O.E.A. Act was repealed, all intermediary's interest vested with the State Government with effect from 1974. So, the Mahanta of Bada Akhada Math filed an application under Section 8-A(3) of the O.E.A. Act for fixation of fair and equitable rent for its settlement under Sections 6 and 7 of the said Act. As the Mahanta Ram Prakash Das was looking after the property on behalf of the Deity, the temple administration did not make any application independently. However, the settlement vide OEA Act Case No.460/1974 filed by the petitioner has been settled in favour of Lord Shri Jagannath Mahaprabhu under the Marfadarship of Mahanta Shri Ram Prakash Das and as the order was passed in favour of Lord Shri Jagannath Mahaprabhu, the petitioner cannot claim better title than a Marfatdar or a tenant.

6. As the Jagannath Temple Managing Committee was constituted under the provisions of Shri Jagannath Temple Act, 1955 (in short 'SJT Act') and the Government in Revenue Department extended time for filing claim under Sections 6 and 7 of the O.E.A. Act in 1989 vide notification dted 18.04.1989, the temple administration made an application for fixation of fair and equitable rent in respect of the case land vide OEA Case No.317 of 1989 and it was allowed in 1992. It is asserted in the counter affidavit that even if there are two orders passed by the O.E.A. Collector, Nimapara, the petitioner-Ram Prakash Das cannot have any grievance against the order of settlement made in favour of the temple

administration as the orders were passed in favour of the Deity and none has any personal interest in it.

7. As the ex-intermediary was Shri Jagannath Mahaprabhu, the claim of Bada Akhada Math over the case property to have settlement of the property in his favour is a falsehood. Neither the Mahanta nor the Math can claim any personal interest over the suit property which admittedly belongs to Lord Shri Jagannath Mahaprabhu.

8. So far as the allegation of recording of land in favour of the petitioner-Math in the consolidation operation is concerned, the opposite party no.3 denied such assertion as no document is filed by the petitioner to prove the same. Since the case land belongs to Lord Shri Jagannath Mahaprabhu and it vests absolutely in the name of Shri Jagannath Mahaprabhu represented through the Temple Managing Committee by virtue of Section 5 of SJT Act, the petitioner-Mahanta or Marfatdar was neither intermediary nor in Khas possession of the disputed property as claimed. So, the reliefs prayed in the writ petition should be disallowed.

9. Mr.Sougat Das, learned Additional Standing Counsel for the State-opposite parties submits that the State is supporting the counter affidavit filed on behalf of Lord Shri Jagannath Mahaprabhu-opposite party no.3.

SUBMISSIONS

10. Mr.N.K.Sahu, learned counsel for the petitioner urged that since under Section 13-D of Chapter-11-A of the OEA Act, the Trust Estate has been declared at the instance of Mahanta-Ram Prakash Das in respect of the suit land and there is no appeal against such decision of the Tribunal, such finding of the Tribunal has attained finality. Such decision was made on 28.10.1965. Thereafter, the Bada Akhada Math, being the ex-intermediary, applied through the Mahanta Ram Prakash Das by filing a petition under Sections 6 and 7 of the OEA Act for settlement of the land in favour of the Math. After observing due procedure, on 28.05.1983, the OEA Collector, Nimapara has settled the disputed land in favour of ex-intermediary Math under the Marfatdarship of Ram Prakash Das vide OEA Case No.460 of 1974. According to him, since the settlement of the case land has been made under the provisions of the OEA Act and revised ROR was issued accordingly in the name of the petitioner-Math, the case property is endowed to Math but not to the temple administration.

11. Mr.Sahu, learned counsel for the petitioner further submitted that the petitioner-Math has acquired property for offering Seva to Lord Shri Jagannath Mahaprabhu and offerings were being distributed between the devotees. So, the Mahanta, being the Marfatdar of Lord Shri Jagannath Mahaprabhu, is the actual ex-intermediary and being in Khas possession of the case land, has got the ownership in possession over the case land. In consolidation operation also, the ROR was published in favour of the Math, Marfatdar-Ram Prakash Das.

12. Mr.Sahu, learned counsel for the petitioner further contended that the Administrator of Shri Jagannath Temple, Puri filed another OEA Case No.370 of 1989 before the OEA Collector, Nimapara under Sections 6 and 7 of the OEA Act for settlement of the case land in favour of Lord Shri Jagannath Mahaprabhu represented through the temple administration and the same was also settled in their favour. Since the case land has already been settled in favour of the Mahanta of Math, the subsequent settlement by the O.E.A. Collector, Nimapara is without jurisdiction. On the other hand, the case land is not the property of Lord Shri Jagannath Mahaprabhu but it was endowed to Math for various religious purposes. In this regard, he relied on the Constitution Bench decision of the Hon'ble Supreme Court in the case of ***Mahanta Shri Shrinivas Ramanuj Das –V- Suryanarayan Das and another; AIR 1967 SC 256*** where Their Lordships, at paragraphs-40 and 41, have observed that the lands known as Amruta Manohi is under the superintendence of the Raja but the lands other than Amruta Manohi are endowed to the Math of petitioner but not merely gifted to the plaintiff or, as had been suggested, to Lord Shri Jagannath Mahaprabhu. Since the Constitution Bench of the Hon'ble Supreme Court has made such observation in similar matter of ***Mahanta Shri Shrinivas Ramanuj Das –V- Suryanarayan Das and another (Supra),*** such ratio of the Constitution Bench is also applicable to this case and as such, the case land recorded in the name of Lord Shri Jagannath Mahaprabhu Marfatdar Mahanta Shri Ram Prakash Das is to be exclusively property of Math and not the property of Lord Shri Jagannath Mahaprabhu represented by the temple administration. Not only this but also the Math is in possession of the case land for last thirty years and paying rent regularly for the same to the State for which the ownership over the case land is also vested with the Math but not with the temple administration.

13. It has been further submitted by Mr.N.K.Sahu, learned counsel for the petitioner that the subsequent settlement of the case land vide OEA Case No.370 of 1989 is a nullity because before that the same land has already been settled under the OEA Act. If the opposite party no.3 was to object the settlement made under Sections 6 and 7 of the OEA Act, they could have participated in the proceeding or they could have preferred an appeal under Section 9 of the OEA Act challenging the finding of the OEA Collector but cannot file another case for settlement as the OEA Collector has become functous officio in subsequent application to settle the case land in favour of Shri Jagannath Mahaprabhu Bije Puri. Therefore, the order passed under Annexure-7 by the OEA Collector is invalid and illegal.

14. Mr.Sahu, learned counsel for the petitioner further submitted that not only the petitioner-Math has got stitiban status over the case land but also being in possession of the same for more than 12 years, he is settled raiyat as per the provisions of Section 23 of the Orissa Tenancy Act, 1913 (hereinafter called as "OT Act"). Further, he submitted that under Section 28 of OT Act, by acceptance of rent from the petitioner-Math, the occupancy tenancy in favour of the petitioner-Math has also been created.

15. Mr.Sahu, learned counsel for the petitioner further submitted that the decision of the Hon'ble Supreme Court in the case of ***Shri Jagannath Temple Managing Committee –V- Siddha Math and others; 2016 (I) OLR (SC) 209*** is not applicable to the facts and circumstances of the present case and the decision rendered by the Constitution Bench of the Hon'ble Supreme Court in the case of ***Mahanta Shri Shrinivas Ramanuj Das –V- Suryanarayan Das (Supra)*** always to be followed. The decision rendered by two members Bench of the Hon'ble Supreme Court in the case of ***Shri Jagannath Temple Managing Committee –V- Siddha Math and others (Supra)*** decided the principle decided the principle against the ratio decided in the Constitution Bench case. Since the ratio of ***Shri Jagannath Temple Managing Committee –V- Siddha Math and others (Supra)*** is contrary to the view taken by the Constitution Bench, as per principle of precedent, the decision of two members Bench of the Hon'ble Supreme Court is per incuriam. So far as the applicability of Sections 5 and 6 of the OEA Act is concerned, he submitted that provisions of SJT Act have no application to the fact and circumstances of the case because the operation of the provisions of law in SJT Act is different than the operation of the law under the OEA Act. Section 5 of the SJT Act refers to constitution of Managing Committee to look after the affairs of the Shri Jagannath Mahaprabhu but the OEA Act is meant for settlement of land after the property are vested with the State. So, the ratio decided by the Division Bench of the Hon'ble Supreme Court that the provisions of OEA Act are not applicable on the ground that OEA Act is general principle of law and the SJT Act as a special law is not correct. Therefore, he submitted to quash the settlement of land made in favour of Shri Jagannath Mahaprabhu.

16. Mr.B.H.Mohanty, learned Senior Advocate for the Shri Jagannath Mahaprabhu-opposite party no.3 submitted that Annexures-1, 2, 3, 4 and 5 would go to show that the case land has been settled in favour of Shri Jagannath Mahaprabhu through the Marfatdarship of Ram Prasad Das, Bada Akhada Math, Puri. According to him, the property was never settled in favour of the Math but it was settled in favour of Lord Shri Jagannath Mahaprabhu and the Mahanta used to look after the property of Deity by staying in Math. So, the Math has no relationship with the property except using the same on behalf of the Deity for religious purposes and distributing the Bhog offered to the Deity between the devotees. Therefore, the settlement of land on the application of the Math does not go to show that the Math is the owner of the property superseding the right of Lord Shri Jagannath Mahaprabhu, who is admittedly ex-intermediary and possessing the suit property.

17. Mr.Mohanty, learned Senior Advocate for the opposite party no.3 further submitted that the temple administration was not made party to the settlement proceeding under Sections 6 and 7 of the OEA Act. But, however, on the application of the Collector, Puri and the petitioner-Math, the Trust Estate was declared in favour of Lord Shri Jagannath Mahaprabhu.

18. Since the ROR was issued with the status of Lakharaj Bahel vide Annexure-5, opposite party no.3 filed petition to settle the land. "Lakharaj Bahel" means right to enjoy the property without payment of revenue. So after the case land being vested with the State, application was made by the opposite party no.3 to settle the land in favour of Lord Shri Jagannath Mahaprabhu representing through temple administration. Under the SJT Act, the Temple Managing Committee was constituted to look after the movable and immovable property of Lord Shri Jagannath Mahaprabhu and by virtue of the statutory power, the temple administration made application under the provisions of the OEA Act and it was settled. Since Lord Shri Jagannath Mahaprabhu is always the owner of the property either through Marfadari right of the petitioner or through the temple administration, the question of bequeath of the ownership of Deity does not arise.

19. Mr.Mohanty, learned Senior Advocate for the opposite party no.3 submitted that in the case of ***Mahanta Shri Shrinivas Ramanuj Das –V- Suryanarayan Das (Supra),*** the Constitution Bench of the Hon'ble Supreme Court did not take into account the operation of SJT Act but went ahead to decide the case in respect of other Math. That decision also has been cited by the Hon'ble Supreme Court in the subsequent judgment in the case of ***Shri Jagannath Temple Managing Committee – V-Siddha Math and others (Supra).*** Although Their Lordship in that case took note of the observation of the Constitution Bench but did not opine anything to distinguish the same. On the other hand, in the judgment of the two members Bench of the Hon'ble Supreme Court, it is clearly observed that as the SJT Act is a Special Act and OEA Act is a general law, the principle that the General provisions of law would pave the way to the Special Act, the provisions of the OEA Act is not applicable to the properties of Lord Shri Jagannath Mahaprabhu. Hence, the ratio decided in ***Shri Jagannath Temple Managing Committee –V- Siddha Math and others (Supra)*** is absolutely applicable to the facts and circumstances of the present case. Accordingly, Annexuer-7 has been passed by the OEA Collector rightly.

20. In reply, Mr.N.K.Sahu, learned counsel for the petitioner turned down his argument or narrowed down his argument to the effect that the Math admits the ownership of Lord Shri Jagannath Mahaprabhu and temple administration also admit the ownership of Lord Shri Jagannath Mahaprabhu over the suit property but the Math, being in possession of the case land, should not be divested of its right to possess and the temple administration should not interfere with the management of the property by Math over the case land.

21. <u>POINT FOR DETERMINATION</u>

The main points for considerations are as follows:

I. Whether the petitioner Ram Prasad Das of Bada Akhada Math is the owner of the case land or Lord Shri Jagannath Mahaprabhu continues to be Landlord of suit property? And

II. Whether Annexure-7 is liable to be quashed?

DISCUSSION

22. POINT No.(I)

It is the admitted fact that the suit property comprising of an area of Ac.123.336 decimals was part of Debottar Lakharaj Bahel estate of Lord Shri Jagannath Mahaprabhu. It is not in dispute that Mahanta Shri Ram Prakash Das of Bada Akhada Math was looking after the suit property on behalf of Lord Shri Jagannath Mahaprabhu. It is also admitted fact that the Collector and Mahanta Ram Prakash Das made petition before the Tribunal to declare as Trust Estate of Lord Shri Jagannath Mahaprabhu Bije Puri.

23. Annexure-1 shows that two misc. Cases, i.e., Misc. Case No.543 of 1963 and Misc. Case No.1369 of 1965 were filed by the Collector and Mahanta Shri Ram Prakash Das to declare the case land as Trust Estate and it is clearly mentioned in the order that the entire income is to be spent for religious purpose. Annexure-2 shows that OEA Case No.460 of 1974 was filed by Shri Jagannath Mahaprabhu, Marfat Mahanta Shri Ram Prakash Das. It is clearly mentioned in that order that Mahanta Ram Prakash Das preferred claim consequent upon vesting of Trust Estate that the State Government by Revenue Department notification made on 18.3.1974. Thus, due to such vesting under the provisions of the OEA Act, the Mahanta preferred the claim. In that case, the properties were settled with Lord Shri Jagannath Mahaprabhu Bije Puri Marfatdar Mahanta Ram Prakash Das of Markandaswarsahi of Bahda Akhada Math. Annexure-3 shows that the land schedule was issued where name of tenant with address is written as Shri Jagannath Mahaprabhu Marfatdar Mahanta Ram Prakash Das, Bada Akahada Math. Annexure-4 series shows that in pursuance of the disposal of such OEA case, the Marfatdar of Lord Shri Jagannath Mahaprabhu has been paying the rent to the State Government. In Annexure-4/A and Annexure-4/D, the name of Mahanta is only written as tenant. However, Annexure-5 shows that settlement ROR was issued on 24.03.1982 in the name of Lord Shri Jagannath Mahaprabhu Bije Puri Marfatdar Mahanta Ram Prakash Das, Bada Akhada Math, Puri. That ROR shows that it was earlier bebandobasta or lakharaj bahel. Annexure-6 shows that Orissa Hindu Religious Endowment Department, Bhubaneswar has received Rs.2000/- from Mahanta Ram Prakash Das as arrear dues on 20.03.1996. But that receipt relates to Bada Akhada Math where Mahanta Ram Prasad Das used to reside. Then Annexure-7 comes where OEA Case No.370 of 1989 filed by the opposite party no.3 before the OEA Collector, Nimapara. From Annexues-1 to 5, it appears that Lord Shri Jagannath Mahaprabhu Bije Puri is the landlord and ex-intermediary but represented through the Marfatdar Shri Ram Prakash Das, who used to reside at Bada Akhada Math, which is situated at Markandaswarsahi, Puri. The claim of the petitioner that Trust Estate property of Lord Shri Jagannath Mahaprabhu is endowed to Math but not to temple is not established by such documents because the settlement of claim was

made in favour of Lord Shri Jagannath Mahaprabhu, of course with the Marfatdari of Mahanta of Bada Akhada Math. What is the difference between "Math" and "Temple"? In Orissa Hindu Religious Endowments Act, 1951, the words "Math" and "Temple" have been described as under:

> *"**math**" means an institution for the promotion of the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples and succession to whose office devolves in accordance with the directions of the founder of the institution or is regulated by custom and includes places of religious worship other than a temple and also places of instruction or places for the maintenance of Vidyarthis or places for rendering charitable or religious services in general which are or may be appurtenant to such institution."*
>
> *"**temple**" means a place by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community, or any class or section thereof, as a place of public religious worship and also includes any cultural institution or mandap or library connected with such a place of public religious worship."*

24. After going through the above definition, it is clear that "Math" is an institution where spiritual service is performed by spiritual head. In the O.H.R.E. Act, 1951, the definition of "trustee" is given as under:

> *"**trustee**" means a person by whatever designation known, in whom the administration of a religious institution and endowment are vested, and includes any person or body who or which is liable as if such person or body were a trustee"*

25. From a perusal of the aforesaid definition, it appears that Math is neither the temple, nor the temple is a Math and both have got separate existence. Trustee is related to religious institutions. Math and temple both are religious institutions.

26. The contention of Mr.N.K.Sahu, learned counsel for the petitioner has focussed to show that since Bada Akhada Math, under the trusteeship of Marfatdar Shri Ram Prakash Das, is taking care and management of the case land, the Math is the owner of the property. The opposite party no.3 has opposed the move stating that the Mahanta is simply a Marfatdar that means the trustee but cannot be a Landlord as Lord Shri Jagannath Mahaprabhu is the Landlord of the case land. The contention of Mr.B.H.Mohanty, learned Senior Advocate for the opposite party no.3 has got force for the simple reason that the documents, as described above, clearly show that Lord Shri Jagannath Mahaprabhu Bije Puri is the Landlord and the settlement was made in the name of Deity, which is perpetual minor but represented through the Marfatdar Shri Ram Prakash Dash. The duty of Mahanta is to manage the property and utilize the usufructs of the property for religious purposes and distribute them between the devotees. Therefore, learned counsel for the petitioner, in the last part of his argument, admitted that Lord Shri Jagannath Mahaprabhu is the owner of the property but the Mahanta, being in charge of the affairs of the case land, is to succeed to acquire the title thereto, which is very unnatural phenomenon.

27. However, Mr.N.K.Sahu, learned counsel for the petitioner stressed on the decision of Constitution Bench of the Hon'ble Supreme Court in the case of ***Mahanta Shri Shrinivas Ramanuj Das –V- Suryanarayan Das and another (Supra)*** and he took us to paragraphs-40 and 41 of the said judgment, which are placed in the following manner:

> *"40.We may now consider the properties in schedule Kha said to be the Amrut Manohi properties of Lord Jagannath and held by the plaintiff as marfatdar. The plaintiff alleges that these properties were acquired either by purchase or 'krayadan' or by way of gift subject to a charge of some offering to Lord Jagannath which depended upon the individual judgment and discretion of the plaintiff, and that the public had no concern with the enjoyment or management of the usufruct thereof. The Gazetteer makes a reference to such properties and states:--*
>
> *"Both Saiva and Vaishnava Maths exist in Puri. The lands of the latter are known as Amruta Manohi (literally nectar food), because they were given with the intention that the proceeds thereof should be spent in offering bhoga before Jagannath and that the Mahaprasad thus obtained should be distributed among pilgrims, beggars and ascetics, they are distinct from the Amruta Manohi lands of the Temple itself which are under the superintendence of the Raja. This statement makes it clear that lands endowed to the temple of Lord Jagannath are distinct from the lands or property endowed to the Vaishnava Maths for the purpose of utilizing the proceeds of those properties for offering bhoga before Lord Jagannath and the subsequent distribution of that Mahaprasad among pilgrims, beggars and ascetics, presumably visiting the Math, or approaching its authorities for a portion of the Mahaprasad. The mere fact that the proceeds of the properties were to be so used, would not justify the conclusion that these properties were not endowed to the Maths but were endowed to the temple of Lord Jagannath. Properties endowed to the temple of Lord Jagannath were, according to this statement, in the Gazeteer, not under the superintendence of any Math or Mahant but under the superintendence of the Raja of Puri himself.*
>
> *41. As already stated, these Amrit Manohi properties are properties which are endowed to the Math by the devotees for a particular service, which is done to Lord Jagannath by the Mahant on behalf of the Math. The properties are therefore properties endowed to the Math and not merely gifted to the Math and not merely gifted to the plaintiff or, as had been suggested to Lord Jagannath."*

28. With due regard to the aforesaid decision, it appears that Their Lordships, under the Constitution Bench, have been pleased to decide the case in a Civil Appeal arising out of a suit filed before the Additional Sub-ordinate Judge, Puri dismissing the suit instituted by Mahanta Gadadhar Ramanuj Das against the Endowment Commissioner. In that suit, Endowment Commissioner was the defendant. In that decision, the concept of Amruta Manohi property of Lord Jagannath as per Gazeteer was discussed to find out the nature of property involved in suit as Amruta Manohi. In the present case, there is nothing found from the writ petition that the petitioner claims Amruta Manohi property. Apart from this, in the case of ***Mahant Shri Shrinivas Ramanuj Das –V- Suryanarayan Das and another (Supra),*** the property has been acquired in the name of Mahanta, usufructs of the same are dedicated to the offerings of Lord Shri Jagannath Mahaprabhu and then distributed between the Sisyas, Chelas and devotees. In that decision, it is decided that such property cannot be acquired for the personal enjoyment of the Mahanta but it may belong to Math or

Temple of Lord Shri Jagannath Mahaprabhu. In that decision, there was no discussion about application of the SJT Act, which was enacted in 1955 although the said decision was rendered in 1967. On further perusal, it appears that the original suit was filed in 1946, which culminated with the decision in the Constitution Bench in the above referred case. Since the suit was filed before enactment of SJT Act, Their Lordships have no occasion to consider about the implementation of the SJT Act, 1955. Moreover, such plea of applicability of SJT Act did not arise for consideration. Hence, the argument of the learned counsel for the petitioner that the issues raised in this case exactly similar to the issues raised before the Constitution Bench decision of the Hon'ble Supreme Court in the case of ***Mahant Shri Shrinivas Ramanuj Das –V- Suryanarayan Das and another (Supra)*** is not correct because the property, in this case, is admittedly in the name of Lord Shri Jagannath Mahaprabhu, represented by Marfatdar Shri Ram Prakash Das, who resides at Bada Akhada Math, Puri and the case properties are not specifically arrayed as Amruta Manohi property in writ petition and the settlement of claims or any other documents are prepared in this case after implementation of SJT Act, 1955. Therefore, with due regard to the aforesaid Constitution Bench decision of the Hon'ble Supreme Court, although same has binding effect but the present issue being not raised in that decision, said decision does not apply to the case at hand.

29. Shri Jagannath Temple Act was enacted in 1955 with the following avowed objects and reasons:

> *"Whereas the ancient Temple of Lord Jagannath of Puri has ever since its inception been an institution of unique national importance in which millions of Hindu devotees from regions far and wide have reposed their faith and belief and have regarded it as the opitome of their tradition and culture;*
>
> *And whereas long period to and after the British concquest the superintendence, control and management of the affairs of the Temple have been the direct concern of successive Rulers, Governments and their officers and of the publisher exchequer;*
>
> *And whereas by Regulation IV of 1809 passed by the Governor-General in Council on 28th April, 1809 and thereafter by other laws and regulations and in pursuance of arrangement entered into with the Raja of Khurda, later designated the Raja of Puri, the said Raja came to be entrusted hereditary with the management of the affairs of the Temple and its properties as Superintendent subject to the control and supervision of the ruling power;*
>
> *And whereas in view of grave and serious irregularities thereafter Government had to intervene on various occasions in the past;*
>
> *And whereas the administration under the Superintendent has further deteriorated and a situation has arisen rendering it expedient to reorganize the scheme of management of the affairs of the Temple and its properties and provide better administration and governance therefor in supersession of all previous laws, regulations and arrangements, having regard to the ancient customers and usage and the unique and traditional nitis and rituals contained in the Record-of-Rights prepared under Puri Shri Jagannath Temple (Administration) Act, 1952 (Odisha Act XIV of 1952) in the manner hereinafter appearing:*
>
> *It is hereby enacted by the Legislature of the State of Odisha in the Sixty Year of the Republic of India as follows.*

xx xx xx xx"

30. From the aforesaid avowed objects of the above Act, it appears that SJT Act has a special identity for all human beings. Lord Shri Jagannath Mahaprabhu is Universal and the law pertaining to Him and his property have separate space in all norms. The crores of devotees around the work assembled to see world famous CAR FESTIVAL of Lord Shri Jagannath Mahaprabhu. When we are sitting in the temple of justice, we are not emotional but at the same time, we are with the sentiment of the public to safeguard and protect the properties of Lord Shri Jagannath Mahaprabhu, who is perpetual minor. Taking the importance of the Deity Lord Shri Jagannath Mahaprabhu and his Temple at Puri, the SJT Act, 1955 was enacted to take out the management and other affairs of the Deity from the purview of the O.H.R.E. Act, which were taking care of the affairs of the Shri Jagannath Temple Bije at Puri. The aforesaid conclusion is based upon two members Bench decision of the Hon'ble Surpeme Court in the case of ***Shri Jagannath Temploe Managing Committee –V- Siddha Math and others (Supra).*** Mr.B.H.Mohanty, learned Senior Advocate for opposite party no.3 relied upon the decision of the Hon'ble Supreme Court but Mr.Sahu, learned counsel for the petitioner opposed the move. In that decision, Their Lordships, at paragraph-6 of the judgment, have categorically held as follows:

> *"6.A Constitution Bench of this Court had the occasion to examine the provisions of the Temple Act, 1955 in detail, while adjudicating upon its constitutional validity in the case of* ***Raja Bira Kishore Deb v. State of Orissa, AIR 1964 SC 1501.*** *Wanchoo, J, speaking for the bench observed as under:*
>
> *"This review of the provisions of the Act shows that broadly speaking the Act provides for the management of the secular affairs of the Temple and does not interfere, with the religious affairs thereof, which have to be performed according to the record of rights prepared under the Act of 1952 and where there is no such record of rights in accordance with custom and usage obtaining in the Temple. It is in this background that we have to consider the attack on the constitutionality of the Act."*
>
> *After adverting to the history of the administration of the Temple, it was also held:*
>
> *"Finally the preamble says that the administration under the superintendent has further deteriorated and a situation has arisen rendering it expedient to reorganize the scheme of management of the affairs of the Temple and its properties and provide better administration and governance therefore in supersession of all previous laws, regulations and arrangements, having regard to the ancient customs and usages and the unique and traditional nitis and rituals contained in the record of rights prepared under the 1952 Act. So for all these reasons the appellant was removed from the sole superintendence of the Temple and a committee was appointed by s. 6 of the Act for its management."*
>
> *(emphasis laid by this Court)*
>
> *A perusal of the provisions of the Act and the decision of this Court in the case of* **Raja Bira Kishore Deb** *referred to supra clearly shows that as far as Shri Jagannath Temple of Puri is concerned, the position of law is that all the endowments and properties belonging to the Temple vest in the Shri Jagannath Temple Managing Committee.*

31. With due regard to the aforesaid decision, it appears that from the commencement of the SJT Act, 1955, all the endowment properties belong to Shri

Jagannath Temple vested with the Shri Jagannath Temple Management Committee with the avowed object, as discussed above. In the said judgment, Their Lordships have discussed about the OEA Act, 1951 vis-a-vis the SJT Act, 1955. After threadbare discussion, Their Lordships have taken note of the Constitution Bench decision of the Hon'ble Suprem Court in the case of ***Mahant Shri Shrinivas Ramanuj Das –V- Suryanarayan Das and another (Supra)***. But, at the same time, took note of another judgment of the Hon'ble Supreme Court in the case of ***Lord Jagannath through Jagannath Singri Narasingh Das Mahapatra Shridhar Panda and others –V- State of Orissa; 1989 (1) Suppl. SCC 553*** where the Hon'ble Supreme Court has taken view that since 1974 the property of Lord Shri Jagannath Mahaprabhu vests with the State. Their Lordships in ***Shri Jagannath Temple Managing –V- Siddha Math and others (Supra)*** have taken view that the decision in the case of ***Lord Jagannath through Jagannath Singri Narasingh Das Mahapatra Shridhar Panda and others –V- State of Orissa (Supra)*** is per incuriam as it has not taken care of implementation of SJT Act, 1955. Further after discussing in detail, Their Lordships, at paragraphs-23, 24 and 25, have observed in the following manner:

> *"**23.** In the instant case, there is a clear conflict between the proviso of Section 2(oo) of the OEA Act, 1951 and Sections 5 and 30 of the Temple Act, 1955.It is also clear that both the above statutory provisions of the Acts cannot survive together. While the rule of harmonious construction must be given effect to as far as possible, when the provisions of two statutes are irreconcilable, it needs to be decided as to which provision must be given effect to. In the instant case, Section 2(oo) proviso in its entirety is not violative of the provisions of the Temple Act. At the cost of repetition, we reproduce the relevant part of Section 2(oo) of the OEA Act, 1951 as under:*
>
> *"Provided that all estates belonging to the Temple of Lord Jagannath at Puri within the meaning of the Shri Jagannath Temple Act, 1955 and all estates declared to be trust estates by a competent authority under this Act prior to the date of coming into force of the Orissa Estate Abolition (Amendment) Act, 1970 shall be deemed to be trust estates."*
>
> *(emphasis laid by this Court)*
>
> *It is only the first part of the proviso which is in contravention of the Temple Act, 1955. If that part of the proviso continues to be given effect, Sections 5 and 30 of the Temple Act, 1955, by which the estates of Lord Jagannath Temple at Puri are vested in the Temple Committee will lose their meaning. By striking down Section 2(oo) proviso to that extent, both the provisions will be able to operate.*
>
> *In **Commercial Tax Officer v. Binani Cements Ltd; (2014) 8 SCC 319** this Court held as under:*
>
> *"It is well established that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origins in the latin maxim of generalia specialibus non derogant, i.e., general law yields to special law should they operate in the same field on same subject."*
>
> *(emphasis laid by this Court)*
>
> *In **J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of U.P.; (1961) 3 SCR 185,** a three judge bench of this Court held as under:*

"9. ...We reach the same result by applying another well known rule of construction that general provisions yield to special provisions. The learned Attorney-General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In ***Pretty v. Solly (quoted in Craies on Statute Law at p.m. 206, 6th Edn.) Romilly, M.R.,*** *mentioned the rule thus:*

The rule is, that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

The rule has been applied as between different provisions of the same statute in numerous cases some of which only need be mentioned:

De Winton v. Brecon, Churchill v. Crease, United States v. Chase and Carroll v. Greenwich Ins. Co.

10. Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, we must hold that Clause 5(a) has no application in a case where the special provisions of Clause 23 are applicable." (emphasis laid by this Court)

It becomes clear from a perusal of the above mentioned two judgments of this Court that while provisions of different statutes must be harmoniously constructed as far as possible, in cases where it is not possible, the Court needs to examine as to which provision must be given effect to.

24.In the case in hand, the first part of the proviso of Section 2(oo) of the OEA Act, 1951 cannot be allowed to sustain. Clearly, the intention of the legislature could not have been to render virtually the entire Temple Act, enacted on the specific subject, meaningless, by way of enacting a proviso to Section 2(oo) of the OEA Act, 1951 as an amendment in 1974, which is the general legislation in the instant case. Section 2(oo) of the OEA Act, 1951, thus, to that extent requires to be struck down so that both the OEA Act, 1951 as well as the Temple Act, 1955 can be given due effect in their respective field of operation. In exercise of the powers conferred under Article 142 of the Constitution, this Court can pass any order as may be "necessary for doing complete justice" in a case before it. In the instant case, great injustice will be caused to the appellant Temple if the rights conferred upon it by the Temple Act are allowed to be taken away by operation of the proviso to Section 2(oo) of the OEA Act. Therefore, we have to strike down the proviso to Section 2(oo) of the OEA Act and also quash the notification dated 18.03.1974 in so far as it relates to the property of Lord Jagannath Temple at Puri.

25.Further, it is a settled principle of law that once a property is vested by an Act of legislature, to achieve the laudable object, the same cannot be divested by the enactment of any subsequent general law and vest such property under such law. Similarly, if in the instant case, we were to accept the contentions advanced by the learned senior counsel appearing on behalf of the respondent Math, then Sections 5 and 30 of the Temple Act, 1955

will be rendered useless and nugatory and thereby the laudable object and intendment of the Temple Act will be defeated and the interest of the public at large will be affected. Thus, the notification dated 18.03.1974 issued by the State Government under Section 3-A of the OEA Act, 1951, whereby the estate of Lord Jagannath Mahaprabhu Bije, Puri vested in the State Government (in terms of Point (ii) of the notification), is liable to be quashed to that extent. As a consequence, the order dated 30.09.1981 passed by the OEA Tahsildar, who falls within the inclusive definition of Collector in terms of Section 2 (d) of the OEA Act, 1951, settling the land in favour of the Mahantas of various Maths as Marfatdars of the Shri Jagannath Mohaprabhu Bije, Puri is in violation of the provisions of the Temple Act, 1955 and is thus, liable to be set aside."

32. With due regard to the aforesaid decision, it appears that Their Lordships have clearly observed that since the SJT Act, 1955 is a special statute, it will override the general enactments, i.e., OEA Act and as such proviso to Section 2(oo) of the said Act was struck down. Section 2(oo) of the OEA Act is placed below for better reference:

"2(oo) 'trust estate' means an estate the whole of the net income whereof under any trust or other legal obligation has been dedicated exclusively to charitable or religious purposes of a public nature without any reservation of pecuniary benefit to any individual:

Provided that all estates belonging to the Temple of Lord Jagannath at Puri within the meaning of the Shri Jagannath Temple Act, 1955 and all estates declared to be trust estates by a competent authority under this Act prior to the date of coming into force of the Orissa Estates Abolition (Amendment) Act, 1970 shall be deemed to be trust estates."

33. While stricking down the proviso of Section 2(oo) of the OEA Act, Their Lordships quashed the vesting of the land in favour of Mahanta of various Maths or Mahants as Marfatdar of Shri Jagannath Temple Bije Puri for their violation of Section 5 of the SJT Act. Finally, at paragraph-34 of the said judgment, Their Lordships have answered in the following manner:

"34.For the foregoing reasons, we pass the following order :-

i)C.A. Nos.7729 of 2009, 7730 of 2009,142 of 2010, 221 of 2010, 2981 of 2010, 3414 of 2010,3415 of 2010 and 3446 of 2010 are allowed. The impugned judgment and order dated 07.07.2009 passed in Original Jurisdiction Case No. 2421 of 2000 by the High Court of Orissa at Cuttack is hereby set aside.

ii)We strike down the first part of the proviso of Section 2(oo) of the OEA Act, 1951, which pertains to the properties of Lord Jagannath Temple at Puri.

iii)The notification dated 18.03.1974 issued by the State Government under Section 3A of the OEA Act, 1951 in so far as point No. (ii) is concerned, is also quashed by this Court, to the extent, it applies to the lands and estate of Lord Jagannath Temple at Puri.

iv)We make it very clear that the striking down of the first part of the proviso to Section 2(oo) of the OEA Act, 1951 as mentioned above and quashing of the notification referred to supra will be prospective and this judgment shall not be applicable to the settled claim of the claimants hitherto under the provisions of the OEA Act of 1951 in so far as the lands of the Lord Jagannath Temple at Puri are concerned.

v) In view of the disposal of appeals above-mentioned in favour of the Temple Managing Committee, C.A. Nos. @ SLP (C) Nos. 9167-9168 of 2010 (filed by Shri Raghab Das Math) and C.A. No. 9627 of 2010 (filed by Bauli Math) are hereby dismissed; and
v) No costs are awarded in these proceedings."

34. The observation of the Hon'ble supreme Court at Clause-IV, as postulated above, does not arise for consideration since vide Annexure-7, the case land has been settled in favour of Shri Jagannath Mahaprabhu represented through Temple Managing Committee.

35. With due regard to the concluding paragraph of the aforesaid judgment, it appears that the said judgment is absolutely applicable to the facts and circumstances and issues raised in the present case. Now, applying the ratio decided in the case of ***Shri Jagannath Temple Managing Committee –V- Siddha Math and others (Supra),*** it appears that properties have been vested in favour of Lord Shri Jagannath Mahaprabhu because he is the ex-intermediary and after implementation of the SJT Act, the OEA Act has paved the way to SJT Act for vesting of the property with the Management of Shri Jagannath Temple Committee and it did not remain with the Marfatdari of any Mahanta or Math basing on the principle of Latin Maxim of "generalia specialibus non-derogant". Not only this but also Annexure-7 shows that Shri Jagannath Mahaprabhu represented by Temple Committee filed the case under Sections 6 and 7 of the OEA Act before the OEA Collector and rent was fixed in favour of Lord Shri Jagannath Mahaprabhu Temple represented by the Managing Committee. From the above order under Annexure-7, it appears that the Managing Committee of the Temple, the record of right earlier prepared in the name of Shri Jagannath Mahaprabhu Marfatdar Shri Ram Prakash Das, Bada Akhada Math was in bebandobasta status. Once it is Bebandobasta status, as submitted by the learned counsel for the opposite party no.3, it is the land without having fixation of any rent. So, for fixation of rent, the Temple Managing Committee filed application by virtue of the power under Section 5 of the SJT Act and it was settled in favour of Lord Shri Jagannath Mahaprabhu Bije Puri represented through Managing Committee. So, the settlement of land when remained under Bebandobasta status, it cannot be said that there is settlement of claim in favour of Mahanta Shri Ram Prakash Das or Math. When it is again settled in favour of Lord Shri Jagannath Mahaprabhu represented through Temple Administration as per the provisions of SJT Act, which is to govern the field, the Court is of the view that Lord Shri Jagannath Mahaprabhu is the sole owner in possession of the case land and the management of case land has now been changed to Temple Managing Committee by virtue of operation of law. Moreover, Section-2 of SJT Act clearly shows that OHRE Act will not apply the properties of Lord Shree Jagannath Mahaprabhu Bije at Puri. On the other hand, due to enactment of SJT Act, neither OHRE Act nor OEA Act hold field to decide the management of movable and immovable properties of Lord Shree Jagannath Mahaprabhu. It is also clear that when Lord Shree Jagannath Mahaprabhu is the owner and the petitioner-Math or Marfatdar claims as Marfatdar of deity, they are only caretaker. Can a caretaker take the plea of ownership of deity? It is not at all. It is reiterated that SJT Act gives the authority of vesting of land with Lord Shree Jagannath Mahaprabhu represented through the Managing Committee of the Temple. The Point No.(I) is answered accordingly.

POINT NO.(II)

36. Mr.Sahu, learned counsel for the petitioner has argued that since there is judgment of the Hon'ble Supreme Court passed in the case of ***Mahant Shri Shrinivas Ramanuj Das –V- Suryanarayan Das and another (Supra),*** the same would be followed and the judgment of Division Bench of the Hon'ble Supreme Court in the case of ***Shri Jagannath Temple Managing Committee –V- Siddha Math and others (Supra)*** will have no precedent to be followed. The question of precedent is well discussed by the Hon'ble Supreme Court in the case of ***N.Meera Rani –V- Government of Tamil Nadu and another; AIR 1989 SC 2027*** and Their Lordships, at paragraph-13 of the said judgment, have observed in the following manner:

> *"13. We may now refer to the decisions on the basis of which this point is to be decided. The starting point is the decision of a Constitution Bench in* ***Rameshwar Shaw –v- District Magistrate, Burdwan & Anr; (1964) 4 SCR 921 : AIR 1964 SC 334****. All subsequent decisions which are cited have to be read in the light of this Constitution Bench decision since they are decisions by Benches comprised of lesser number of Judges. It is obvious that none of these subsequent decisions could have intended taking a view contrary to that of the Constitution Bench in* ***Rameshwar Shaw's case (supra)****."*

37. With due regard to the aforesaid decision, it is undisputed that the decision of the Constitution Bench is to prevail over the decision of Bench having lesser number of judges but the question arises if ratio decidendi as decided by the Constitution Bench is on the same issue raised before the Bench of lesser number of Judges. In the instant case, it is reiterated that the issue in ***Mahant Shri Shrinivas Ramanuj Das –V- Suryanarayan Das and another (Supra),*** is not on the issue raised and decided in the case of ***Shri Jagannath Temple Managing Committee –V- Siddha Math and others (Supra)***..

38. Mr.Sahu, learned counsel for the petitioner further submitted that Annexure-7 is liable to be set aside because of the fact that once the claim is settled under Sections 6 and 7 of the OEA Act, further claim cannot be settled against same land under Sections 6 and 7 of the OEA Act. In the aforesaid paragraphs, it has been well discussed that the Temple Managing Committee, representing Lord Shri Jagannath Mahaprabhu Bije Puri, has filed the claim as the case land was of bebandobasta status. So, the claim of the Temple Managing Committee filed subsequently cannot be said as repetition of earlier claim but a fresh claim and there is no reason to differ from the contention of the learned counsel for the Managing Committee to file such case. However, the contention of Mr.N.K.Sahu, learned counsel for the petitioner that subsequent settlement made under Sections 6 and 7 of the OEA Act is without jurisdiction is indefensible. Hence, Annexure-7 is not liable to be quashed.

39. Learned counsel for the petitioner argued that under Sections 23 and 28 of the Orissa Tenancy Act, the petitioner-Mahanta has become a settled Raiyat. Since Lord Shri Jagannath Mahaprabhu B ije at Puri is the Landlord continuing as

Landlord, the question of applicability of OT Act does not arise. He further urged that the operation under Section 9 of the OEA Act could have been filed by the Shri Jagannath Temple Managing Committee to set aside the order passed by the OEA Collector under Sections 6 and 7 vide Anenxure-2. Since the earlier claim made under Sections 6 and 7 of the OEA Act vide Annexure-2 was not final, and further claim is filed by the Shri Jagannath Temple Managing Committee upon operation of law, question of applicability of appeal against Annexure-2 does not arise. Here, only conclusion arrived is that the argument of the petitioner is otiose one because if the appeal under Section 9 of the OEA Act is applicable, then the petitioner could have filed such appeal instead of filing the present writ petition.

40. In terms of the above discussion, the Court is of the view that Annexure-7 is not liable to be quashed but it is a valid document in favour of Lord Shri Jagannath Mahaprabhu, who has been continuing as owner in possession of the case land throughout. The Point No.(II) is answered accordingly.

CONCLUSION

41. In the writ petition, it has been prayed to quash Annexure-7, the order dated 02.06.1992 passed by the O.E.A. Collector, Nimapara in O.E.A. Case No.370 of 1989.

42. In terms of the discussions made hereinabove, it has been already observed that Lord Shri Jagannath Mahaprabhu is the Landlord of the case land and continued to be as such. It has been already held that under Annexure-7, the rent has been fixed payable by Lord Shri Jagannath Mahaprabhu represented by Temple Managing Committee. As the Hon'ble Supreme Court in ***Shri Jagannath Temple Managing Committee –V- Siddha Math and others (Supra),*** have also directed in a similar facts, circumstances and issues that the Temple Managing Committee is the sole authority to manage the properties of Lord Shri Jagannath Mahaprabhu, thus, the Court is of the view that the case land, by facts and law, did not remain under the care of the petitioner-Mahanta Shri Ram Prakash Das and his successor or Bada Akhada Math, Puri and they are all to continue to remain in the name of Shri Jagannath Mahaprabhu Bije Puri represented by the Shri Jagannath Temple Managing Committee. The Writ Petition is disposed of accordingly.

2018 (II) ILR - CUT- 71

S.K. MISHRA, J & DR. D.P. CHOUDHURY, J.

OJC NO. 2813 OF 1999

PRUTHWEERAJ PATNAIK
(Dead) through L.Rs. .....Petitioners

.Vs.

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

LEASE PRINCIPLES – Lease of Govt. Land for raising of medicinal plant – Allegation of violation of lease conditions – Resumption proceeding – Field enquiry – Lease holder was not informed about such field enquiry nor was granted proper opportunity of defending his case before passing of resumption order – Violation of principles of natural justice apparent – Held, order cancelling the lease is liable to be set aside – Matter remanded. (Para 51)

Case Laws Relied on and Referred to :-

1. 2007 (3) MPHT 429 : Kashiram Dehalwar and another v. Union of India & Ors.
2. AIR 1997 SC 1228 : T.N. Godavarman Thirumulkpad v. Union of India & Ors..
3. (1952) 1 K.B. 189 at 195 : Abbott vs. Sullivan.
4. (1929) 1 Ch. 602, 624 : Maclean v. The Workers' Union
5. AIR 2003 SC 2041 : Canara Bank and Others v. Shri Debasis Das & Ors.
6. AIR 1990 SC 1984 : S.N. Mukherjee v. Union of India
7. AIR 1978 SC 851 : Mohinder Singh Gill & Anr v. The Chief Election Commissioner, New Delhi & Ors.
8. (2016) 2 SCC 779 : Poonam v. State of U.P. & Ors.
9. (2004) 6 SCC 311 : Bar Council of India v. High Court of Kerala.

For Petitioners : M/s. Ramakant Mohanty, Sr. Adv.
A.C. Mohanty & D.K. Pradhan
For Opp. Parties: Mr. Bibekananda Bhuyan, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 02.07.2018

DR. D.P. CHOUDHURY, J.

Challenge has been made to the order of cancellation of lease dated 19.2.1999 and proceeding of the Resumption Case No.1 of 1998.

FACTS

2. The unshorn details of the case of the petitioners is that the original petitioner Pruthweeraj Patnaik being a qualified and experienced Chemical Engineer had gained special knowledge in the manufacture of essential oils at the Central Institute of Medicines and Aromatic Plants, Bangalore in 1979. So, desiring to establish an industry by growing aromatic/Pelmarosa plant and extracting oil from the plants to export same applied to the Government through the Department of Revenue & Excise for leasing out 100 acres of land and petitioner took advance possession of said 100 acres of case land from State Government. But State Government leased out 50 acres of case land out of said 100 acres of case land to the petitioner. The State Government had transferred said 100 acres of forest land from the Forest Department to the Revenue Department.

3. Be it stated that in pursuance of the letter of the State Government he deposited Rs.49,500/- towards the premium of the case land in one installment. The Additional District Magistrate vide letter dated 30.7.1988 informed the said fact to the State Government in Revenue Department. Accordingly, letter was issued for

execution of lease agreement, also the Tahasildar vide letter dated 29.8.1988 asked the original petitioner to pay a sum of Rs.1,254/- towards the ground rent and cess which was also complied by the petitioner. Thereafter registered lease deed was executed conveying 50 acres of land in favour of the petitioner.

4. Be it stated that after the Scheme being approved, the petitioner had approached the State Bank of India for financial assistance to establish his factory to which said Bank agreed for assistance to the tune of Rs.2,91,300/- in June, 1980. In spite of hardship, the petitioner started his work in full swing and utilized 40 acres of land for cultivation of Aromatic plantations and made necessary construction of the industry as well as installed the machineries. But the progress was crippled as the State Bank of India did not cooperate fully for which a Consumer Dispute Case No.113 of 1991 was started.

5. While the matter stood thus, petitioner received a show cause notice from the Collector in 1998 as to why the lease sanctioned would not be cancelled due to non-progress of the industrial activity. In spite of the show cause by the petitioner stating that he had already completed plantation over 40 acres of land as per lease agreement, learned Collector passed order to suggest the Government for resumption of the land in Resumption Case No.1 of 1998. After receiving the certified copy of the order passed by the learned Collector, the petitioner came to know that there was violation of the terms and conditions stipulated in Clause (1), (2) and (4) of the lease agreement but in that regard the petitioner was never asked to show cause.

6. It is stated that the petitioner was only asked to show cause as to why he had not executed the lease deed, as to why he had not planted Aromatic plantations within a period of three years from the date of execution of the lease and as to why the petitioner has not utilized the land for the purpose it was sanctioned. But surprisingly the order in question in determining the lease is passed on some other reason for which the petitioner was never called to show cause. Since natural justice of the petitioner has been violated, the said order is liable to be quashed. As the action taken by the opposite parties violating the mandatory provisions of the lease deed, such action amounts to colourable exercise of power which is not structured by any rational consideration. The Tahasildar also did not receive the rent offered by the petitioner on the ground that the lands have not been recorded in the name of the petitioner. But the fact remains that since lease deed has been executed and registered, the record should automatically be mutated in favour of the petitioner so that the Tahasildar should receive the rent. As the principle of natural justice and equity of the petitioner has been violated, the action of the State Government is per se illegal and arbitrary. Hence, the writ petition.

7. Per contra, opposite party No.1 filed counter refuting the averments made in the writ petition. It is the case of the opposite party No.1 that the petitioner has committed breach of agreed terms and conditions stipulated in Item Nos.(i), (ii), (v)

(vii) and (viii) of the Sanction Order No.65268/R. dated 28.9.1984 and No.36774/R. dated 26.6.1987 and Clauses 1, 4(i), 6 and 8 of the lease deed. Moreover, the petitioner has been given due opportunity of being heard before determination of the lease.

8. Be it stated that the petitioner was sanctioned lease on 50 acres of land in village Jagannath Prasad under Bhubaneswar Tahasil for raising medicinal and aromatic plants for manufacture of essential oils vide order No.65268/R. dated 28.9.1984 and No.36774/R. dated 26.6.1987. The State Government in Revenue and Excise Department vide Sanction Order dated 28.9.1984 had fixed premium of Rs.4,95,000/- with a condition of 10% of premium to be paid at the time of taking over possession and the balance 90% is to be paid in five equal installments after expiry of a moratorium of 24 months. Although the petitioner has paid the first installment of the market value but had not paid beyond the required percentage of premium. Also in spite of the revised order the petitioner has not paid the amount of premium with the Tahasildar as per the revised order issued on 26.6.1987 for Rs.1,389/- per acre in pursuance of provisions of I.P.R. 1979-83. It is admitted by the opposite parties that lease deed was also executed on 1.10.1988 for 90 years and registered on 20.12.1988. The State Government is not aware about the application of the petitioner for sanction of loan by the State Bank of India. Lease deed was executed with certain terms and conditions particularly with the stipulation that infringement of any of the conditions would result in immediate reversion of land to Government in Revenue Department free from all encumbrances without payment of any compensation for the land and for the structure. Due to infringement of the conditions of the sanction order, a notice to show cause was issued to the petitioner. It is stated that on field inspection report, the Additional District Magistrate found that the land was not used by following the terms and conditions of the lease deed and the sanction order.

9. It is further averred in the counter by the opposite party No.1 that the petitioner filed show cause explaining the reasons for non-fulfillment of the conditions in the Resumption Case No.1 of 1998. Although the field enquiry was held by the learned Additional District Magistrate in presence of the petitioner, petitioner refused to sign in the enquiry report. However, the learned Collector after considering the explanation furnished by the petitioner, field enquiry report of the A.D.M., Khurda and other documents recommended to the Government for determination of the lease in lieu of breach of conditions of the lease. After receipt of the Government order, the learned Collector issued direction to the Tahasildar to resume the land after observing all the formalities and on 27.2.1999 the Tahasildar, Bhubaneswar took over possession of the land. So, there is no any irregularity in resumption of the case land.

10. Opposite Party Nos.4 and 5 have filed counter affidavit stating that the State Government has taken over possession of the land in question, i.e., Plot Nos.1270,

1271, 1272 and 1280 of Khata No.469 of mouza Jagannath Prasad since 27.2.1999 but the interim order of status quo was passed for the first time on 4.3.1999. It is averred that the land in question is a part of Jagannath Prasad Demarcated Protected Forest of Chandaka Wild Life Division, Bhubaneswar. The State Government in Forest, Fisheries & Animal Husbandry Department have declared the entire Jagannath Prasad D.P.F. as Chandaka-Damapara Wild Life Sanctuary and the disputed land is within the Sanctuary. So, the averments of the petitioner that he has done the plantation work over the land in question, is incorrect and wrong. Rather, one Siba Pradhan, who is the henchman of the petitioner dug earth for cultivation, he was prosecuted by the Forest Department.

11. It is further case of the Opposite Party Nos.4 and 5 as available from the counter affidavit that on 21.12.1982 in exercise of power conferred under Section 18 of the Wild Life (Protection) Act, 1972, there was boundary of the Sanctuary in which the present case land is situated. Subsequently on 10.6.1988 said boundary was modified but there is no reallocation of the schedule land and same continued to remain in the Sanctuary under Section 18 of the Wild Life (Protection) Act. Under Section 20 of the Wild Life (Protection) Act, 1972, no person can claim any right over the said land except by way of succession both testamentary and intestate. So, the petitioner has no right to claim such land. Since the petitioner has failed to fulfill the conditions within a period of six months from the date of order of lease, the lease has been determined. Hence, the petitioner has no claim over the suit land.

12. The petitioner filed rejoinder reiterating the allegations made in the writ petition. Further it is added in the rejoinder that in order to lease out 100 acres of land from Jagannath Prasad D.P.F. of Chandaka Range in Puri district, the said land was ousted from the forest area to lease out same in favour of the petitioner. The advance possession has also been given by the Government of Orissa in Revenue Department vide letter No.GEC (Puri)-49/78-3987/R dated May, 1979. The original petitioner is the proprietor of M/s. Sun Industrial Chemicals, Bhubaneswar which was registered under Small Scale Industry. The petitioner has constructed infrastructures such as bore well, pumps, power connection, a processing machinery by 1985 and the Unit got production of essential oil started, in spite of the financial constraints. The then Revenue Secretary-cum-Commissioner had inspected the plantation site and expressed his satisfaction over the plantation work. But after long 18 years, petitioner got a notice from the learned Collector, Cuttack to his surprise.

13. In the rejoinder it has been specifically asserted that the learned A.D.M., Khurda made field visit without any notice to the petitioner for which there is violation of natural justice while challenging the inspection report of the learned A.D.M. It is specifically averred that the learned Collector adjourned the Resumption Case No.1 of 1998 on 2.8.1998 but without knowledge of the petitioner he preponed the case to 26.10.1998 and passed the final order on 3.11.1998 without any intimation to the petitioner. Thus, the petitioner was not given reasonable

opportunity of being heard before determining the lease. The petitioner also asserts that he has paid more than the amount stipulated in keeping with the modified valuation in pursuance of the sanction order. Although the petitioner was again ready to pay the rent but the R.I. refused to receive the rent for the reason best known to him. It is stated that the office of the Tahasildar although received rent and cess till 1989 it failed to issue direction to the concerned R.I. to collect rent and cess. Thus, the petitioner has been harassed in many ways.

14. It is asserted by the petitioner that he has never violated Clause (V) of the sanction order corresponding to Clasue-6 of the lease deed, Clause (VI) of the sanction order corresponding to Clause-8 of the lease deed, Clause (VIII) of the sanction order which is corresponding to Clause-9 of the lease deed, Clause-4(i) and Clause 4 V(1) of the lease deed.

15. Since there are procedural lapses in the Resumption Case No.1 of 1998 as well as there is violation of natural justice by not giving opportunity of hearing to the petitioner, the initiation of Resumption Case No.1 of 1998 is illegal and improper. By virtue of this, the fundamental right of the petitioner under Article 19 (i)(g) of the Constitution of India has been seriously violated. Not only this but also the impugned order being de hors to Article 21 of the Constitution, the same is liable to be quashed.

SUBMISSIONS

16. Learned counsel for the petitioner submitted that the petitioner has applied for 100 acres of land for raising the medicinal and Aromatic plants to manufacture essential oil in 1973 and on 23.2.1978 the Government in Forest Department decided to carve out 100 acres of land from Jagannath Prasad Demarcated Protected Forest of Chandaka Range in order to lease out the same in favour of the petitioner subject to payment of compensatory plantation and the value of the forest growth and accordingly the advance possession was given to the petitioner. In May 1979, the State Government sanctioned 100 acres of forest land of Jagannath Prasad Demarcated Protected Forest which has been reserved for industrial development in favour of the petitioner for manufacture of essential medicinal oil.

17. Mr. Mohanty, learned Senior Advocate for the petitioner further submitted that the Forest Conservation Act, 1980 came into force in December, 1980 but the forest land has been already taken out to the Revenue Department and then leased out to the petitioner. As the formalities of deposit of money and execution of lease deed took some years at the instant of State, the lease deed was executed between the petitioner and the State Government on 1.10.1988. As the sanction has been already made and the possession of the case land has been already delivered to the petitioner before the Forest Conservation Act, 1980 came into force, the said Act could not be made applicable to the petitioner. He relied on the decision reported in ***2007 (3) MPHT 429; Kashiram Dehalwar and another v. Union of India and others***.

18. Mr. Mohanty further submitted that to the utter surprise, on 16.4.1998 the Revenue Department issued letter for initiation of Resumption proceeding against the petitioner and the petitioner challenged the same in this writ application. According to him, in the meantime the petitioner suffered from financial crunch due to inaction of the State Bank of India for sanctioning loan in time. But the petitioner has already commenced the plantation over the 40 acres of land as per the terms and conditions of lease for 50 acres of case land to the petitioner and also made construction over the portion of the case land to manufacture medicinal oil. The Collector, Khurda without giving proper opportunity of hearing to the petitioner recommended to the State Government to cancel the lease in Resumption Proceeding No.1 of 1998.

19. It is contended by learned counsel for the petitioner that the allegation of the State Government to resume the case land is mainly on the ground that the petitioner has not executed lease deed within stipulated time, petitioner has not converted 40 acres of land under aromatic plantation within a period of three years from the date of sanction and petitioner has not utilized the land for the purpose it is sanctioned and the petitioner has not deposited the premium and interest thereon. All these allegations are strongly refuted by the petitioner in his explanation submitted to the Collector. The Collector without any notice to the petitioner conducted the field enquiry by the A.D.M. which is also violation of natural justice to the petitioner. Mr. Mohanty, learned counsel for the petitioner further submitted that the petitioner has already made representation to the Collector stating about compliance of the terms and conditions and same has been also well viewed in the A.D.M. report although it was prepared in absence of the petitioner. So, the Collector without any justifiable reasons or speaking order recommended for cancellation of the lease. However, on 19.2.1999 the Government without any hearing extended to the petitioner, basing on the report of the Collector directed the Collector to resume the leasehold property due to violation of Clauses 9 and 10 of the lease deed. Since the order of resumption of the Government is totally against the natural justice of the petitioner and same also violates the fundamental right of the petitioner as enshrined under Article 19 (1)(g) of the Constitution, same is liable to be quashed.

20. Mr. Mohanty further submitted that the D.F.O., Chandaka Wild Life Division and Range Officer, Chandaka Wild Life Range, who are arrayed as opposite party Nos.4 and 5 forcibly entered the leasehold land and tried to dispossess in 2007 and due to such Act of the D.F.O., the activities of the opposite party again came under challenge.

21. Mr. Mohanty submitted that once the State Government carved out the case land to the Revenue Department from the Forest Department, the notification of Forest Department as Wild Life Sanctuary under Annexure-A/4 is gross violation of the legal provision. Moreover, when status quo order is already implemented, it is none of the business of the State Government in Forest Department to declare same

as Wild Life area under Annexure-A/4. Apart from this, the notification relied on by opposite party Nos.4 and 5 did not per se contain the case land. While summing up the contention, Mr. Mohanty submitted that the action of the opposite parties against the petitioner amounts to gross violation of the principle of natural justice of the petitioner and the legal provision of lease principle. Moreover, in no way the Forest Conservation Act or any Forest law do stand on the way for granting lease in favour of the petitioner. So, he prayed to quash the proceeding under Resumption Case No.1 of 1998 and uphold the lease granted in favour of the petitioner.

22. Mr. Bhuyan, learned Additional Government Advocate submitted that the original petitioner had requested for lease of 100 acres of land for Aromatic plantation and manufacture of oil and in fact the State Government has sanctioned same. But 50 acres of land was leased out to the petitioner for 90 years with terms and conditions that same could be utilized for the purpose it is prayed for subject to deposit of compensatory cost for deforestation and anciliary expenses. According to him, in 1980 the Forest Conservation Act came into force. It was the part of terms and conditions to deposit a compensatory cost within certain period and to execute lease deed within three years from the date of sanction. But the petitioner delayed the matter in depositing necessary cost and also delayed for execution of the registered lease deed and in fact in 1988 the lease deed could be executed. Not only this but also there were terms and conditions that at least 40 acres of case land must have plantationed within three years of the sanction of the lease. But the petitioner has failed to do so as per the field enquiry report. So, the petitioner is found guilty of violation of terms and conditions of the lease granted in favour of the petitioner. There was also terms and conditions that in case the petitioner is found to have violated any of the terms and conditions, the concerned land would be resumed and simultaneously the lease would be cancelled.

23. Mr. Bhuyan, learned Additional Government Advocate further submitted that since the petitioner has not complied the terms and conditions as stated above, the State Government passed order to resume the case land vide Resumption Case No.1 of 1998 and on his part of rival submission maintained that the petitioner has been issued with necessary show cause and he has submitted the explanation which is not satisfactory to the Collector, Khurda. Since the petitioner has been given adequate opportunity of being heard, the question of violation of natural justice does not arise.

24. Mr. Bhuyan, learned Additional Government Advocate contended that while there is delay in complying the terms and conditions by the petitioner, the Forest Conservation Act, 1980 (hereinafter called "the Act, 1980") came into force and as per the provisions of the Act, no forest land can be leased out or alienated in favour of any person. Same view has been also echoed in the decision of the Hon'ble Supreme Court, reported in ***AIR 1997 SC 1228;T.N. Godavarman Thirumulkpad v. Union of India and others***.

25. Mr. Bhuyan, learned Additional Government Advocate further submitted that since the lease deed was not registered before commencement of the Forest Conservation Act but was only executed after such Act came into force and forest is involved in this case, as per the provisions of the Forest Conservation Act, 1980, the lease itself does not confer any interest upon the petitioner. According to him, not only the State Government passed the order of resumption of the case land but also on 19.2.1999 said case land has been occupied by the State Government and later on such case land is declared as a Sanctuary under Section 18 read with Section 20 of the Wild Life Protection Act, 1972 (hereinafter called "the Act, 1972"). Adding this, the State Government in Forest Department has already filed forest case against the Supervisor of the petitioner for having violated the Forest Laws. In either of the way the lease in question being not in existence but having been resumed, the petition of the petitioner becomes groundless and hence liable to be rejected.

26. <u>The main point for consideration:</u>

(i) Whether there is violation of natural justice of the petitioner for not giving reasonable opportunity of hearing while resuming the land in Resumption Case No.1 of 1998 ?

(ii) Whether the lease of the case land is hit by Forest (Conservation) Act, 1980 or Wild Life Protection Act, 1972 ?

<u>DISCUSSION</u>
<u>POINT NO.(I)</u>

27. It is admitted fact that the petitioner approached the State Government to have cultivation of medicinal plant and to establish a factory for production of medicinal oil. It is not in dispute that 100 acres of land was transferred from Forest Department to Revenue and Disaster Management Department and accordingly 50 acres out of the said land were sanctioned under lease principle in favour of the original petitioner Pruthweeraj Patnaik. It is not in dispute that advance possession of 50 acres of land was granted in favour of the petitioner Pruthweeraj Patnaik on 24.5.1980.

28. It appears from W.L. Case No.2339 of 1980 that after due publication of the Istahar the lease was granted under lease principle dated 24.5.1979 of the State Government, necessary formalities were maintained and finally lease was sanctioned for Plot Nos.1270, 1271, 1272 and 1280 under Khata No.469 of Mouza Jagannath Prasad measuring 50 acres of land. On 7.3.1988, the Additional Tahasildar, Bhubaneswar submitted record to the Collector, Puri and the Additional District Magistrate intimated vide letter dated 28.9.1988 to realize the ground rent, cess and interest in respect of the land allotted in favour of the petitioner. It will not be out of place to mention that on 20.12.1984 the State Government has intimated the Revenue Divisional Commissioner, Central Division, Cuttack that said 50 acres of case land was sanctioned under lease principle in favour of the petitioner Pruthweeraj Patnaik with the following terms and conditions:

"(i) The lessee shall have to pay 10% of the premium i.e. Rs.49,500/- at the time of taking over possession of land and balance 90% in five equal installments after expiry of a moratorium of 24 months.

(ii) The lessee shall have to pay ground rent of Rs.100/- per annum (@ Re.1/- per acre) for the entire 100 acres till the date of resumption and thereafter Rs.50/- @ Re.1/- per acre for 50 acres subject to revision at every settlement/revisional settlement along with usual cess and normal interest on back rent, and salami.

(iii) The period of lease shall be 90 years.

(iv) The lessee shall have only surface right over the land.

(v) The lessee shall cover at least 40 acres of land under aromatic plantation within a period of three years from the date of execution of the lease and continue to maintain a minimum level of 40 acres of plantation thereafter during the subsistence of lease failing which the land shall be liable for resumption.

(vi) The lessee shall not construct any residential colony on any part of the land except for residence of his workers nor shall use any part of land for any commercial purpose except for the purpose for which lease is granted.

(vii) The land shall be utilized for the purpose for which it is sanctioned and shall not be transferred or leased out to private persons, bodies and otherwise disposed of.

(viii) If the land or any part of it is not utilized for the purpose for which it is sanctioned the same shall revert to Government in the Revenue Department free from all encumbrances.

(ix) Infringement of any of the conditions would result in immediate revision of the land to Government in Revenue Department free from all encumbrances without payment of any compensation for the land and for the structure if any erected thereon and for any improvement which might have been made to the land."

29. According to these conditions the aforesaid ground rent, cess etc. has been fixed by the Additional District Magistrate. It appears from the record that the petitioner has paid the required amount towards ground rent, cess and interest and has also deposited Rs.49,500/- as premium. It is also clear from the registered lease deed that in pursuance of the sanction order of the Government, the learned Collector, Puri has executed registered lease deed in favour of the petitioner. One of the main conditions is that lessee would raise medicinal and aromatic plants for manufacture of essential oil on 40 acres of land out of the case land. So, it is clear that the State Government had leased out 50 acres of land in favour of the petitioner in W.L. Case No.2339 of 1980 under lease principle of the State Government.

30. Now the Resumption Case No.1 of 1998 is required to be discussed. To find out whether the resumption proceeding has been conducted in accordance with law or not. We have called for the original case record. The order sheet dated 30.5.1998 shows that vide Revenue and Excise Department Letter No.19386 dated 16.4.1998 a direction was issued to the Collector, Khurda to start resumption case against the original petitioner Pruthweeraj Patnaik as the terms and conditions of the lease were not complied by him although he was sanctioned with lease of such land by the Government for the purpose of raising medicinal and Aromatic Plants for manufacture of essential oil. On that day, the learned Collector issued notice to show

cause. The order sheet dated 26.9.1998 shows that the original petitioner appeared and sought for adjournment for which the case was fixed to 26.10.1998. On that day, the learned Collector again adjourned the matter to 16.11.1998. But order sheet shows that on 3.11.1998, the Collector, Khurda called for the case record without notice to petitioner and asked the A.D.M., Khurda to make field visit so as to submit the report by 16.11.1998. This conduct of the Collector is keeping the petitioner in dark to award fair justice. There is nothing found from records that the A.D.M., Khurda had issued a notice to the petitioner to remain present on the date of visit. But however the report of the A.D.M. annexed to the record shows that during field enquiry the petitioner was present and other revenue officials were also present. Again in the bottom of the report, the A.D.M. has made endorsement that the petitioner declined to sign on the report. The report dated 13.11.1998 only shows the signature of R.I., Amin and the concerned A.D.M. but no outsider. It has been also mentioned in the report that nine labourers and one supervisor of the petitioner, namely, Siba Pradhan were present. If at all the petitioner refused to sign, it does not appear why the signature of the labourers and supervisor of the petitioner were not obtained on the local field enquiry report. So, it cannot be said that the field enquiry was made by the learned A.D.M. at the instance of the Collector complying the natural justice of the petitioner.

31. After submission of the field visit report, the matter was dragged till 9.2.1999. On 9.2.1999 the Collector passed the following order:

> **"9.2.99** Case taken up today. Advocate for Pruthweeraj Patnaik filed written counter. Perused the report of ADM and the submission made by the lessee Sri Patnaik through his Advocate. After careful consideration of the case it is decided to suggest the Govt. for resumption. Send the letter to Govt. as dictated and keep a copy in the C.R.
>
> Sd/- Collector"

The aforesaid order is not a speaking order because it does not spell out what are the actual grounds on which he took decision to resume the case land at the instance of the State Government. A quasi-judicial authority even if disposing of the case has to maintain minimum propriety of disposal of the case or passing of order. Any final order or interim order without any reason is not an order according to law. It must be remembered that always reasons of the orders precede the final order. However, the record shows that the petitioner has filed objection and written argument denying the grounds of notice to show cause. Moreover, the impugned order does not spell out about discussion on any submission of petitioner to show that said order was passed by adducing reasonable opportunity of being heard to the petitioner.

32. It is reported in ***Abbott vs. Sullivan, reported in (1952) 1 K.B. 189 at 195***, it is stated that the principles of natural justice are easy to proclaim, but their precise extent is far less easy to define. During the earlier days the expression Natural Justice was often used interchangeably with the expression natural Law, but in the

recent times a restricted meaning has been given to describe certain rules of Judicial Procedure. Main essential points of Natural Justice are-

(1) No man shall be a Judge in his own cause
(2) Both sides shall be heard, or audi alteram partem
(3) The parties to a proceedings must have due notice of when the Court/Tribunal will proceed.
(4) The Court/Tribunal must act honestly and impartially and not under the dictation of other persons to whom authority is not given by Law.

33. In the decision reported in ***Maclean v. The Workers' Union (1929) 1 Ch. 602, 624*** it has been stated as follows:

> "The phrase is, of course, used only in a popular sense and must not be taken to mean that there is any justice natural among men. Among most savages there is no such thing as Justice in the modern sense. In ancient days, a person wronged executed his own justice. Amongst our own ancestors, down to the thirteenth century, manifest felony, such as that of a manslayer taken with his weapon, or a thief with the stolen goods, might be punished by summary execution without any form of trial. Again, every student has heard of compurgation and of ordeal; and it is hardly necessary to observe that (for example) a system of ordeal by water in which sinking was the sign of innocence and floating the sign of guilt, a system which lasted in this country for hundreds of years, has little to do with modern ideas of justice. It is unnecessary to give further illustrations. The truth is that justice is a very elaborate conception, the growth of many centuries of civilization; and even now the conception differs widely in countries usually described as civilized".

34. Thus, Audi Alteram Partem can be classified as under:

(1) Party to an action is prima facie entitled to be heard in his presence.

(2) he is entitled to dispute his opponent's case, cross examine his opponents witnesses and entitled to call his own witnesses and give his own evidence before Court.

(3) He is entitled to know the reasons for the decision rendered by a Court/Tribunal.

35. It is reported in ***Canara Bank and Others v. Shri Debasis Das and others; AIR 2003 SC 2041***, relevant paragraphs of which are quoted below:

> "15. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated.
>
> xxx xxx xxx
>
> 16. Principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making

an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

36. In the Constitution Bench reported in ***AIR 1990 SC 1984; S.N. Mukherjee v. Union of India***, where Their Lordships have observed the following:

> "36…….The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely (i) no one shall be a Judge in his own cause (nemo debet esse judex propria causa) and (ii) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice." (pp. 468-69) (of SCR) : (at pp. 156-57 of AIR).
>
> 37. A similar trend is discernible in the decisions of English Courts wherein it has been held that natural justice demands that the decision should be based on some evidence of probative value. (See: **R. v. Deputy Industrial Injuries Commissioner ex P. Moore, [1965] 1 QB 456; Mahon v. Air New Zealand Ltd., 1984 AC 808).**
>
> 38. The object underlying the rules of natural justice "is to prevent miscarriage of justice" and secure "fair play in action." As pointed out earlier the requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making. Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi- judicial functions the legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement……."

37. In ***Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others; AIR 1978 SC 851*** where Their Lordships have observed as follows:

> "43. Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed, from the legendary days of Adam-and of Kautilya's Arthasastra- the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not newfangled. Today its application must be sustained by current legislation, case- law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system."

38. The aforesaid view has also been followed in the decision reported in ***Bar Council of India v. High Court of Kerala; (2004) 6 SCC 311***.

39. It is reported in ***(2016) 2 SCC 779; Poonam v. State of U.P. and others***, where Their Lordships have observed the following:

> "20. In this context the authority in ***Sadananda Halo v. Momtaz Ali Sheikh (2008) 4 SCC 619*** is quite pertinent. The Division Bench referred to the decision in ***All India SC & ST Employees' Assn. v. A. Arthur Jeen; (2001) 6 SCC 380*** wherein this Court had addressed the necessity in joining the necessary candidates as parties. The Court referred to the principle of natural justice as enunciated in ***Canara Bank v. Debasis Das; (2003) 4 SCC 557***. We may profitably reproduce the same: (***Sadananda Halo case***, SCC pp. 647-48, para 63)
>
> "63 …. 'Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.' (***Debasis Das case***, SCC pp.560h-561a)"
>
> And again: (***Sadananda Halo case***, p.648, para 63)
>
> "63 …… 'Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. *The old distinction between a judicial act and an administrative act has withered away*. The adherence to principles of natural justice as recognised by all civilised States is of supreme importance….' (Debasis Das case, SCC p.561e-f)" (emphasis in original)
>
> 21. We have referred to the aforesaid passages as they state the basic principle behind the doctrine of natural justice, that is, no order should be passed behind the back of a person who is to be adversely affected by the order. The principle behind proviso to Order I Rule 9 that the Code of Civil Procedure enjoins it and the said principle is also applicable to the writs. An unsuccessful candidate challenging the selection as far as the service jurisprudence is concerned is bound to make the selected candidates parties."

40. With due regard to the aforesaid decisions, it appears that natural justice is absolutely embodied in the Constitution. The compliance of natural justice depends on the facts and circumstances of the case.

41. It is reiterated that the petitioner was not given reasonable opportunity to attend the field enquiry and also not given opportunity of hearing while the Collector heard the Resumption Case No.1 of 1998 inasmuch as his order is silent as to the contention of the learned counsel for the petitioner to have been duly considered with reasons. Be that as it may, the order dated 9.2.1999 is not only an order without any reason but also it violates the natural justice of the petitioner basing on which same is alone to be interfered with.

42. From the analogy as made by the Collector in his letter of recommendation, it appears he has relied on the enquiry report of the A.D.M. but said report is clear to show that the petitioner has put a barbed fence with installation of gate. Not only this but also there is one structure which is in dilapidated condition. He also found the labourers were in work. The A.D.M. has also found some lemon plants and brinjal plants on the plot. The plea of the petitioner that he was not given adequate finance by the S.B.I. to improve the financial condition, same fact has not been discussed by the Collector in his letter of recommendation. On the other hand, the letter of the Collector appears to be biased as he has not opined as to the action taken by the petitioner in spite of his financial crunch when he relied on the report of the A.D.M. However, the undertaking of the petitioner that he was ready to go ahead with the Aromatic plantation and medicinal plantation to solve the purpose of lease has not been well discussed in the letter of recommendation.

43. Bereft of the above finding of the A.D.M., there is also explanation of the petitioner submitted to the Collector that he has paid the installment which is admitted by the State in the counter and also has complied other formalities which should have been discussed to find out the truth with the allegation of the State. The main thrust in the letter of recommendation to resume the case land because the petitioner has not used the land as for the purpose he has taken but same is not a fact in view of the field enquiry report as discussed above. On the other hand, the plea of the petitioner that prior to this inspection the Commissioner-cum-Secretary of the State Government had visited the case land and found it used for the purpose having not been discussed in the report creates doubt with the report of the Collector.

44. It appears from the material that the Collector has proceeded basing on the letter of the Government to resume the case land and after giving recommendation he again directed the Tahasildar to resume the case land. Since record shows that State Government has sanctioned the lease, it is the State Government to issue notice to show cause before determining the lease. But the counter of State lacks such aspect.

45. From the aforesaid discussion, it is clear that not only natural justice of the petitioner has been violated by the Collector while recommending for resumption but also the order of the Collector being without reason in spite of the explanation and field visit going on in favour of the petitioner, the said order is thus observed to be capricious and full of conjectures. So also the order of the State Government determining lease also lacks brevity for not giving reasonable opportunity to petitioner Pruthweeraj Patnaik to determine lease and resume the case land. Thus, we are of the view that natural justice of petitioner Pruthweeraj Patnaik has been grossly violated while disposing of Resumption Case No.1 of 1998. The Point No.(I) is answered accordingly.

POINT NO.(II)

46. It is admitted fact that the petitioner had filed request for sanction of lease for 100 acres of land in his favour for aromatic Plantation to manufacture medicinal oil. It is also not in dispute that from the beginning it was forest land under Demarcated Protected Forest category. It is also admitted fact the State Government in Revenue Department carved out 100 acres of land by issuing necessary notification as available from the concerned file and leased out 50 acres out of such 100 acres to original petitioner.

47. The counter of the opposite party Nos.1 to 3 do not disclose about application of Forest Conservation Act to the present case although the learned Additional Government Advocate only raised during hearing that due to enforcement of the Forest Conservation Act, 1980, same Act applies to the fact of this case. Learned counsel for the petitioner submitted that the said Act, 1980 does not apply to this case as advance possession of the land has been already given prior to commencement of the Act, 1980. Thus, a point for application of such Act 1980 was framed.

48. Opposite party Nos.4 and 5 now raised the question that the case land comes under the purview of the Sanctuary under the Act, 1972. On the other hand, learned counsel for the petitioner submits that the case land is not within the Sanctuary. The documents filed by the opposite party Nos.4 and 5 do not contain the leasehold plot numbers and khata numbers. So, the opposite party Nos.4 and 5 failed to prove that the case land is within the Sanctuary under the Act, 1972.

49. In terms of above discussion, since issue of applicability of Act 1980 has been raised during argument being not pleaded, we restrain ourselves to discuss such issue having kept on academic. The Point No.(II) is answered accordingly.

CONCLUSION

50. In the writ petition the petitioner has prayed for to quash the order of determining the lease dated 19.2.1999 vide Annexure-4 and to declare Resumption Case No.1 of 1998 as not maintainable and at the same time to allow the petitioner to make good further compliance of the contract if at all anything left out.

51. In view of the aforesaid discussion, we are of the view that Resumption Case No.1 of 1998 being disposed of by the learned Collector by violating natural justice, same does not stand and liable to be quashed and the Court do so. At the same time, Annexure-4 shows that the State Government informed the Collector, Khurda that due to infraction of Clauses-9 and 10 of the Lease Deed, the Government determined the lease and directed for immediate resumption of the 50 acres of land. That order relates to 19.2.1999 which is as follows:

"Government of Orissa
Revenue and Excise Department
.....
No.GE(KHD)63/95(P)-10426/R., Dt.19.2.99

From

Shri D.K Das, OAS (I) (SB)
Deputy Secretary to Government

To

The Collector, Khurda

Sub:- Resumption of 50 acres of land in village-Jagannath Prasad under Bhubaneswar Tahasil leased out to Shri Pruthiveeraj Patnaki, Proprietor, M/s Sun Industrial Chemicals, Bhubaneswar sanctioned vide No.65268/R., dt.28.9.84 and No3677/R., dt.26.6.87 of the Revenue Department for raising of medicinal and aeromatic plants for manufacture of essential oils.

Ref.:- Your letter No.75/Rev dt.10.2.99

Sir,

I am directed to invite reference to your aforesaid letter on the subject cited above and to say that after careful consideration of the report on the Show Cause furnished by Shri Pruthiveeraj Patnaik, Proprietor, M/S Sun Industrial Chemicals, Bhubaneswar, your report dt.10.2.99 and all facts and circumstances in the case, Government are satisfied that;

1. conditions stipulated in item No.(i), (ii), (v), (vii) & (viii) of the Sanction order No.65268/R., dt.28.9.84 and No.36774/R., dt.26.6.87 and Clauses-1, 4(i), 6 & 8 of the Lease Deed have not been fulfilled by the Lessee.

2. no valid or maintainable reason exists for such non-fulfillment of the aforesaid terms and conditions of the lease.

Hence, in exercise of the provisions contained in Clauses-9 & 10 of the Lease Deed, Government have been pleased to determine the lease and order for immediate resumption of 50 acres of land as described below along with the structures etc. existing thereon without payment of any compensation.

You are therefore requested to resume and take over possession of the land along with the structures etc. standing thereon and report compliance to the Government immediately.

LAND SCHEDULE

VILLAGE	KHATA NO.	PLOT NO.	AREA(IN ACRE)
Jagannath Prasad	469	1270	0.240
		1271	2.600
		1272	16.660
		1280	30.500
			50.000

Yours faithfully
Sd/-
Deputy Secretary to Government"

52. The aforesaid order does not disclose any personal hearing of the petitioner. Since the personal hearing has not been made and the report of the Collector vide Resumption Case No.1 of 1998 has been knocked down due to violation of natural justice, Annexure-4 cannot be allowed to stand valid. So, we are of the opinion that Annexure-4 also suffers from infirmity due to violation of natural justice of the petitioner for which same is liable to be quashed and the Court do so. Hence, we remand the matter back to the learned Collector, Khurda for fresh disposal.

53. It is further directed that the learned Collector, Khurda would follow the appropriate procedure after affording reasonable opportunity of being heard to the L.Rs. of the petitioner and dispose of Resumption Case No.1 of 1998 within a period of six months from the date of receipt of this order. It is made clear that the learned Collector, Khurda while taking decision would pass a speaking order in accordance with law keeping in view the points discussed hereinabove.The writ petition is disposed of accordingly.

2018 (II) ILR - CUT- 88

DR. A.K. RATH, J.

S.A. NO. 165 OF 1992

BISWANATH DIXIT & ORS. .....Appellants

.Vs.

KOTHABANDHU PUJAPANDA & ANR. .....Respondents

CODE OF CIVIL PROCEDURE, 1908 – Order 41 Rule 17(1) – Explanation under – The question as to whether the Court was justified in deciding the appeal on merit in the absence of any representation on behalf of the appellant – Held, in view of Explanation to Order 41 Rule 17 (1) CPC the appeal should not have been decided on merit – Ghanshyam Dass Gupta v. Makhan Lal, (2012) 8 SCC 74 followed. (Paras 6 & 7)

Case Laws Relied on and Referred to :-

1. (2012) 8 SCC 74 : Ghanshyam Dass Gupta v. Makhan Lal.

For Appellants : Dr.Sujata Dash
For Respondents : None

JUDGMENT Date of Hearing :17.4.2018 Date of Judgment:23.4.2018

DR. A.K.RATH, J.

Plaintiffs are the appellants 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 plaintiffs as appellants instituted the suit for declaration of title, confirmation of possession, permanent injunction and certain other consequential reliefs. The defendants entered contest and filed written statement denying the assertions made in the plaint. The suit was dismissed. Felt aggrieved, the plaintiffs appealed before the learned District Judge, Puri, which was subsequently transferred to the court of the learned Additional Sub-Judge, Puri and renumbered as T.A.No.33/56 of 1990/88. None appeared for the appellants. After hearing the learned counsel for the respondents, learned appellate court dismissed the appeal. Hence, this appeal.

3. This appeal was admitted on the following substantial question of law:

> "Whether the lower appellate court was justified in not dismissing the appeal in absence of the appellant and dispose of the matter without considering the evidence on record ?"

4. Heard Dr.Sujata Dash, learned Advocate for the appellants. None appeared for the respondents.

5. Dr.Dash, learned Advocate for the appellants submitted that counsel for the appellants filed an application on 9.4.1992 for adjournment. The same was rejected. No argument was advanced by the learned counsel for the appellants. Learned appellate court committed a manifest illegality in dismissing the appeal on merit.

6. The subject matter of dispute is no more res integra. An identical question came up before the apex Court in the case of Ghanshyam Dass Gupta v. Makhan Lal, (2012) 8 SCC 74. The question arose before the apex Court as to whether the High Court was justified in deciding the appeal on merit in the absence of any representation on behalf of the appellant, in view of Explanation to Order 41 Rule 17 (1) CPC. The apex Court held thus:

> "7. Rule 17(1) of Order 41 deals with the dismissal of appeal for the appellant's default. The abovementioned provision, even without Explanation, if literally read, would clearly indicate that if the appellant does not appear when the appeal is called for hearing, the court has to dismiss the appeal. The provision does not postulate a situation where, the appeal has to be decided on merits, because possibility of allowing of the appeal is also there, if the appellant has a good case on merits; even if nobody had appeared for the appellant.

> 8. Prior to 1976, conflicting views were expressed by different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 CPC. Some High Courts had taken the view that it was open to the appellate court to consider the appeal on merits, even though there was no appearance on behalf of the appellant at the time of hearing. Some High Courts had taken the view that the High Court cannot decide the matter on merits, but could only dismiss the appeal for appellant's default. Conflicting views raised by the various High Courts gave rise to more litigation. The legislature, therefore, in its wisdom, felt that it should clarify the position beyond doubt. Consequently, Explanation to sub-rule (1) of Rule 17 of Order 41 CPC was added by Act 104 of 1976, making it explicit that nothing in sub-rule (1) of Rule 17 of Order 41 CPC should be construed as empowering the appellate court to dismiss the appeal on merits where the appellant remained absent or left unrepresented on the day fixed for hearing the appeal. The reason for introduction of such an Explanation is due to the fact that it gives an opportunity to the appellant to convince the appellate court that there was sufficient cause for non-appearance. Such an opportunity is lost, if the courts decide the appeal on merits in absence of the counsel for the appellant."
>
> (emphasis laid)

7. In view of the authoritative pronouncement of the apex Court in the case of Ghanshyam Dass Gupta (supra), the inescapable conclusion is that the learned lower appellate court fell into patent error of law in deciding the appeal on merit in the absence of the counsel for the appellants. The impugned judgment is, therefore, set aside. Instead of directing the learned appellate court to decide the application for non-appearance of the counsel for the appellants after a quarter century, interest of justice shall be best served, if the learned lower appellate court decides the appeal on merit. Accordingly, this Court directs the learned lower appellate court to decide the appeal, as expeditiously as possible, preferably within a period of six months. The appeal is allowed to the extent indicated above. The parties shall bear their costs throughout.

2018 (II) ILR - CUT- 90

DR. A.K. RATH, J.

W.P.(C) NO.1684 OF 2018

SUCHITRA BAL .....Petitioner

.Vs.

STATE OF ODISHA & ORS .....Opp. parties

ORISSA CIVIL SERVICE (REHABILITATION ASSISTANCE) RULES, 1990 – Claim of service on compassionate ground by the widow in an aided educational institution – Whether the benefit of the rehabilitation scheme applies to the family members of an aided educational institution which is receiving Block Grant ? Held, Yes. – 2016 (I) ILR CUT-1162 followed. (Para 6)

Case Laws Relied on and Referred to :-

1. 2016 (I) ILR CUT-1162 : Ritanjali Giri @ Paul vs. State of Odisha and others

For Petitioner : Mr. Purusottam Chuli
For Opp. Parties : Additional Government Advocate

JUDGMENT Date of Hearing: 16.07.2018 Date of Judgment:16.07.2018

DR. A.K.RATH, J

This petition challenges the order dated 5.10.2016, passed by the Director, Higher Education Department, Odisha, vide Annexure-9, whereby and whereunder the application of the petitioner for appointment to the post of Asst. Librarian under Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 has been rejected.

2. Hemanta Kumar Rout, husband of the petitioner, was working as an Asst. Librarian (1st post) in Nalini Kanta Mohavidyalaya, Rajnagar, Keonjhar. Pursuant to the approval of the Government in the Higher Education Department vide order No.55125, dated 12.12.2013, he was receiving block grant. He expired on 20.06.2012. He was the sole bread earner of his family. After his demise, the family members are in a distressed condition. The petitioner, who is the widow of Hemanta Kumar Rout, filed an application before the Principal, Nalini Kanta Mohavidyalaya, Rajnagar, Kendrapara on 27.6.2012 to appoint her under the rehabilitation assistance scheme. Pursuant to the resolution of the Governing Body, the Principal issued letter of appointment to the petitioner appointing her in the post of Asst. Librarian (1st post) on 05.07.2012. The petitioner joined in the post on 11.7.2012. The Governing Body of the College sent the proposal to the Government on 02.09.2016 for approval of the appointment of the petitioner under rehabilitation assistance scheme. The same was rejected on 05.10.2016, vide Annexure-9, on the ground that there is no provision for appointment under the rehabilitation assistant scheme to the legal heirs of the employees of the College receiving Block Grant.

3. Heard Mr. Purusottam Chuli, learned counsel for the petitioner and learned Additional Government Advocate for the State.

4. Mr. Chuli, learned counsel for the petitioner, submits that the husband of the petitioner was functioning as Asst. Librarian (1st post). He died while in service. After his death, the family received a setback. The application of the petitioner was rejected on untenable and unsupportable grounds. To buttress the submission, he places reliance on the decision of this Court in the case of *Ritanjali Giri @ Paul vs. State of Odisha and others*, W.P.(C) No.5022 of 2013 disposed of on 11.5.2016. **(Reported in 2016 (I) ILR CUT-1162).**

5. In *Ritanjali Giri @ Paul* (supra), the question arose as to whether the benefit of the Scheme applies to the family members of an aided educational institution, which is receiving block grant ? This Court held –

> "**7.** Section 3(b) of the Orissa Education Act, 1969 defines the Aided Educational Institutions, which is quoted hereunder:

"**3(b) Aided Educational Institutions** means private educational institution which is eligible to, and is receiving grant-in-aid from the State Government, and includes an educational institution which has been notified by the State Government to receive grant-in-aid."

8. On a bare perusal of the aforesaid provision, it is abundantly clear that private educational institution which is eligible to, and is receiving grant-in-aid from the State Government, and includes an educational institution which has been notified by the State Government to receive grant-in-aid is an aided educational institution. The Act does not make any distinction between the full Grant School or Block Grant School. Moreover, the private educational institution which has been notified by the State Government to receive grant-in-aid is also an aided educational institution."

6. The judgment in *Ritanjali Giri @ Paul* (supra) applies with full force to the facts of this case. The application of the petitioner was rejected on jejune grounds. In view of the same, the impugned order is quashed. The matter is remitted back to the Director, Higher Education, Odisha, opposite party no.2, for re-consideration in accordance with law.

7. The petition is allowed.

2018 (II) ILR - CUT- 92

DR. A.K. RATH, J.

S.A. NO. 216 OF 1989

BORISA PADRA & ANR. .....Appellants

.Vs.

ELUTERIA NAYAK .....Respondent

CODE OF CIVIL PROCEDURE, 1908 – Order 7 Rule 3 – Suit for declaration of title over the suit land and for declaration that the patta, if any, issued in favour of the defendants is null and void – Claim based only on the basis of Adhikar Patra given by Marikote Math – Title of Math not established – Reliance on Adhikar Patra is held to be misplaced as the same is not a document of title – Principle of transfer – Indicated.

"A person can only transfer the other person right, title and interest in any tangible property, which he is possessed of to transfer it for consideration or otherwise. If on the date of transfer of any tangible property, the vendor did not have any subsisting right, title and interest over it, then the vendee of such property would not get any right, title & interest in the property purchased by him for consideration or otherwise." *(Pages 9 &10)*

For Appellants : Mr. Bhubanananda Mishra
For Respondent : Ms. Jyotsnamayee Sahoo

JUDGMENT Date of Hearing: 13.07.2018 Date of Judgment: 23.07.2018

DR. A.K.RATH, J

This is a defendants' appeal against reversing judgment.

2. Plaintiff-respondent no.1 instituted the suit for declaration of title over the suit land and for declaration that the patta, if any, issued in favour of the defendants is null and void. The case of the plaintiff was that the suit land originally belonged to the ex-zamindar of Badagada estate. He had given the land to the Math Head of Marikote for management. Marikote Math allotted the land to the ancestor of the plaintiff for enjoyment of the same in lieu of the service to the deity Sri Sri Patakhanda Mohaprabhu Bije Marikote. The plaintiff used to provide vegetables out of the income of the property on the date of Dussehara and obtained receipts. The receipts were burnt in the fire. Defendants had no semblance of right, title and interest over the suit land. In the year 1982, the plaintiff applied for mutation of the land in his favour. The defendants resisted the same. The case was dismissed. With this factual scenario, he instituted the suit seeking the reliefs supra.

3. The defendants entered contest and filed a written statement denying the assertions made in the plaint. According to the defendants, the plaintiff is not the owner of the suit land. They are the owners of the suit land. The Math Head of Marikote had not allotted the suit land to the ancestor of the plaintiff for offering bhog to the deity.

4. Stemming on the pleadings of the parties, learned trial court struck three issues. Parties led evidence, oral and documentary. Learned trial court dismissed the suit holding, inter alia, that the plaintiff had no title over the suit land. Felt aggrieved, the plaintiff filed appeal before the learned District Judge, Berhampur, which was subsequently transferred to the court of learned 2nd Additional District Judge, Berhampur and renumbered as Title Appeal No.77/88/(T.A. No.89/86 G.D.C.). Learned appellate court came to hold that the Math Head had granted Adhikar Patra, Ext.1, on 1.3.30 to Andha Naik, ancestor of plaintiff. The father of the defendant was an attesting witness. The Management Committee of the deity recognised the right, title, interest and possession of the plaintiff over the suit land on 2.10.74. Ext.1 is a thirty years old document. Held so, it allowed the appeal.

5. The second appeal was admitted on the substantial questions of law enumerated in Ground Nos.1, 3 and 5 of the appeal memo. The same are -

> "1. Whether execution of documents can be accepted when the signatures therein are stoutly denied only on the ground that the document is 30 years old.
>
> 3. Whether the plaintiff can be permitted to rely upon facts not pleaded in the plaint.
> 5. Whether the appellate court can reverse the finding regarding possession without displacing the reasons given by the Original Court."

6. Heard Mr. Bhubanananda Mishra, learned Advocate, on behalf of Mr. S.N. Mishra, learned Advocate for the appellants and Ms. Jyotsnamayee Sahoo, learned Advocate, on behalf of Mr. Manoj Kumar Mishra, learned Senior Advocate for the respondent.

7. Mr. Mishra, learned counsel for the appellant submitted that there is no material on record that the property originally belonged to Marikote Math. No title passed by virtue of Adhikar Patra, Ext.1. The mutation case filed by the plaintiff was dismissed.

8. Per Contra, Ms. Sahoo, learned counsel for the respondent submitted that the property originally belonged to Marikote Math. The Math Head granted Adhikar Patra, Ext.1 to the ancestor of the plaintiff. The plaintiff is in possession of the same since the time of his ancestor. She further submitted that Ext.1 is a thirty years old document. The same is presumed to be correct. Learned appellate court, on a threadbare analysis of the evidence on record and pleadings, allowed the appeal. There is no perversity in the findings of the learned court below.

9. There is no material on record that the property originally belonged to Marikote Math. Reliance placed on Adhikar Patra, Ext.1 is totally misplaced. The same is not a document of title. At best, the same shall be construed as a document authorizing Andha Naik to look after the property. Sec.90 of the Indian Evidence Act, 1872 provides that where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that persons handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. On a bare perusal of the said provision, it is evident that the presumption is available to the signature, execution or attestation of a document. The presumption does not extend to correctness of statement, contents of the document or that it had been acted upon. Learned lower appellate court fell into patent error in declaring the title of the plaintiff over the suit land placing reliance on Ext.1.

10. A person can only transfer the other person right, title and interest in any tangible property, which he is possessed of to transfer it for consideration or otherwise. If on the date of transfer of any tangible property, the vendor did not have any subsisting right, title and interest over it, then the vendee of such property would not get any right, title & interest in the property purchased by him for consideration or otherwise.

11. In *M/s. Eureka Builders and Others*, 2018 (II) CLR (SC) -121, the apex Court held thus :

> "40) It is a settled principle of law that a person can only transfer to other person a right, title or interest in any tangible property which he is possessed of to transfer it for consideration or otherwise.

41) In other words, whatever interest a person is possessed of in any tangible property, he can transfer only that interest to the other person and no other interest, which he himself does not possess in the tangible property.

42) So, once it is proved that on the date of transfer of any tangible property, the seller of the property did not have any subsisting right, title or interest over it, then a buyer of such property would not get any right, title and interest in the property purchased by him for consideration or otherwise. Such transfer would be an illegal and void transfer."

12. The ratio in *M/s. Eureka Builders and Others* proprio vigour applies to the facts of the case. The substantial questions of law are answered accordingly.

13. A priori, the impugned judgment is set aside. The appeal is allowed. Consequently, the suit is dismissed. There shall be no order as to costs.

2018 (II) ILR - CUT- 95

DR. A.K. RATH, J.

S.A. NO. 247 OF 2001

SUKADEV SAHOO .....Appellant

.Vs.

BENGA DIBYA & ANR. .....Respondents

CODE OF CIVIL PROCEDURE, 1908 – Section 96 – First Appeal –The scope of interference by appellate court – Indicated.

"First appeal is valuable right of the parties. The whole case is open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. It is the duty of the first appellate court to deal with all the issues and the evidence led by the parties before recording the finding regarding title." (Paras 8 & 9)

Case Laws Relied on and Referred to :-

1. 2010 (13) SCC 530 : B.V.Nagesh and another vs. H.V. Sreenivasa Murthy.
2. (2001) 3 SCC 179 : Santosh Hazari v. Purushottam Tiwari (deceased) by LRs.

For Appellant : Mr. R.K. Kar.
For Respondents : Mr.D.P. Mohanty.

JUDGMENT Date of Hearing :16.07.2018 Date of Judgment: 20.07.2018

DR. A.K. RATH, J.

Defendant no.1 is the appellant against a reversing judgment.

2. Since the appeal is to be disposed of on a short point, the facts need not be recounted in detail. Suffice it to say that the plaintiffrespondent no.1 instituted T.S. No.203 of 1998 in the court of the learned Additional Munsif, Jajpur for declaration

that the sale deed dated 21.2.1972 executed by her in favour of the father of the defendant no.1 is a fraudulent one and confirmation of possession over the suit land. The defendants filed a written statement denying the assertions made in the plaint. Parties led evidence, oral and documentary. Learned trial court dismissed the suit holding inter alia that the sale deed is legal and valid. Felt aggrieved, the plaintiff filed T.A. No.44 of 1998 before the learned Additional District Judge, Jajpur, which was allowed.

3. The second appeal was admitted on the substantial question of law enumerated in ground no.C(iv) of the memorandum of appeal. The same is:

> "(iv) Whether the grounds of reversal assigned by the learned lower appellate court are sustainable in the facts and circumstances of the case and in view of settled position of law ?"

4. Heard Mr. R.K. Kar, learned Advocate for the appellant and Mr. D.P. Mohanty, learned Advocate for the respondents.

5. Mr. Kar, learned Advocate for the appellant, argued with vehemence that the learned lower appellate court has not dealt with all issues. The finding of the learned lower appellate court that the plaintiff is a pardanashin lady and without understanding the contents of the document, she put her L.T.I. in the sale deed is perverse. The sale deed, Ext.A, shows that the contents of the sale deed was read over and explained to the vendor. Thus the matter may be remitted back to the learned lower appellate court.

6. Per contra, Mr. Mohanty, learned Advocate for the respondents, submitted that the learned lower appellate court has passed a reasoned judgment. There is no perversity in the findings of the learned lower appellate court.

7. The scope of interference in an appeal under Sec.96 C.P.C. is well known. In *Santosh Hazari v. Purushottam Tiwari (deceased) by LRs,* , (2001) 3 SCC 179, the apex Court reminded the duty of the first appellate court. The apex Court held:

> "… The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (*See Girijanandini Devi v. Bijendra Narain Choudhary*). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. …"
>
> (Emphasis laid)

8. The apex Court in the case of *B.V.Nagesh and another vs. H.V. Sreenivasa Murthy*, 2010 (13) SCC 530 held:

> "3. How regular first appeal is to be disposed of by the appellate court/High Court as been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate Court shall state:
>
> a) the points for determination;
> b) the decision thereon;
> c) the reasons for the decision; and
> d) where the decree appealed from is reversed or
> varied, the relief to which the appellant is entitled.
>
> 4. The appellate Court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put-forth, and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (*Vide Santosh Hazari vs. Purushottam Tiwari,* (2001) 3 SCC 179 = JT (2001) 2 SC 407 and *Madhukar and others vs. Sangram and others,* (2001) 4 SCC 756)
>
> 5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it asa first appellate Court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the Court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

9. First appeal is valuable right of the parties. The whole case is open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. It is the duty of the first appellate court to deal with all the issues and the evidence led by the parties before recording the finding regarding title.

10. On the bare reading of the judgment, it reveals that the learned lower appellate court has not dealt with all issues. Learned lower appellate court has not discussed the evidence on record while upsetting the judgment of the learned trial court.

11. A priori, the judgment and decree of the learned lower appellate court are set aside. The matter is remitted back to the learned lower appellate court for de novo hearing. For the said purpose, parties shall appear before the learned lower appellate court on 10.8.2018. Learned lower appellate court shall conclude the

hearing of the appeal by end of December, 2018. Since the matter is remitted back to the learned lower appellate court, this Court refrains from answering the substantial questions of law. The appeal is allowed. No costs.

2018 (II) ILR - CUT-98

D.DASH,J.

FAO NO. 481 OF 2013

STATE OF ODISHA & ORS. ……..Appellants

.Vs.

MANAGING COMMITTEE OF B.B.C. VIDYAPITHA, TOTAPADA ……Respondent

ORISSA EDUCATION ACT, 1969 – Section 24-C – Appeal by State challenging the order passed by State Education Tribunal in GIA Case directing to release grant-in-aid to the teaching and non-teaching staff as per the Grant-In-Aid Order, 1994 – Plea that the teaching and non-teaching staff of the applicant-school are not entitled to the claim as laid in terms of GIA Order, 1994 since their eligibility comes under the GIA Order, 2004 – Applicant-school received the recognition for the academic session 1988-89 for presentation of the candidates at the Annual HSC Examination of the year 1991 – Whether entitled for GIA as per GIA Order 1994 – Held, yes, in view of para-12 read with para-16(iii) of GIA Order, 1994, the teaching and non-teaching staff of the applicant-school do stand entitled to receive the grant in aid at the rate of 60% of the admissible salary cost with effect from 1.6.1994 as also 100% of the salary cost with effect from 1.6.1997 in terms of said GIA Order, 1994 – The ground of attack to the claim of the applicant-school that it is not entitled the benefit because of repeal of the GIA Order, 1994 by GIA Order, 2004 and 2008 is untenable in view of the fact that when the applicant-school was entitled to get benefits under the GIA Order 1994 having fulfilled with the conditions laid therein, the repeal of GIA Order 1994 by subsequent GIA Order, 2004 and 2008 cannot take away such rights. (Paras 7 & 8)

Case Laws Relied on and Referred to :-

1. 2003(I) OLR-91 : Prafulla Kumar Sahu vs. State of Orissa.

For Appellants : S.S.C. (School and Mass Education)
For Respondent : M/s. M.K. Sahoo and S.K. Rath

JUDGMENT Date of Jearing: 19.06.2018 Date of Judgment : 09.07.2018

D.DASH,J.

In this appeal under section 24-C of the Orissa Education Act, 1969 (for short, called 'the Act') the challenge is to the order dated 24.04.2013 passed by the

learned State Education Tribunal, Orissa, Bhubaneswar in GIA Case No. 585 of 2011 directing the appellants to release grant-in-in-aid to the teaching and non-teaching staff of B.B.C. Vidyapitha, Totapada in the district of Bhadrak as being entitled to their salary component as per the Grant-In-Aid Order, 1994 (for short, called as GIA Order, 1994); at the rate of 60% of salary cost with effect from 1.6.1994 and full salary cost (100%) with effect from 1.6.1997 and to pay the arrear differential salary payable to them.

2. The parties hereinafter have been referred to as they have been arraigned before the Tribunal.

3. Facts essential for the purpose of this appeal may be stated hereunder:-

The applicant-school (B.B.C. Vidyapitha, Totapada in the district of Bhadrak) has been established in the year 1987 and the School has received recognition from the Government from the academic session 1988-89. The first batch of students of the school have appeared in the Annual HSC Examination in the year 1991. The applicant-school thus claims entitlement of salary component at the rate of 60% for its teaching and non-teaching staff with effect from the presentation the first batch of students in the Annul HSC examination and full salary cost after four years of such presentation. It is stated that the applicant-school being squarely covered under the GIA Order, 1994, they have not been paid with the same and instead the school has been notified to receive block grant with effect from 1.1.2004 in terms of GIA Order, 2004. The claim as aforesaid having not been paid any heed to, the applicant-school approached the Tribunal by filing an application under section 24-B of the Odisha Education Act, 1969.

The opp.parties (the State and the Director), the present appellants have chosen not to file any counter. Be that as it may, the stand taken in course of argument is that the teaching and non-teaching staff of the applicant-school are not entitled to the claim as laid in terms of GIA Order, 1994 and since their eligibility comes under the GIA Order, 2004, notification has been rightly made and accordingly the teaching and non-teaching staff of the school are being paid with all their entitlements thereunder.

4. The Tribunal has negated the above contention raised by the opp.parties. Considering the claim levied by the applicant-school for its teaching and non-teaching staff, in view of the position of law set at rest by the decision of this Court as has been referred to, the Tribunal has passed the order which runs as under:-

> " xx xx xx xx xx xx
>
> 7. It is argued on behalf of the learned Standing Counsel that even if a date has been prescribed in the Grant in Aid Order, 1994, the State Government is not bound to follow the date of release of Grant-in-aid, inasmuch as, the State Government has been authorized to specify such other date as may be determined by it under the provisions of Sub-section (4) of Sec.7-C of the Odisha Education Act, 1969. On a reading of this Sub-section, it is seen that the relevant portion runs thus:

"xx Grant-in-Aid where admissible under the said rule or order, as the case may be, shall be payable from such date as may be specified in that rule or order of from such date as may be determined by the State Government."

This is a case, where admittedly the Grant in Aid Order, 1994 has already prescribed a particular date, wherefrom the same would be released. Had no date in such order been prescribed, option was there with the State Government to determine any other date or to make any other Rules. Since a particular date has been specified in the Grant in Aid Order, 1994 i.e. 1st day of beginning of the succeeding year, no choice has been left with the State Government to determine any other date ignoring the provision of the Grant in Aid Order, 1994."

Having reached at the conclusion as above, the following are the paras consequential thereto:-

"8. In view of the settled position of law and since a particular date has been prescribed under Paragraph-16(iii) of the Grant in Aid Order, 1994, no option has been left to the Government but to release grant-in-aid in favour of the applicant-school w.e.f. 1.6.1994 and 1.6.1997 @ 60% of salary cost and full salary cost respectively.

9. The O.P. Nos. 1 and 2 are accordingly directed to release grant in aid to the teaching and non-teaching staff of the applicant-school @ 60% of the salary cost w.e.f. 1.6.1994 and full salary cost (100%) w.e.f. 1.6.1997 strictly in accordance with Grnat-in-Aid Order 1994. The differential salary components be accordingly paid to all the staff of the applicant-school. The entire exercise shall be completed within a period of three months from the date of communication of the order."

5. In this appeal, the following grounds have been raised in support of the prayer made hereunder for setting side the impugned order of the learned Tribunal:-

"A) For that the judgment passed by the learned State Education Tribunal, Orissa, Bhubaneswar is unjust, illegal contrary to the material available on record and liable to be set aside.

B) For that the learned Tribunal failed to appreciate the facts and law involved in the lis in its proper perspective.

C) For that the learned Tribunal did not take into consideration the provision of Section 7(c)(1) of the Orissa Education Act, 1969 which clearly states that the State Government shall within the limits of its economic capacity, set apart a sum of money annually for being given as grant-in-aid to Private Educational Institution in the State, which clearly reveals that the Government is not bound to provide grant-in-aid to any private educational institution on merely attaining/acquiring the eligibility.

D) For that the learned Tribunal committed an apparent error by entertaining the prayer made in the GIA case wherein relief was sought for under the Orissa Education (Payment if Grant-in-aid to the High Schools and Upper Primary Schools) Order, 1994 which was repealed since long w.e.f 05.02.2004 and the present respondent approached the State Education Tribunal after a long gap of seven years i.e. in the year 2011 and the learned Tribunal directed the Opp. Parties therein to grant of benefits to the applicant therein under a repealed law which is not sustainable in the eye of law.

E) For that the learned Tribunal also failed to appreciate that when grant-in-aid was received in favour of the petitioner's institution after amendment of the Orissa Education (Payment of Grant-in-aid to the High Schools and Upper Primary Schools) Order, 1999 and they accepted the said grant-in-aid without any objection or allegation and raising a claim

after a period of 7 years, should have been dismissed by the learned Tribunal on the ground of inordinate delay and on the principle of waiver and acquiescence.

F) For that the learned Tribunal should have taken into consideration the fact that the present respondent never challenged the Orissa Education (Payment of Grant-in-aid to High Schools, Upper Primary Schools, etc.) Order, 2004 wherein vide order 7 of the Orissa Education (Payment of Grant-in-aid to the High Schools and Upper Primary Schools) Order, 1994 was repealed and after repeal of said order of 1994 no benefit should have been granted to the petitioner in GIA Case (present respondent) under a repealed law and the learned Tribunal committed a gross error of law by allowing the benefits under a repealed law when particularly the repealing of the said order of 1994 was never challenged and set aside by a competent court of law.

G) For that the present respondent can not claim grant-in-aid as a matter of right in view of the settled position of law. Besides that the present respondent's institution in the application for recognition had given a declaration that they will not claim any grant from the Government and thereafter any claim made by the present respondent is hit by the principle of waiver and acquiesce.

H) For that the learned Tribunal relied upon the ratio decided in the case of Prafulla Kumar Sahoo Vrs. State of Orissa and others reported in 2003(I) OLR-91 erroneously as the facts in the case of Prafulla Kumar Sahoo are not similar to the facts in the present case on the following reasons;

i) That Prafulla Kumar Sahoo was working in an institution which has already been notified by the State Government and his post was approved and grant-in-aid was released in his favour with effect from 01.06.1991 and he had filed his case for approval of his promotion against the post of Junior Librarian but in this instant case the institution has filed its case for notification as an aided educational institution.

ii) That while the case was decided the judgment was pronounced GIA order 1994 was in force and he was claiming grant-in-aid as per that order but in this instant case, the Orissa Education (Payment of GIA to High Schools and Upper Primary Schools) Order 1994 has already been repealed under which the applicant is now claiming GIA.

iii) That said Prafulla Kumar Sahoo was an employee of a college and his service has been regulated by the Odisha (Non-Govt. College, Junior Colleges and Higher Secondary Schools) GIA Order 1994 and the same has been taken into consideration when the judgment was passed. But in this instant case, the said order is not applicable to the Schools. On the other hand, the institution has filed case to notify as per GIA order called Orissa Education (Payment of G.I.A to High Schools and Upper Primary Schools) Order, 1994.

iv) That Prafulla Kumar Sahoo had filed is case challenging the rejection order dt.09.08.2000 in which the State Govt. was pleased to reject his claim on the ground of financial ban. But in this instant case the applicant's institution has filed its case to notify the institution as per the GIA Order 1994 after more than 14 years.

I) For that the judgment dt.24.04.2013 passed in GIA Case No. 585/2011 is contrary to the law laid down by this Hon'ble Court in a Full Bench in case of Laxmidhar Pati & Others Vrs. State of Orissa & others reported in 1996(I) OLR-152 wherein this Hon'ble Court held as follows;

" 22. The ratio of the aforesaid decisions is not in doubt or in dispute in any manner whatsoever. By construing and interpreting the Government resolutions and the Government circular as indicated above, we shall have to consider whether the scheme as framed by the State Government entitles the recipients to receive grant-in-aid from the date of their achieving the eligibility criteria and / or from the date of notification to indicate that such

eligible schools or their teaching and non-teaching staff are eligible to receive grant-in-aid by approving their eligibility, or whether the date of release of grant-in-aid to eligible schools and / or their teaching and non-teaching staff from the date of actual order of release having no nexus to the date of approval of the eligibility criteria. Looking at the scheme and in particular the provision of law that there is no absolute right to claim grant-in-aid and the financial capacity, the economic potentiality and other development work of Government have to be considered in interpreting Act. 41 of the Constitution of India. We are of the considered view that the Bench decision of this Court reported in 1993(I) OLR 77 is correct. The view taken by the subsequent Division Bench as to entitlement to grant-in-aid from the date of approval and/or from the date of achieving the eligibility criteria does not appear to be good law. The reference is answered accordingly.

When to add here that we may not be understood to have laid down the law that the Government is a free-lancer in ordering release of grant-in-aid arbitrarily and denying fair play and by encouraging favouritism. Its decision/order in the matter of grant/refusal of grant-in-aid must be based on sound principles and should not be whimsical or arbitrary."

J) For that although the present respondent in GIA Case raised a question in the GIA Petition that a number of similarly situated High Schools have already been released salary component out of the grant-in-aid order 1994, whereas the applicant's school has been discriminated, therefore discriminatory actions of the Opp. Parties are hit by Article 14 of the Constitution of India but he has not disclosed the names of such schools and the statement of the present respondent is only an omnibus one and should be ignored.

K) For that the judgment of the learned Tribunal is illegal, arbitrary and without proper appreciation of facts and laws, hence the same is not sustainable in the eye of law."

6. Heard learned Standing Counsel for the School and Mass Education Department and learned counsel for the respondent-claimant. I have gone through the order of the Tribunal.

7. Indisputably, the applicant-school has received the recognition in terms of the provisions of the Act and Rules for the academic session 1988-89 for presentation of the candidates at the Annual HSC Examination of the year 1991. In view of that when para-12 and para-16(iii of GIA Order, 1994 are read together, the teaching and non-teaching staff of the applicant-school do stand entitled to receive the grant in aid at the rate of 60% of the admissible salary cost with effect from 1.6.1994 as also 100% of the salary cost with effect from 1.6.1997 in terms of said GIA Order, 1994.

In such circumstances, the opp.parties having merely been notified the said school when GIA Order 2004 had already come into force wherein the GIA Order, 1994 stood repealed, the said action is clearly unsustainable.

8. The ground of attack to the claim of the applicant-school because of repeal of the GIA Order, 1994 by GIA Order, 2004 and 2008 is untenable. In view of the fact that when the applicant-school was entitled to get benefits under the GIA Order 1994 having fulfilled with the conditions laid therein, the repeal of GIA Order 1994 by subsequent GIA Order, 2004 and 2008 cannot take away such rights.

The ratio decided in case of **Prafulla Kumar Sahu vs. State of Orissa**; 2003(I) OLR-91, comes to the aid of the case of the applicant-school. The learned

Tribunal appears to have rightly answered the question in favour of the teaching and non-teaching staff of the applicant-school as regards their entitlement to the benefit of the grant-in-aid in terms of GIA Order 1994, relying upon the ratio decided in case of Prafualla Kumar Sahu (supra).

It is pertinent to state here that upon reference being made to the Full Bench for an authoritative pronouncement on the scope and ambit of section 7 of the Orissa Education Act, 1969, the interplay of section 7-C (1) and sectin 7-C(4) of the Act and the Grant-In-Aid Order promulgated in terms of section 7-C(4) of the Act vis-à-vis the jurisdiction of the Court under Article 226 of the Constitution to direct the Govt. for making necessary budgetary allocation for payment of grant-in-aid, the Full Bench of this Court by judgment dated14.5.2014 has made authoritative pronouncement as under:-

> "15. xxx xxx xxx xxx xxx xxx
> There is no reason to resume that the State will issue an Order/Rule without its economical capacity. Once Rule/Order is issued under section 7-C(4) , plea of lack of economic capacity cannot be allowed to be raised to nullify the same order or Rule issued by the State itself.
> 16. xxx xxx xxx xxx
> 17. Since section 7-C(4) pr ovides for grant-in-aid as per orders of the State itself, such order cannot be rendered ineffective by permitting plea of financial incapacity. Section 7-C(1) can only apply to claim for graint-in-aid beyond the orders of the State under section 7-C(4)."

9. At the ultimate the Full Bench of this Court has held the judgment in Prafulla Kumar Sahoo's case to be perfectly in consonance with the law laid down by the Apex Court in the decisions cited therein and in absence of any valid reason, the Full Bench of this Court has refused to give a fresh look into the matter.

10. For the aforesaid discussion and reasons, no such fault is found with the findings of the learned Tribunal which are hereby affirmed.

Consequentially, the order of the Tribunal containing all the said directions to the opp.parties stand confirmed.

11. The appeal accordingly fails. No order as to cost is passed.

2018 (II) ILR - CUT-103

D.DASH, J.

F.A NO. 282 OF 2997

HAREKRUSHNA DASH .....Appellant

.Vs.

SADASIVA DASH .....Respondent

HINDU ADOPTION & MAINTENANCE ACT, 1956 – Section 16 – ADOPTION – Burden of proof – Heavily lies on the person who

sets up a case of adoption which makes a departure from the natural course and incidents of succession.

"The law is fairly settled that the evidence in support of an adoption must be sufficient enough to satisfy the very grave and serious onus that rests upon any person who seeks to displace the natural line of succession by alleging an adoption. The fact of adoption must be proved in the same way as any other fact, but where there is a lapse of long period between the date of adoption and the time when it is being questioned, every allowance for the absence of evidence to prove such fact must be favourably entertained, the reason being that on expiry of very long term of years, it is difficult to procure direct evidence. A person who claims title on the basis of adoption or who asserts that in view of the adoption, the party has no title over the subject matter of the lis, must prove the adoption and it has to be established that the essential ceremony of giving and taking did take place. That burden however, shifts to the person who challenges the adoption to disprove the adoption when on account of long lapse of years, direct evidence of giving and taking has disappeared, but there remains the evidence of varieties of transactions in open life and conduct upon the footing of adoption, the acceptance as such for all these years and other events happening in normal course of life. But if direct evidence is available or it somehow even comes out during trial and shown, then the burden would not shift and the person who claims title on the basis of adoption must discharge that heavy burden. It is the settled position of law that mere creation of document in support of prior adoption cannot be the substitute of the actual evidence of giving and taking with regard the adoption. Onus lies on the person who claims adoption to prove the same by leading clear, cogent and acceptable evidence with regard to the factum of giving and taking ceremony. This onus resting on that party is required to be discharged independently of any document. In the absence of evidence of actual giving and taking of the child even the presumption arising out of a registered document, acknowledging the factum of adoption said to have taken place at any anterior date without detail recitals regarding giving and taking of the child is not enough to hold in favour of adoption. In fact, in the absence of such recital on the vital aspect of adoption and upon which it is founded in that document, the same in my considered view can neither be said to be a deed falling within the purview of section 16 of the Hindu Adoption & Maintenance Act. What is acknowledged after is adoption and the adoption when is said to be by giving and taking, it has to find indicated clearly in the document" (Paras 9,12 & 13)

Case Laws Relied on and Referred to :-

1. (1987) 2 S.C.C. 338 : Rahasa Pandiari (Dead) by LRs and others Vrs. Gokulananda Panda & Ors.
2. AIR 1959 S.C. 504 : Kishori Lal Vrs. Mt. Chaltibai
3. 1989 OLR (I) 425 : Prafulla Kumar Biswal Vrs. Sashi Beura and Ors.
4. AIR 1971 Orissa 299 : Sulei Bewa & Ors. vrs. Gurubari Rana.
5. AIR 1970 SC 1286 : L.Debhi Prasad (dead) by L.Rs. vrs. Smt. Tribeni Devi and Ors.

For Appellant : M/s. B.N. Muduli, A.K. Beura, P.Patra, S. Pradhan,

For Respondent : M/s. A.K. Mohapatra, M.R. Mishra, B. Mohanty, S. Lal, N.K. Mohanty, N. Rath, B.P. Das, N. Rout, M/s. K.N. Parida, S. Biswal, S.K. Padhi, K.N. Parida & R.K. Mohanty.

JUDGMENT Date of hearing-20.06.2018 Date of judgment- 16.07.2018

D.DASH,J.

In the present first appeal under section 96 of the Code of Civil Procedure, the judgment and the preliminary decree passed by the learned Civil Judge (Sr. Divn.), Banki in Title Suit No.5 of 1996 have been assailed.

The respondent as the plaintiff has filed the above noted suit for partition praying for allotment of half share over the plaint 'B' schedule properties from out of the same in his favour and the rest half in favour of the original appellant (defendant). The trial court has preliminarily decreed the suit entitling the respondent (plaintiff) to $4/9^{th}$ share over the said schedule properties. The challenge to the judgment and preliminary decree was originally made by the sole defendant. He having died during pendency of the appeal, now the appeal is being pursued by his legal representatives in whose favour the right to sue survives.

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 court below.

3. Plaintiffs' case is that one Uchhaba Dash had three sons namely, Raghunath, Lokanath and Radhanath; all of whom are dead. It is stated that those three sons of Uchhaba were separated both in mess and estate. It is next stated that despite the fact of separation amongst three sons of Uchhaba both in mess and estate, the record of right in respect of the 'B' schedule land has been published in the last settlement with joint recording in the name of Lokanath, Buli Bewa, Sadasiva (plaintiff) and Harekrushna (defendant).

The plaintiff's case is that the suit property is the ancestral property in his hand as also in the hand of the defendant being the separately possessed properties of Lokanath as allotted in the separation with his two brothers during their lifetime.

4. The defendant coming to contest the suit in his written statement has pleaded that though the plaintiff is his natural brother being the natural born son of Lokanath, he had been given in adoption to Lokanath's brother, Radhanath and he had taken the plaintiff on adoption in the year 1974 to be more specific on 04.03.1974 by a registered deed to that effect. Thus it is said that the plaintiff has severed all his ties with the branch of Lokanath and as such is not entitled to any share from the ancestral property in the hands of Lokanath of which the defendant alone is the owner and has the right to possess. The defendant has also denied the plaint averments that the parties belong to the joint Hindu Mitakshara family, of which the defendant is the Karta, managing all the affairs of the joint family and dealing with the properties of the said joint family.

5. On the above rival pleadings, the trial court has framed the following issues:-

1. Is the suit maintainable?
2. Is the suit bad for misjoinder of parties and non-joinder of necessary parties?
3. Is there cause of action to bring the suit?
4. Is the plaintiff entitled to half share in the suit property?

5. Are the suit properties joint family properties of the parties?

6. To what other relief, if any, the plaintiff is entitled?

The most important issue out of the above is issue no. 4. Perusal of the judgment reveals that the trial court has rightly taken up that issue for decision at first. The issue although is with regard to the entitlement of the plaintiff as to his half share over the properties described in the schedule 'B' of the plaint as claimed by him, it embraces within the contentious question as regards the status of the plaintiff as the adopted son of Radhanath, who happens to be the brother of Lokanath, the natural father of the plaintiff which has remained as the main defence to non-suit the plaintiff.

The answer to this issue would decide the fate of the suit for all purpose and the other issues stand as consequential, to be accordingly answered which of course has been so done by the trial court.

6. The trial court on analysis of the evidence let in by the parties in the backdrop of the rival pleadings has held that the case of adoption of the plaintiff by Radhanath as set up by the defendant has not been established. Its categorical finding is that the plaintiff is the son of Lokanath and has never left his natural father's family severing all his tie therewith upon the adoption as asserted by the defendant.

It is pertinent to mention here that though the plaintiff's claim of ½ share over the property has not been accepted and instead, he has been allotted with $4/9^{th}$ share allotting $1/9^{th}$ share to his sister namely, Naina Dei, the plaintiff has not filed any appeal, cross appeal or cross objection.

The defendant in this appeal questions the allotment of share in favour of the plaintiff asserting that the plaintiff has nothing to get from the property having no such interest over the same in view of his adoption by Radhanath.

7. Learned counsel for the appellant at the outset fairly submitted that the challenge in this appeal is confined to the finding on that question of adoption as has been returned by the trial court against the case projected by the defendant. He submitted that the trial court has failed to appreciate the evidence both oral and documentary on record in their proper prospective in answering against the plaintiff's adoption as asserted by the defendant to have been made in the year 1974 by Radhanath, brother of their father Lokanath; which ought to have been held to have been proved by preponderance of probability. In course of argument, he placed the oral evidence as also has referred to the documents admitted in evidence and exhibited mainly on behalf of the defendant. He finally submitted that on the basis of the evidence on record, the said finding negating the case of adoption of the plaintiff as projected by the defendant in his written statement has to be reversed and it has to be recorded that the plaintiff is the adopted son of Radhanath and as

such not entitled to the share over the property described in schedule 'B' to the extent of 4/9th as decreed.

8. Learned counsel for the respondent submitted all in support of the findings of the trial court. He submitted that the defendant's case that the plaintiff is not the adopted son of Radhanath is based on sound appreciation of evidence in the backdrop of settled position of law holding the field.

9. The settled position of law is that the burden of proof heavily lies on the person who sets up a case of adoption which makes a departure from the natural course and incidents of succession.

The law is fairly settled that the evidence in support of an adoption must be sufficient enough to satisfy the very grave and serious onus that rests upon any person who seeks to displace the natural line of succession by alleging an adoption. The fact of adoption must be proved in the same way as any other fact, but where there is a lapse of long period between the date of adoption and the time when it is being questioned, every allowance for the absence of evidence to prove such fact must be favourably entertained, the reason being that on expiry of very long term of years, it is difficult to procure direct evidence.

10. It has been held in the case of ***Rahasa Pandiari (Dead) by LRs and others Vrs. Gokulananda Panda and others*****,** (1987) 2 S.C.C. 338 that an adoption would divert the normal and natural course of succession. Therefore, the Court has to be extremely alert and vigilant to guard against being ensnared by schemers, who indulge in unscrupulous practice out of their lust for property. If there are suspicious circumstances, just as the propounder of the will is obliged to dispel the cloud of suspicion, the burden is on one, who set up a case of adoption to dispel the same, beyond reasonable doubt. It has also been held in the case of ***Kishori Lal Vrs. Mt. Chaltibai*****,** AIR 1959 S.C. 504 that as an adoption results in changing the course of succession depriving wives and daughters of their rights and transferring properties to comparative stranger or more remote relations, it is necessary that evidence to support it should be such that, it is free from all suspicion or cloud and so consistent and probable as to leave no occasion for doubting its truth.

11. This Court in cases of ***Prafulla Kumar Biswal Vrs. Sashi Beura and others***, 1989 OLR (I) 425, ***Sulei Bewa & others vrs. Gurubari Rana***, AIR 1971 Orissa 299 and ***Arjun Banchhar vrs. Bacchi Banchhar***, AIR 1999 Orissa 32 has also observed that as an adoption displaces natural succession, the burden to establish the adoption is squarely on the person who propounds and that burden is heavy.

Law is well settled in plethora of decisions of the Apex Court as well as this Court including one in ***L.Debhi Prasad (dead) by L.Rs. vrs. Smt. Tribeni Devi and others***, AIR 1970 SC 1286 that giving and receiving are absolutely necessary to the validity of an adoption and they are the operative part of the ceremony being that part of it which transfers the boy from one family to another.

12. A conspectus of the aforesaid authorities unequivocally lays down the rule that a person who claims title on the basis of adoption or who asserts that in view of the adoption, the party has no title over the subject matter of the lis, must prove the adoption and it has to be established that the essential ceremony of giving and taking did take place. That burden however, shifts to the person who challenges the adoption to disprove the adoption when on account of long lapse of years, direct evidence of giving and taking has disappeared, but there remains the evidence of varieties of transactions in open life and conduct upon the footing of adoption, the acceptance as such for all these years and other events happening in normal course of life. But if direct evidence is available or it somehow even comes out during trial and shown, then the burden would not shift and the person who claims title on the basis of adoption must discharge that heavy burden.

13. It is the settled position of law that mere creation of document in support of prior adoption cannot be the substitute of the actual evidence of giving and taking with regard the adoption. Onus lies on the person who claims adoption to prove the same by leading clear, cogent and acceptable evidence with regard to the factum of giving and taking ceremony. This onus resting on that party is required to be discharged independently of any document. In the absence of evidence of actual giving and taking of the child even the presumption arising out of a registered document, acknowledging the factum of adoption said to have taken place at any anterior date without detail recitals regarding giving and taking of the child is not enough to hold in favour of adoption. In fact, in the absence of such recital on the vital aspect of adoption and upon which it is founded in that document, the same in my considered view can neither be said to be a deed falling within the purview of section 16 of the Hindu Adoption & Maintenance Act. What is acknowledged after is adoption and the adoption when is said to be by giving and taking, it has to find indicated clearly in the document.

14. In order to address the contention raised by the learned counsel for the appellant so as to judge the sustainability of the finding of the trial court on that score, it is now necessary to go through the evidence on record.

In the present case, the defendant has proved the register (Ext.A) maintained under the provision of the Indian Registration Act and Rules which contains the entries relating to all those deeds registered in the said office in between the year 1972-74. The relevant entry relating to the deed in question is at page 270 to 272. The original deed is not forthcoming. Formal proof of a document which is the certified copy merely go to show that such a document had come into being on that day. The contents of the documents are not proved thereby nor the transaction which finds mention therein which has to be proved by such acceptable evidence in its support in evidencing the transaction.

Moreover, this deed though has been nomenclatured as deed of adoption but in the eye of law it is not so. In the deed the parties are the so called adoptive

father and the plaintiff whose age then was 26 years. A bare reading of the same discloses that the so called adoptive father has declared therein to have adopted the plaintiff since his childhood days. That to again, it has been said therein that the plaintiff is to be treated as the adoptive son from the day of that document. On a careful reading of the recitals and accepting the same for a moment to be the true version of the executant, the document can neither be said to be a deed of adoption nor a deed of acknowledgement of adoption. There is no mention of date of adoption nor even the age of the plaintiff then.

The plaintiff on the other hand has proved that this document has been cancelled by a deed executed to that effect in the year 1975. The oral evidence of D.W. 10 at this stage be looked into first as the evidence of D.Ws. 7, 8 and 9 are of no such direct impact in view of the fact that they have just deposed in a general manner that the plaintiff had been taken in adoption by Radhanath when he was two years old. D.W.10 is none other than the defendant himself who claims to have seen his brother, the plaintiff being given in adoption. He has stated that Radhanath took the plaintiff in adoption when he was two years old. He also claims to have been very much present during the giving and taking ceremony which had been performed as per his evidence at "Brundabati Chandini" in presence of natural and adoptive parents as also the maternal uncle. Except this D.W.10, none else has stated anything about the performance of the ceremony with the actual giving and taking. So the evidence as to the extent discussed dropping down from the lips of D.W.10 is not receiving corroboration from the evidence of any other witness. He is now stating something which is wholly irreconcilable that no independent person was present during the said ceremony as if such ceremony had been done in a clandestine manner that the adoption instead of being made known to others which is actually the object behind the performance of ceremony to make it known to the outside world, was to keep as a secret affair amongst the natural and adoptive parents and maternal uncle of the parties. In fact, the performance of giving and taking ceremony as the condition for adoption is to give wide publicity and make it known to the whole world upon which it is binding so that the relations as well as the members of the community and all others would accept the vis-à-vis status of the parties accordingly and would deal with them in that manner. The evidence of D.W. 10 is thus found to be of no help and in my considered view, even accepting the same on its face value, the same does not help in proving his case of adoption as set up. The defendant is thus found to have failed to discharge the burden of proof heavily resting upon him in proving the case of adoption of the plaintiff by Radhanath in the year 1974. On the contrary, the High School admission register of the year 1959 showing the admission of the plaintiff in class-VI under Ext. 3 goes to show that in the year 1959, Sadasiva has been described as the son of Lokanath. That apart the transfer certificate of the plaintiff from the U.P. School for his admission in the High School admitted in evidence and marked Ext. 2 also reflects the same position as regards the sonship of the plaintiff. The adoption when is said

to have been made in the year 1974, the age of the plaintiff being computed as 52 in the year 1996, comes to 30 at that your of adoption. To choose a boy of that age to be taken on adoption normally runs contrary to the common prevailant practice as also does not appeal to the common sense. This rather as a factor, improbabilises a case of adoption as projected by the defendant. The voter list of the year 1975 Ext. H though shows the father's name of the plaintiff to be Radhanath, the record of rights prepared by the consolidation authority published on 1.4.1982 in so far as the property of village-Harirajpur is concerned which has been admitted in evidence and marked Ext. 7 finds mention; the name of Lokanath as the father of the plaintiff.

15. The law is well settled that the consolidation authority has the power to adjudicate the right, title and interest of the parties in respect of the land falling within the consolidation operation as per the notification under the Orissa Consolidation and Prevention of Fragmentation of Land Act, 1972. In deciding the right, title and interest, the power also remains to decide the status of the party having direct nexus with the claim/counter claim of right, title and interest over the property. In view of said settled position, heavy weight gets attached to such reflection of the father's name of the plaintiff in the ROR finally published in the consolidation operation which has not been challenged since its publication even as of now. Two more consolidation RORs which are Exts. 10 and 12 also reveal the same state of affair as regards the sonship of the plaintiff. The voter lists of the year 1993, 1973 and 1988 as Exts. 15, 16 and 17 respectively reflect the name of the father of the plaintiff as Lokanath.

Ext. 1 which though has been nomenclatured as deed of adoption does not appear to be that. When its recitals are given a careful reading at one time it has been stated that the adoption of the plaintiff was since the childhood whereas at another stage, it has been stated that by executing the deed, the adoption is acknowledged from that day onwards. The deed in question does not even recite the month and year of adoption as also about the performance of giving and taking ceremony. Furthermore, the said deed has been executed on 7.3.1974 and the defendant's specific case is that the plaintiff was adopted in the year 1974. Interestingly, the very executant of the said deed i.e. Radhanath on 22.3.1975 has executed another deed cancelling the earlier deed of adoption as is so said (Ext.4) and that is also within a short span of time.

The trial court has gone for an elaborate discussion of the oral and documentary evidence on record at para-5 to 7 of the judgment. On going through the same and in view of the foregoing discussion of evidence on record being appreciated in the touch stone of the settled position of law, this Court finds no such fault with the approach and appreciation of evidence of the trial court in recording a finding against the adoption.

For all the aforesaid, this Court feels it quite comfortable to conclude that the defendant has not proved the case of adoption of the plaintiff by Radhanath. In

view of that, the finding of the trial court on that score receives the seal of affirmation.

16. With the above finding, this Court further concludes that the finding of the trial court that the properties are the joint family properties of the parties and that one Naina Dei who is the sister of the plaintiff and defendant has also the share over the same upon notional partition being deemed to have taken place prior to the death of Lokanth is found to be in order. This Court therefore holds that the trial court has rightly passed the preliminary decree allotting 1/9th share to Naina Dei, the sister of plaintiff and defendant and 4/9th share to plaintiff and defendant each.

17. For the aforesaid discussion and reasons, the judgment and preliminary decree passed by the learned Civil Judge (Sr. Divn.), Banki in Title Suit No. 5 of 1996 are hereby confirmed. The appeal thus fails. The parties are directed to bear their respective cost throughout.

2018 (II) ILR - CUT- 111

B. RATH, J.

W.P.(C). NO. 2164 OF 2018

SUPRITI MOHANTY .....Petitioner

.Vrs.

STATE OF ODISHA & ORS. .....Opp. parties

ENVIRONMENT (PROTECTION) ACT, 1986 – Sub-Section (e) of Section-2 and Section-3 – Provisions under – Dealing with "hazardous substance" which means any substance or preparation which, by reason of its chemical or physic-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment – Establishment of Faecal Sludge Treatment Plant – Consent order by State Pollution Control Board without adhering the provisions of Solid Waste Management Rules, 2016 and no issuance of Form-II prior to issuance of consent order – No public hearing undertaken before grant of permission – Held, the entire action of the Public Authorities becomes bad – Directions accordingly.

"Accordingly, keeping in view the involvement of anticipation of a complain on pollution hazard and for the introduction of such Plant for the first time in Odisha, while keeping in abeyance the order to consent, vide Annexure-9, taking into account the experience in the history of environment issues indicated herein above, this Court directs the State Pollution Control Board together with the State Level Environment Impact Assessment Authority created following the decision of the Central Government in terms of provision in Clause-3 of the Notification dated 14.9.2006 to form a Committee of experts, which will submit a detailed

report to it within a period of two months from the date of communication of this order by the petitioner after examining the complaint involved herein undertaking an exercise of detailed inspection, examining the precaution and standard measures undertaken by the FSTP as per their Scheme also involving a representative of each Objector. This Court further observes, the fate of Annexure-9 shall be dependent on the ultimate outcome of the fresh decision by the Board depending on the report to be submitted by the Expert Committee and taking into account the grant of Environmental Clearance Certificate. Till such period, status quo in respect of the construction shall also be maintained." *(Paras 16 to 20)*

Case Laws Relied on and Referred to :-

1. (2018) 4 SCC 218 : Goa Foundation vrs. SESA Sterlite Ltd. & Ors.
2. (1997) 1 SCC 388 : M.C.Mehta vrs. Kamal Nath.
3. (2013) 4 SCC 575 : Sterilite Industries (India) Ltd. vrs. Union of India.

For petitioner : M/s. Ashok Kumar Mohapatra, S.R. Mohapatra, A.K. Mohanty-B, & S.Das.

For Opp.parties : Sri K.K.Mishra, Addl Govt . Adv.
M/s. B.P. Das, S.N. Das, D.Mohanty, A. Mohanty, A. Pattanaik & S. Samal.
M/s. P.K. Mohapatra, S.Mohanty & A. Mohapatra,
M/s. A.K. Bose, Asst. Solicitor General of India.

JUDGMENT Date of hearing : 14.05.2018 Date of Judgment : 18.06.2018

B. RATH, J.

This is a writ petition filed at the instance of RAWA Academy but however represented by Supriti Mohanty, as the Secretary of the above Academy challenging the order at Annexure-3, the inspection report at Annexure-8, the "No Objection Certificate" at Annexure-9 being passed by the Collector, Angul, Assistant Environment Scientist as well as by the Regional Officer, Pollution Control Board respectively and further seeking a direction as to why opposite party no.9, the Angul Municipality shall not be directed to shift the proposed construction of Faecal Sludge Treatment Plant (for short "FSTP") to some other place.

2. Facts involved in this case are that RAWA Academy is a non-profit organisation, registered under the Society Registration Act, 1861. The Academy devoted to the promotion of classical forms of Art, Music and Dance. The Academy is affiliated to AVGMB Mandal, Mumbai and Pracheena Kala Kendra, Chandigarh. On account of its outreach activities, it is functioning with a tax exemption under Section 80(G) of the Income Tax Act with provision under Foreign Contribution Regulation Act by the Ministry of Home Affairs to promote its service activities in the social, educational and cultural fields. In the process of its activities, it has established an establishment called "Adruta Children Home" near the site selected for establishment of the FSTP involved herein and is playing a pivotal and pioneering role in rehabilitation of abandoned, parentless and destitute children having 10 nos. of such Centres across the State with 450 children under its care and nurture. The Adruta Children Home, Angul involved is functioning in the Village-Panchamahala on 3 acres of land allotted by Government of Odisha. There

are 3 buildings over the said plot having a Boys Hostel and Girls Hostel and New Born Child Care Unit. It is while the matter stood thus, the Municipal Administration, Angul decided to establish a FSTP for disposal of Faecal Sludge. In the process, the Tahasildar has identified and demarcated 3 acres of land over Khata No.194, Plot No.1133/3515 at Panchamahala, Angul adjacent to Khata No.198 bearing Plot No.1105/1621 allotted in favour of Adruta Children Home belonging to the petitioner. Coming to know the ground preparation for construction of FSTP at the instance of the Municipal Authority, the petitioner reported the Collector and the District Magistrate, Angul with a request to shift the proposed plant to a distant place to avoid possible health hazards of children staying in the Children Home describing the working of FSTP, anticipating possibility of air and water pollution hazards. Expecting infection and contaminous diseases, all the inmates in the Children Home involved herein met the Collector, Angul on 04.09.2017 in the Grievance Cell, but finding no definite outcome, the petitioner Academy moved this Court vide W.P.(C) No.20131 of 2017 and this Court in disposal of the said writ petition vide order dated 22.09.2017 directed the opposite party no.1 therein to consider and dispose of the representation dated 04.08.2017 available at Annexure-6 of the writ petition within a period of two months. Pursuant to the direction of this Court, the petitioner approached the Collector, Angul and the Collector, Angul hearing the matter on 27.12.2017 passed its order vide Annexure-3 with the observation that all possible measures will be taken to maintain the environmental norms with the involvement of all competent authorities thereby terming the allegation of the petitioner as mere apprehension and baseless and thus rejected the request of the petitioner having devoid of merit for consideration, bringing in the present writ petition.

3. Shri Ashok Kumar Mohapatra, learned counsel appearing for the petitioner apart from reiterating the stand taken in the writ petition by the petitioner, raised the following points for consideration:-

> "(i) The opposite party No.9 has not taken environmental clearance from the State Pollution Control Board before the decision to establish the F.S.T.P. on the disputed site was taken. The opposite party No.9 applied to the opposite party No.5 for environmental clearance only on 26.09.2017 under Annexure-E/9, Page-79 at page-82 & 117 after this Hon'ble Court by order dated 22.09.2017 in W.P.(C) No.20131 of 2017 under Annexure-A/9 at page-33 of the counter affidavit of opposite party No.9 directed the District Collector to consider and dispose of the representation dated 04.8.2017 of the petitioner. So, the opposite parties did not comply the mandatory requirement of the Water (Prevention and Control of Pollution) Act, 1974 and Section 21 of Air (Prevention and Control of Pollution) Act, 1981 before taking decision to establish the F.S.T.P. on the disputed Site. The subsequent action for obtaining clearance from the opposite party No.5 is afterthought act to patch up the lacuna.
>
> (ii) Rule-15 (y) of the Solid Waste Management Rules, 2016 provides that the local authorities shall make an application in Form-I for grant of authorization for setting up waste processing treatment or disposal facility, if the volume of waste is exceeding five metric tons per day from the State Pollution Control Board. Rule-16(1)(e) of the Solid Waste

Management Rules, 2016 provides that the State Pollution Control Board shall issue authorization within a period of sixty days in Form-II to the local body. In the instant case there is no application in Form-I by the opposite party No.9 to the opposite party No.4 and there is also no authorization in Form-II by the opposite party No.4 in favour of the opposite party No.9 for establishment of the F.S.T.P. Hence the establishment of the disputed F.S.T.P. is illegal and contrary to the Rules.

(iii) As per Rule-15(y) and 16(1)(e) of the Solid Waste Management Rules, 2016, the application in Form-I shall be made to the State Pollution Control Board, who shall issue authorization within a period of sixty days in Form-II to the local body. Rule-3(2) thereof says that words and expressions used herein but not defined but defined in the Environment (Protection) Act, 1986, Water (Prevention and Control of Pollution) Act, 1974 and Section 21 of Air (Prevention and Control of Pollution) Act, 1981 etc. shall have the same meaning. Water (Prevention and Control of Pollution) Act, 1974 and Section 21 of Air (Prevention and Control of Pollution) Act, 1981 defines the State Pollution Control Board, its constitution and powers. Nowhere those Acts say that the powers of the Board can be exercised by the opposite party No.5. So the alleged permission granted by the opposite party No.5 for establishment of the F.S.T.P. is without jurisdiction, not an authorization in the eye of law.

(iv) Rule-15 (w)(zi) and Rule 16(1)(b)(e) & 16(4) of the Solid Waste Management Rules, 2016 provides that the land fill site shall meet the specifications as given in Schedule-I. Schedule-I (vii) says that the land fill site shall be 200 meter away from a pond which shall not be permitted within Critical habitat areas and eco-fragile areas. In the instant case as would be evident from annexure-4, 5, 14 & 15, the F.S.T.P. is proposed to established within Critical habitat areas and eco-fragile areas which is bad.

(v) The Research Article under annexure-13 shows the impact on the quality of life living close to the waste treatment plant which is not disputed by the opposite parties. Though the opposite party No.9 has stated that measures have been taken to prevent impact on the quality of life of the child care home of the petitioner, nothing has been explained in that regard in counter which is vague and ambiguous on this aspect. So the proposed F.S.T.P. is bound to adversely affect the health of the children of the child care home of the petitioner. Though the opposite parties inviting and discussed with the owner of the Private Engineering college before taking decision for establishment of the F.S.T.P., yet the petitioner was not invited and the opposite parties did not discuss with the petitioner though admittedly the child care home is more nearer to the proposed F.S.T.P. than the private Engineering college.

4. During course of argument, Shri A.K. Mohapatra, learned counsel appearing for the petitioner also taking to the provisions contained in the Water (Prevention and Control of Pollution) Act, 1974 (for short "the Water Act"), The Air (Prevention and Control of Pollution) Act, 1981 (for short "the Air Act"), contended that there has been no compliance of mandatory requirements in the statutes referred to herein above before taking decision to establish the FSTP at the disputed site. Similarly, referring to Rules-15(y) and 16(1)(e) of the Solid Waste Management Rules, 2016 and also referring to the From-I and Form-II therein, contended that establishment of FSTP remain in violation of the provisions indicated hereinabove and the orders passed involving the matter by different authorities have also not been in conformity with law and the statutory requirements involving the above statute. Referring to a Research Article at Annexure-13, Shri Mohapatra, learned counsel appearing for the petitioner submitted that there is in fact environmental hazard to the petitioner-Establishment as well as the habitation in the locality existed already thereto come in

the event the FSTP is installed on the plot already allotted to it. In the above background, Shri Mohapatra, learned counsel appearing for the petitioner thus prayed for interference of this Court in the impugned action of the opposite parties involved herein and for grant of relief sought for.

5. Shri B.P. Das, learned counsel appearing for the opposite party nos.4 and 5 while not disputing that the FSTP is being established adjacent to Adruta Children Home in the village- Panchamahala, contended that the project site of FSTP is about 280 meters away from Adruta Children Home and it is false to submit that the plant is being constructed just adjacent to the Children Home. With regard to the possibility of air and water pollution and foul smell due to transportation of faecal sludge, Sri Das claimed that since the faecal sludge will be transported through Cesspool/closed tankers to avoid any spillage and public nuisance, keeping this in view the opposite party no.5 while granting consent to establish has imposed a consent condition that the faecal sludge will be transported through Cesspool/closed tankers to avoid any spillage and public nuisance as clearly appearing at Annexure-9. Justifying the grant of consent to establish the FSTP or the no objection by the Angul Municipality, Sri Das contended that the application for grant of consent to establish under the provisions of Section 25 of the Water Act and Section 21 of the Air Act, on 26.09.2017 through online and the Opposite Party No.5 received the hard copy of the same on 07.10.2017. On receipt of the same, the entire aspect is scrutinized by opposite party no.5 and requisite documents were sought for by letter dated 10.10.2017, after entering into correspondences dated 10.10.2017, 13.10.2017 and 09.11.2017 requiring further documents only after receipt of complete documents including the NOC of the Gram Panchayat, inspection was carried on 12.12.2017 and after which only the consent to establish with NOC was given by the opposite party no.5. It is further contended that the Inspection report has been prepared after taking care of all the established norms related to pollution issues. Referring to allegation made in paragraph-12(k) of the writ petition, Shri Das, learned counsel appearing for O.Ps.4 & 5 contended that for having no provision in the air Act or Water Act and the Rules framed therein for providing service of prior notice on inspection to third parties, submitted that the allegations made therein are all false thereby remaining contrary to the statutory provisions. Justifying the stand of the Pollution Control Board and taking this Court to the nature of materials and working involved, Shri Das, learned counsel further submitted that the provision of Schedule-I or Forms-I or II of the Solid Waste Management Rules, 2016 is not applicable to the case at hand. In the above premises, Shri Das, learned counsel contended that there is absolutely no infirmity in the decision making process requiring interference of this Court.

During course of submission, Shri Das, learned counsel appearing for the opposite party nos.4 and 5 in challenge to the submission of Shri Mohapatra to the undertaking of the process by Regional Officer when statute requires, it is a duty caste on the board, Sri Das producing two documents, vide his memo dated

14.05.2008 and document no.1 dated 31.01.2008 justified the order being passed by the Regional Officer establishing that the Chairman, vide the above letter has been pleased to delegate the powers to the Officers indicated therein which shows the Regional Officer is authorized to take decision in the matter of grant of consent to establish. The second item being again an Office order dated 25.04.2008 providing further delegation to different officers on different aspects.

6. Similarly Sri P.K.Mohapatra, learned counsel appearing for the Angul Municipality, O.P.9 while defending the submission made by Sri B.P.Das, learned counsel on behalf of the State Pollution Control Board, O.P.4 and referring to the counter affidavit on behalf O.P.9 submitted that in the previous round of litigation at the instance of the petitioner in W.P.(C) No.20131/2017 on the same cause of action, this Court disposing of the same on 22.9.2017 directed the Collector-cum-District Magistrate, O.P.1 therein to consider the grievance of the petitioner in disposal of the representation at his end. It is pursuant to which order and after inviting objections from all concerned and further giving opportunity of hearing to the petitioner, the Collector disposed of the representation at the instance of the petitioner holding that there is absolutely no environmental hazard in installation of the Faecal Sludge Treatment Plant (FSTP) in the district of Angul at the particular site and also assuring that all possible measures will be taken ensuring that there is no further environmental hazard and in the process confirmed the decision of the Tahasildar in the matter of alienation of particular disputed land. O.P.9 claimed that the petitioner has suppressed the above material facts for its indication in the writ petition at the Cause Title that there was no further writ petition involving the present issue in this Court. O.P.9 further pleaded that there has been following of all the norms under possible statutes involving environment issue and the Municipality has also attempted to ensure that neither there is any environmental hazard on the commencement of FSTP nor will there be any future environmental hazard or health hazard. Sri Mohapatra, learned counsel drawing from the counter affidavit of O.P.9 also submitted that the writ petition is filed on mere apprehension and has no foundation on any of the allegations involved therein and further for the involvement of a Project in the overall benefit of the public at large with infuse of money from an International Organisation coming forward to help this country in providing proper environmental concerns in proper use of Faecal Sludge, entertaining such writ will be amounting to demoralizing the funding agencies and taking the nation to back foot. Sri Mohapatra, learned counsel for O.P.9 otherwise also contended that for non-treatment of Faecal Sludge rather environmental situation is becoming worse. It is in the above premises, Sri Mohapatra appearing for O.P.9 contended that for the larger interest of the public, this Court while permitting the Project to go on should dismiss the writ petition.

7. Sri K.K.Mohapatra, learned Additional Government Advocate for O.Ps.1 to 3 while supporting the stand taken by Sri P.K.Mohapatra, learned counsel for O.P.9 and Sri B.P.Das, learned counsel for O.Ps.4 & 5, referring to the counter on behalf

of O.P.3 on reiteration of the stand taken by O.Ps.4 & 5 & O.P.9 while justifying the site selection contended that the State is completely vigilant in ensuring neither there is any health hazard nor there is any environmental hazard for the installation of FSTP. Further the competent authority having taken care of the provisions under the Air (Prevention and Control of Pollution) Act,1981, the Water (Prevention and Control of Pollution) Act, 1974 and the provision under the Environment (Protection) Act, 1986 more particularly the provision of Solid Waste Management Rules, 2016, there should not be any apprehension and particularly for the State Pollution Control Board, Odisha putting the particular condition in the implementation of a Project appears to be ensuring blockage of all loopholes thereby leaving no room for any chance of hazard. In the above circumstance, Sri K.K.Mishra, learned Additional Government Advocate prayed this Court for rejecting the writ petition for having no substance.

8. Taking into account the rival contentions of the parties involved herein involving the installation of FSTP over the disputed site, this Court finds, the petitioner is showing serious concern on the anticipated health and environmental hazard for the installation of FSTP just for the conditions imposed by the State Pollution Control Board, vide Annexure-9. Keeping in view the involvement of an environmental hazard particularly keeping in view the enormous difficulty being faced by the locals particularly incidents like Bhopal Gas Tragedy, Sterilite Industries and several others, this Court deems it appropriate to go deeper into the matter and it cannot restrain it either with consideration by the Collector in terms of the direction of this Court admittedly confining the site selection and little with the anticipated damages. In the process, this Court entering into the factual aspect finds, the matter involves installation of a FSTP over the disputed plot at Panchamahala Mouza in the district of Angul. Looking to the Scheme for installation of the FSTP Establishment in the district of Angul, this Court finds, the raw-material to be used for the Treatment Plant will be Faecal Sludge. Faecal Sludge is a fluid mixture of untreated and partially treated sewage solids, liquids and sludge of human or domestic origin. In simple word, it is a collection of sludge from onsite sanitation systems that is a combination of raw primary sludge and anaerobically digested sludge. It is known that Faecal Sludge when not managed properly can cause pollution of waterways including groundwater. Therefore, there is no doubt that bringing a Treatment Plant for giving better environment to the Society is definitely a welcoming step. Rationale behind the Project appears is a Project named “Nirmal Programme” funded by the Bill and Melinda Gates Foundation (BMGF) and aims to create an enabling environment for scathing sludge management solutions in Odisha and in the process, the pilot Faecal Sludge Treatment Plant is being undertaken in the Angul Municipal area with capacity of 18 cubic metre per day is designed to treat sludge generated from pits, septic tanks, public toilet/community toilet containment units and wastewater sludge.

9. Looking to the Scheme filed by the petitioner for setting up of the aforesaid Plant and not disputed by any concern, Clauses-3.2.6 & 3.2.7 of the Scheme read as follows :-

"3.2.6-CLIMATIC CONDITIONS-

It is necessary to consider the climatic conditions for design of treatment modules to ensure the effective treatment process : Temperature, to ensure treatment efficiency; rainfall, to ensure the drying of solids in the sludge drying beds and consider the quantity of sludge due to infiltration and frequent emptying resulting in dilute sludge; humidity, to assess the drying time. The design and detailing of the treatment modules are carried out taking the aforementioned factors into consideration.

Due to the outer temperature, the process will be run in a temperature range of 25 to 40^0 C which is a mesophilic range favourable to many beneficial bacteria.

3.2.7-ODOURS

The handling of faecal sludge has been associated with odour problems at the treatment facility. The most characteristic odour of faecal sludge is that of rotten egg which indicates presence of hydrogen sulphide and other gases. The real concern with odours is often not recognized during the design and only becomes apparent after the treatment plant becomes operational. In order to minimize the odour-related issues, it is necessary to consider the same in the design details e.g. by using vent pipes and also develop good housekeeping practices in the facility during operation. Additionally, there is no habitation in immediate 200m of the proposed plant which also provides reasonable buffer."

From reading of both the above, this Court finds, there is no doubt that there is a case for proper consideration at all levels to prevent any sort of environmental hazard presently or even in future. Under Clause-7.4.3 of the Scheme, the treatment plant has a screening chamber further involving the collected solids have to be dried by keeping the same in plastic tray in sunlight till the end of the day and then weighed on the weighing machine provided at the FSTP. It appears, there is exposure of collected solids for several hours, which will be a routine of everyday working. The Scheme nowhere discloses whether such working was prohibited during the rainy season or not ? Thus there is possibility of getting the collected solid being wet during rainy season and taking long time to dry up since the trays are placed to complete openness.

Clauses-7.6 & 7.6.1 of the Scheme read as follows :-

"7.6-SAFETY REQUIREMENTS

This chapter lists down the safety requirements that need to be strictly adhered to for personal safety and precautions that need to be taken within the FSTP premises. All the operational and maintenance tasks in the FSTP have to be performed in a safe and efficient manner with utmost regard for the health and safety of the employees and the public. Safety is an integral part of everyone's duties and responsibilities.

7.6.1-PERSONAL SAFETY

1. The plant operator and all labourers should take precautions because a large number of coliform groups, various kinds of pathogen, and egg parasites exist in sewage. The plant operator and all the labourers should strive to maintain good health by taking care of the following :

a. Wear clear uniform, work boots, face mask and gloves.
b. Wash hands and disinfect them after work and before having a meal.
c. Take a shower if possible after work.
d. Do not enter the offices and lounges wearing dirty clothes.
e. Take vaccinations against tetanus, leptospirosis fever and so on, if necessary.

2. Consuming liquor during working hours, including lunch hours, is strictly prohibited.

3. When additional light is required while working on the treatment plant premises, he shall use a battery powered flashlight, or an approved properly guarded electrical extension light. Do not use an open flame light such as a match, torch or cigarette lighter.

4. Wearing sandals or open toe shoes in the treatment plant premises is discouraged, especially when handling tools or entering the treatment module or areas where weeds and debris can hide glass or sharp objects.

5. Wear rubber boots or leather shoes shall be worn in areas where contact is possible with biological organisms found in faecal sludge.

6. Confined spaces including treatment modules, manholes or any space that is below ground level or has inadequate ventilation, has the potential for containing deadly gases. Prior to entering any confined space clean the confined space off sludge and keep the cover slab on for a minimum of 1 hour.

7. Do not enter a confined space without proper equipment or rescue personnel standing by under any circumstances.

8. Ensure rubber gloves are long enough to come well above the wrist, leaving no gap between the glove and coat or shirtsleeve.

9. Wear safety shoes whenever there is danger of dropping tools or materials on the feet.

10. Use of a gas mask for necessary respiratory protection (while entering any of the treatment modules) is important."

All the above ensure, the Plant has a definite confirmation of the safety requirement as well as personal safety because a large number of coliform groups, various kinds of pathogen and egg parasites exist in sewage.

Clause-7.6.2 of the Scheme requires the following site precautions.

7.6.2-SITE PRECAUTIONS

1. Materials and supplies used at a plant site should be stored in a neat and orderly manner at the site to prevent them from falling off of shelves.

2. Junk parts removed from the treatment module should be disposed off in a proper manner.
3. Spare parts used in the operation of the faecal sludge treatment plant should be kept in a neat and orderly manner with the item labeled to indicate on what piece of equipment the spare part is to be used.

4. Do not allow paper and other lighter combustible materials to accumulate in the treatment plant premises to prevent them from getting into the treatment modules and causing fire.

5. Do not store flammable liquids such as gasoline and diesel fuel in the treatment plant premises where they may cause a fire or leak onto the floor causing hazardous working conditions.

6. Pay strict adherence to "No smoking" signs.

7. Do not accumulate oily rags and papers as they can spontaneously combust under the proper conditions.

8. Consider the size and weight of any object before attempting to lift or move the object. Do not lift any materials that cannot be handled comfortably. If necessary, take obtain assistance or wait until assistance is available.

9. When carrying objects near treatment modules take extra care to avoid falling in the tanks or dropping objects into the tanks.

10. Employees should use tools suitable for the job in progress and only those in good condition.

11. Hoses, extension cords and ropes not in use should not be left where operating personnel might trip over them and possibly fall into a tank.

12. Indoor areas shall have adequate lighting.

13. Use carbon dioxide or halon compressed gas extinguishers to control fires."

Clause-7.7.1 of the Scheme deals with "emergency response" and introduction, which reads as follows :-

"7.7.1-Introduction

Improperly treated faecal sludge carries infectious bacteria, viruses, parasites and toxic chemicals. Human contact with this raw or improperly treated sewage can lead to serious health problems. If the FSTP works as designed then there is a reduced risk to public health or environment, however during emergencies, there can be increased risks. The purpose of this section is to minimize the potentially damaging effects of spills, valve failure, leakages in the system. This section details out the types and levels of emergencies and the specific responses for each. These are usually out of the ordinary event and not part of the day to day operations of the FSTP."

All the above indicate possibility of damage and crossing of pipe under the heading of emergency response. At internal page-58 of the Scheme and running page-109 of the brief, there is provision of environment management plant involving the plant, which also includes disease causing vectors under the microorganism. In the Scheme there is clear disclosure that single cell and complex organisms are present in the sludge for e.g., bacteria, viruses, pathogens etc. Further their presence causes diseases. They are usually transmitted through the above means or direct intake due to contamination or exposure requiring specific care at his level.

10. This Court here likes to take a look to the meaning of Faecal Sludge to find as to whether it at all involves solid waste or not ? As per Chambers 21st Century Dictionary, the meaning of faecal is solid waste matter discharged from the body through anus. As per the Webster's New Word Dictionary, Faecal has the same meaning of feces- Waste matter expelled from the bowels, excrement. Again bowels means- to pass waste matter from the large intestine, defecate. As per Collins Dictionary, Faecal means referring or relating to faeces. Faeces is the solid waste substance that people and animals get rid of from their body by passing it through the anus. As per the Cambridge Dictionary, Faeces means the solid waste passed out of the body of a human or animal through the bowels. As per the Oxford Dictionary, Faecal means discharge of fecal matter. Reading the meaning of Faecal Sludge through the dictionary meaning referred to herein above, this Court has no hesitation

to observe that Faecal Sludge cannot be anything else than solid waste and this Court, therefore, while accepting the submission of Sri Mohapatra in this regard disagrees with the submission of the learned counsel for opposite party nos. 1 & 2, 4 & 5 and 9 and proceeds accordingly.

11. Now coming to the Solid Waste Management Rules, 2016, Sub-Rule (40) of Rule 3 of the said Rules deals with "sanitary land filling", which reads as follows :-

> "Sub-Rule (40) of Rule 3-"Sanitary land filling" means the final and safe disposal of residual solid waste and inert wastes on land in a facility designed with protective measures against pollution of ground water, surface water and fugitive air dust, wind-blown litter, bad odour, fire hazard, animal menace, bird menace, pests or rodents, greenhouse gas emissions, persistent organic pollutants slope instability and erosion."

Further Schedule-I therein at Clause-vii clearly stipulates that the landfill shall not be permitted in critical habitat areas. Coming to Hazardous Wastes (Management and Handling) Rules, 1989, Sub-Rule (14) of Rule-3 of which reads as follows "-

> "Sub-Rule (14) of Rule-3: "hazardous waste" means any waste which by reason of any of its physical, chemical, reactive, toxic, flammable, explosive or corrosive characteristics cases danger or is likely to cause danger to health or environment, whether alone or when in contact with other wastes or substances, and shall include-
>
> (a) Wastes listed in column (3) of Schedule 1;
>
> (b) Wastes having constituents listed in Schedule 2 if their concentration is equal to or more than the limit indicated in the said Schedule;
>
> (c) Wastes listed in Lists "A" and "B" of Schedule 3 (Part A) applicable only in case(s) of import or export of hazardous wastes in accordance with rules 12, 13 and 14 if they possess any of the hazardous characteristics listed in Part B of Schedule 3."

Schedule-I therein at item no.36 requires waste treatment processes such as incineration, distillation, separation and concentration techniques.

12. Record reveals the Solid Waste Management Rules, 2016 is brought in supersession of the Municipal Solid Wastes (Management and Handling) Rules, 2000. Rule 3(17) of the Solid Waste Management Rules, 2016 deals with "domestic hazardous wastes" and Rule 3(46) deals with "solid waste", which read as follows :-

> "Rule 3(17)- "domestic hazardous waste" mans discarded paint drums, pesticide cans, CFL bulbs, tube lights, expired medicines, broken mercury thermometers, used batteries, used needles and syringes and contaminated gauge, etc., generated at the household level.
>
> Rule 3(46)- "solid waste" means and includes solid or semi-solid domestic waste, sanitary waste, commercial waste, institutional waste, catering and market waste and other non-residential wastes, street sweepings, silt removed or collected from the surface drains, horticulture waste, agriculture and dairy waste, treated bio-medical waste excluding industrial waste, bio-medical waste and e-waste, battery waste, radio-active waste generated in the area under the local authorities and other entities mentioned in rule 2."

13. Looking to the provisions referred to herein above, this Court finds, there is no denial of the fact by all the parties concerned that previously management of

municipal wastage including faecal was regulated under the provision of Municipal Solid Waste Management Rules, 2000, which has been repealed and replaced by Solid Waste Management Rules, 2016. Section 2(46) of the Solid Waste Management Rules deals with "Solid Waste". But however there is no touch of Faecal Sludge in the replaced Rules even there is dealing with solid or semi-solid domestic waste as well as sanitary waste. Thus this aspect requires a broader consideration and this Court thus proceeds accordingly.

14. This Court here taking into consideration the Environment (Protection) Act 1986 finds, Section 2(e) thereof reads as follows :-

> "2(e)-"hazardous substance" means any substance or preparation which, by reason of its chemical or physico-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment."

Section 3 of the Environment (Protection) Act, 1986 empowers the Central Government to take measures to protect and improve environment. The enactment brought as of now such as the Hazardous and other Wastes (Management and Transboundary Movement) Rules, 2016, the Hazardous and other Wastes (Management and Transboundary Movement) Amendment Rules, 2016, the Solid Waste Management Rules, 2016 did not deal with Faecal Sludge leaving thereby a vacuum in such area. This Court herein finds relevancy in the Notification dated 14.9.2006 published in Gazette of India in exercise of powers conferred by Sub-Section (1) and Clause-(v) of Sub-Section (2) of Section 3 of Environment (Protection) Act, 1986 read with Clause (d) of Sub-Rule (3) of Rules, 5 of the Environment (Protection) Rules, 1986. The Central Government by the above Notification directed that on and from the date of its publication, the required construction of new projects or activities or the expansion or modernization of existing projects or activities listed in the Schedule to this Notification entirely capacity addition etc. shall be undertaken only after the prior environmental clearance from the Central Government or as the case may be by the State Level Impact Authority duly constituted by the Central Government. It is under the above Notification, provision has also been made for creation of State Level Environment Impact Assessment Authority as well as District Level Environment Impact Authority for the exercise of power at different levels with specialized reasons as indicated therein. This Notification at Appendix XIV at Sl. No.3 deals with Waste Management reads as follows :-

> "3.Solid waste: Separate wet and dry bins must be provided in each unit and at the ground level for facilitating segregation of waste.
>
> Sewage: In areas where there is no municipal sewage network, onsite treatment systems should be installed. Natural treatment systems which integrate with the landscape shall be promoted. As far as possible treated effluent should be reused. The excess treated effluent shall be discharged following the CPCB norms.
>
> Sludge from the onsite sewage treatment, including septic tanks, shall be collected, conveyed and disposed as per the Ministry of Urban Development, Central Public Health and

> Environmental Engineering Organisation (CPHEEO) Manual on Sewerage and Sewage Treatment Systems, 2013.
>
> The provisions of the Solid Waste (Management) Rules, 2016 and the E-waste (Management) Rules, 2016, and the Plastics Waste (Management) Rules, 2016 shall be followed."

This Item No.3 under heading Sludge also includes sludge from septic tanks and not only required to be disposed of as per the Ministry of Urban Development, Central Public Health and Environmental Engineering Organisation Manual on Sewerage and Sewage Treatment Systems, 2013. At the same time, it has also made it clear that the provision of Solid Waste (Management) Rules, 2016 shall have to be followed.

In the circumstance, this Court finds, mere receipt of no objection from the Pollution Authority is not enough. The Authority before commencement of the Project work should also take environmental clearance considering the impact of the above Notification.

15. Keeping the above in view and considering the allegation of the petitioner in the matter of health and environmental hazard involved herein, this Court further delving into the materials available on record finds, the objection whatever has been submitted there though is not exhaustive but it appears, the Sarapanch of Nua Mouza, Angul has a clear indication of possibility of health as well as environmental hazard. What appears from the application is that the application though not that much heavily warded but there is showing of concern on the health as well as environment hazard involved therein. It also further appears that there is also an objection at the instance of the petitioner-Institution at Bhubaneswar accompanied therein at internal page-211 of the brief. A part of the counter of O.P.9 clearly discloses the apprehension of the petitioner-Institution in the matter of health and environmental hazard for the installation of FSTP besides there was also an objection by the local Sarapanch itself. Though the decision of the Collector pursuant to the direction of this Court involves a report of a Site Inspection Committee, perusal of the joint field verification report by the Site Inspection Committee dated 7.4.2017, vide Annexure-V at running page-236 of the brief, even after inclusion of a Member from the State Pollution Control Board, there is absolutely no touch on the aspect of the possibility of environment and health hazard keeping in view the allegation of the petitioner as well as the Sarapanch and taking into account the provision of law and the Notification as discussed in detail in paragraph-14 herein above, it appears, the report has been submitted only keeping in view the feasibility of land, distance factor from the Institution standing and in and around habitation.

16. Now coming to the legal aspect involving the matter, this Court finds, Sub-Section (e) of Section-2 and Section-3 of the Environment (Protection) Act, 1986 dealing with "hazardous substance" which means any substance or preparation

which, by reason of its chemical or physic-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment.

Apart from applicability of the Notification, from the above also, this Court observes that the provisions of Solid Waste Management Rules, 2016 are very much applicable to the case at hand and consequently it became essential to meet the contingencies under Rule 15(w)(zi) and Rule 16(c)(b)(e) and16(4) of the Solid Waste Management Rules, 2016. This Court further observes that for no application under Form-I of the Rules, 2016 and for no issuance of Form-II involving Rules, 2016 by the State Pollution Control Board prior to issuance of consent order impugned herein, the entire action of the Public Authorities becomes bad. There is straightway involvement of a request for issuing a consent to operate in absence examining the other aspects involved herein particularly keeping in view the examination of the matter from the point of view of the Solid Waste Management Rules, 2016 and the Notification referred to herein above.

17. Considering the question of environmental impact, Hon'ble apex Court in paragraph-142 in the case of ***Goa Foundation vrs. SESA Sterlite Ltd. & others*** reported in (2018) 4 SCC 218 held as follows :-

> "We must emphasise that issues impacting society are required to be looked at holistically and not in a disaggregated manner. An overall perspective is necessary on such issues including issues that impact on the environment and the people of a community or a region or the State. It is for this reason that it is necessary to look at them broadly otherwise if that broader perspective is lost, everyone will be a loser and no one will be a real beneficiary. One or two violations here and there may be wished away as inconsequential, but multiple violations by several persons can result in serious problems. As the novelist and philosopher Ayn Rand had said: We can evade reality, but we cannot evade the consequences of evading reality. Therefore, there is no doubt that the Mineral Policy, the Grant of Mining Leases Policy, the amendment to the MMDR Act, the report of the EAC and the report of the Expert Committee must be considered in the larger context of constitutionalism, the rule of law, environmental jurisprudence as well as the fundamental right of the people of Goa to have clean air and protection of the fragile ecology. Governance cannot and should not be carried out de hors the interests of the people and some uncomfortable decisions may be inevitable for balancing the equities."

Keeping in view the allegation aspect against the State, this Court finds, the State being the trustee of all natural resources, which are by nature meant for public use and enjoyment here has a legal duty to protect the natural resource, which also includes air, water in their pressing purity. There is already judicial recognition of the above concept by the Hon'ble apex Court in the case of ***M.C.Mehta vrs. Kamal Nath*** (1997) 1 SCC 388 and again reinforced in 2000 (6) SCC 213. Per Professor Barbora, an eminent Environmentalist termed "ecological necessity" as a moral imperative has said :

"We can forget moral imperatives. But today morals of respect and care and modesty came to us in a form, we cannot evade. We cannot cheat on DNA. We

cannot get round Photosynthesis. We cannot say I am not going to give a damn about phytoplankton. All these mechanisms provide pre-conditions of your planetary life. To say we do not care is to say in the most literal sense that we choose death."

Considering from another angle, this Court taking into account the grievance of the petitioner, this Court is reminded of the development taking place in the matter of environment. There has been introduction of public hearing in such matters. Purpose of public hearing is to incorporate the concerns of the people in the finding before issuing clearance or no objection. Importance of which has been seriously felt and taken care of by the Hon'ble apex Court in the case of ***Sterilite Industries (India) Ltd. vrs. Union of India*** reported in (2013) 4 SCC 575. What this Court finds from the case at hand is not only there is no address to the concern shown by the petitioner-Establishment by any concerned involved but there is even lost of impact of provision of Environment (Protection) Rules, 1986 and the Notification issued thereunder to determine the scope of the Project, the extent of the screening and the assessment of the cumulative effects, Court cannot be simply carried away by the money spent on the Project and Mega Project as life of people cannot be put to experiment under the guise of taking subsequent measures depending upon the future impact. Why not blocking the loopholes, if any, at the threshold itself ?

18. This Court while considering the case of the parties is also constrained to take note of the report of a very highly competent body in the international level bringing out a Research Article finds place at Annexure-13. Taking into consideration the environmental impact involving the waste treatment plants at international level involving a nationwide survey in Sweden has observed that there is availability of increased risk of headache, concentration difficulties, unusual tiredness and head heaviness in the workers. Their study also further reveals an increase in the rate of mental disorder to the population living near waste treatment plants and the occurrence of gastrointestinal or muyskeletal systems to the residents. Their study also further indicates, there is significant presence of possible pathogenic microorganism in the aerosols closed to the waste treatment plant and this concentration is dependent on the distance. There is indication of the burden of microorganism in air according to the distance of the inhabitants, and therefore, suggestions have been made to lower the impact on the public health in areas like this, retaliating preventive measures should be taken by the authorities in order to protect the inhabitants' health. It is also proposed therein that such measures should be considered may be by tree-growth around the plants as well as the appropriation function of the treatment plant with protective equipment for the aerosols.

In the above background, this Court observes that for the installation of an Establishment of first of its kind in the State of Odisha may be in the entire nation, much care is to be taken at the initial stage so as to avoid any future hazard. If necessary, taking help of environmental scientists and health scientists.

This Court from the counter submission observes that selection of a site away from the inhabitants, a site away from heavy population, involvement of a larger interest of the public, involvement of international fund and time-bound project etc. are too small in comparison to protection of the life of the people in the locality in the matter of their better air and better water.

19. Whole reading of the Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974, this Court nowhere finds the definition of "solid waste" or "hazardous waste". The purpose behind these two Acts confined to provide for prevention and control of air and water pollution. In the process, these two Acts have been enacted for the prevention and control of water pollution for conferring an assignment such as powers and functions relating thereto and for matters connected therewith have been constituted. Per this Court the authorities while working under the above two Acts, attending to the demand of ensuring clean air and water cannot simply confine itself to the ensuring of certain aspect in the Scheme but with the utilization of experts at its end must come deeper to the ensuring aspect and further taking into account the gravity of the substance involving the other Acts as indicated herein above before grant of consent order. It is at this stage, reading the consent order as appearing at Annexure-9 and the contents made therein taking note of certain conditions, this Court observes, the Board has simply put some conditions expecting prevention of air and water pollution for the installment of FSTP. Keeping in view the observations of this Court herein above and looking to the allegations of the petitioner and the large number of pollution related issues taking place in this country, observes, both the Collector and the State Pollution Control Board have adopted a very casual approach on such serious issue requiring a fresh look on it.

20. Accordingly, keeping in view the involvement of anticipation of a complain on pollution hazard and for the introduction of such Plant for the first time in Odisha, while keeping in abeyance the order to consent, vide Annexure-9, taking into account the experience in the history of environment issues indicated herein above, this Court directs the State Pollution Control Board together with the State Level Environment Impact Assessment Authority created following the decision of the Central Government in terms of provision in Clause-3 of the Notification dated 14.9.2006 to form a Committee of experts, which will submit a detailed report to it within a period of two months from the date of communication of this order by the petitioner after examining the complaint involved herein undertaking an exercise of detailed inspection, examining the precaution and standard measures undertaken by the FSTP as per their Scheme also involving a representative of each Objector. This Court further observes, the fate of Annexure-9 shall be dependent on the ultimate outcome of the fresh decision by the Board depending on the report to be submitted by the Expert Committee and taking into account the grant of Environmental Clearance Certificate. Till such period, status quo in respect of the construction shall also be maintained. The writ petition stands disposed of with the direction indicated herein above. No cost.

2018 (II) ILR - CUT- 127

B. RATH, J.

O.J.C. NO. 3091 OF 1996

BHAGIRATHI MISHRA(SINCE DEAD)
through L.Rs. & Ors. .....Petitioner

.Vs.

COMMISSIONER-CUM-SECY,
(S.& M.E), GOVT. OF ODISHA & ORS. .....Opp. parties

SERVICE – Dismissal – The deceased petitioner was serving as a Clerk in a school – Criminal cases initiated against him on the allegations of misappropriation – Dismissed from service in consequence of the conviction in 1994 – Expired in 1999 – Acquitted in appeal in 2017 – Writ petition challenging the order of dismissal was pending since 1996 – Amended prayer by legal heirs for grant of financial benefits and family pension – Whether entitled – Held, Yes.

"*For the petitioner's acquittal in all the criminal cases and this being the sole reason of termination, the reason having been lost its force for the acquittal of the original petitioner in all the three criminal cases, the original petitioner would be deemed to be continuing in service at least till his death on 12.8.1999. Considering that the original petitioner was terminated from service on 27.9.1994 and died on 12.8.1999, but however, he has not worked for all these period, but keeping in view that he has been prevented to work for no fault of him, the original petitioner would be entitled at the rate minimum 75% of the back wages for the period from 27.9.1994 up to 12.8.1999. The wife of the original petitioner would also be entitled to gratuity and the family pension.* *(Paras 8 & 9)*

Case Laws Relied on and Referred to :-

1. (2003)95CLT724(F.B : Smt. Rama Panigrahi versus State of Orissa & Ors.
2. 1998(1)WLC(Raj.)445 : Man Singh versus State of Rajasthan

For Petitioners : M/s. P.K. Nanda, M.R. Parida, P.R. Sethi
For Opp Party : Mr. D. Mohapatra, Standing Counsel
Mr. A.K. Mishra, Additional Government

JUDGMENT Date of hearing :9.07.2018 Date of Judgment : 18.07.2018

B. RATH, J.

This writ petition has been filed by the employee petitioner in its original form challenging his dismissal from service of the School w.e.f. 27.09.1994 communicated by way of a publication dated 26.05.1996 vide Annexure-13 as well as Annexure-15. While the petitioner sought for a direction for treating him to be continuing in service till his superannuation and release of consequential financial benefits as well as pensionary benefits, upon death of the original petitioner during pendency of the litigation, the original petitioner has been substituted by his legal heirs i.e. his wife and children amending the prayer by way of addition to the extent of grant of family pension to the petitioner no.1 (a) while maintaining all other claims made in the writ petition.

2. Short background involved in the case is that on 20.08.1973 Bhagirathi Mishra the original petitioner was appointed as a Lower Division Clerk in the Orissa Police High School, Tulsipur, Cuttack. This institution was an Aided Educational Institution under Section 3(b) of the Orissa Education Act, 1969 and was in receipt of grant in aid. On 15.12.1979 the petitioner was promoted to the post of Upper Division Clerk. On 18.07.1986 the original petitioner was placed under suspension w.e.f. 14.7.1975 on the basis of a decision of the Managing Committee of the School on the alleged involvement of the original petitioner in a criminal case. On 20.03.1989 the original petitioner was reinstated in service pending disposal of the criminal proceeding/inquiry against him. On 14.8.1990 the original petitioner was once again placed under suspension vide Annexure-4. For not being paid subsistence allowance, the original petitioner was constrained to file O.J.C. no.1838 of 1991, followed with a contempt application for noncompliance of the direction of this Court vide Ori. Criminal Misc. Case No.227/1991. In the meantime, on 27.9.1994 by the judgment of the A.C.J.M.(Spl.) Cuttack in G.R. Case No.2137/1986, U/s.408 of I.P.C., G.R. Case No.2138/1986, U/s.408 of I.P.C. and G.R. Case No.1650/1984, U/s.408 of I.P.C. the original petitioner was convicted.

3. Challenging the convictions in the three above cases, the original petitioner preferred three criminal appeals vide Cr. Appeal No.141/1994, Crl. Appeal No.142/1994 and Crl. Appeal No.143/1994. Based on the grant of stay of the suspension of the conviction as well as sentences therein, the petitioner submitted a representation to the Managing Committee on 20.11.1994 praying therein to continue in serving along with release of unpaid subsistence allowances. Based on the conviction order, by the resolution of the Managing Committee, the petitioner was dismissed from service with effect from the date of judgment i.e. 27.9.1994. On the premises that the petitioner was not prepared to receive dismissal order, the dismissal order as well as the resolution were all published in newspaper.

4. Challenging the order of dismissal, the original petitioner filed this writ petition before this Court on 2.04.1996. During pendency of the writ petition, the criminal appeal no.142/1994 though was allowed with an order of acquittal in favour of the original petitioner but the criminal appeal no.141/1994 and 143/1994 were dismissed. The original petitioner preferred criminal revision vide Criminal Revision No.206/1996 and Criminal Revision No.205/1996 in this Court. In the meantime, this Court by its judgment while allowing both the criminal revisions at the instance of the original petitioner acquitted the original petitioner in both the cases. Criminal revision No.206/1996 was allowed on 16.02.2017 whereas the Criminal Revision No.205/1996 was allowed on 16.3.2017, all taking place during pendency of the writ petition. Reading of the averments made in the writ petition, this Court observes, the writ petition bears description up to entertaining the criminal revisions by this Court, but however, from the documents appended to the further affidavit by the petitioner as well as the amendment of the writ petition, it appears, the fact of acquittal of the original petitioner from the criminal charges vide Criminal Revision nos.205/1996 &

206/1996 have all been brought to the fold of the pleadings by way of amendment. Shri Nanda, Learned counsel for the legal heirs of the original petitioner after his death, taking reliance of the acquittal of the original petitioner from all the three charges involving three criminal proceedings submitted that since the reason of dismissal of the original petitioner was purely based on the conviction of the original petitioner in criminal cases and for the acquittal of the original petitioner in the meantime in the criminal cases, it will be presumed that there was no criminal case involving the original petitioner at any point of time and as a consequence, the original petitioner being an employee of the School would be deemed to be continuing in service and is also entitled to all statutory benefits on the premises of continuance of the original petitioner in the service till he attended the age of superannuation.

5. It is stated here that the original petitioner died on 12.8.1999, though his date of superannuation in the natural course would have been 30.05.2012. In the meantime, the School in question having been taken over by the Government, becomes a Government School w.e.f. 16.1.1996. It is, in the above premises, learned counsel for the petitioners submitted that since the entire service of the original petitioner was falling under the Managing Committee of the School on the date of attainment of superannuation of the original petitioner on 30.05.2012 and the School having been taken over w.e.f.16.1.1996, in the minimum, the original petitioner is entitled to the benefits following the provisions involving **The Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974** (hereinafter in short called as "The Rules, 1974) as well as the provisions contained in **The Orissa Aided Educational Institutions' Employees Retirement Benefit Rules, 1981** (hereinafter in short called as "The Rules, 1981).

6. Shri D. Mohapatra, learned Standing Counsel for the School and Mass Education Department while opposing the stand taken by the petitioners raised objection on the maintainability of the writ petition on the premises that the School involved having been taken over by the State Government in the meantime, no direction involving the original petitioner is possible to be given in such matters and the legal heirs of the original petitioner are required to approach the competent authority deciding such issues involving the Government Schools.

7. Referring to a Full Bench Decision in the case of ***Smt. Rama Panigrahi*** *versus* ***State of Orissa & others*** as reported in **(2003)95CLT724(F.B)**, Shri D. Mohapatra, learned Standing Counsel for the School & Mass Education Department submitted that for the decision involving the above reported case, this writ petition is not maintainable.

8. Considering the rival contentions of the parties, looking to the submission of both the sides, this Court finds, there is no dispute that the original petitioner was terminated from service on account of his involvement in the criminal proceedings

initiated at the particular point of time while he was continuing in the service in the School involved. There also remains no dispute that the original petitioner has been acquitted from all the three cases, may be in appeal stages or revision stage. The further admitted fact involved here is that had the original petitioner survived, his date of retirement would have been 30.5.2012, but unfortunately, the original petitioner has died on 12.8.1999. Looking to the objection of the learned Standing Counsel for the School & Mass Education Department, this Court before entering into the merit of the case, likes to first deal with the question of maintainability of the writ petition. Taking into account the background involved herein, the date of termination of the original petitioner and the judgment in acquittal of the original petitioner, there remains no doubt that had there been no criminal cases against the original petitioner, the original petitioner would have been allowed to continue at least till his date of death on 12.8.1999. It is at this stage of the matter, this Court finds from the materials available on record that the School involving the original petitioner was taken over by the State Government on 17.9.1996, therefore, on 12.8.1999 i.e. on the date of death of the petitioner the School was an aided educational institution. It is at this stage on perusal of the decision involving **(2003)95CLT 724(F.B)** this Court finds, for the difference in facts, this decision has no application to the case at hand and for the discussions made hereinabove, the writ petition is still maintainable. Here, taking into account a circular of the Government of Orissa in School & Mass Education Department dated 17.9.2016, this Court finds, the circular involves the course on taking over of the Management on Non-Government fully aided High Schools by Government-Service conditions of the employees. This is a circular issued also involving the Police High School, Tulsipur, Cuttack but dealing with the employees so far as their retirement benefits is concerned on the taking over of the School. It is made clear that employees of such taken over High Schools shall be governed under two sets of rules. Pension and other terminal benefits admissible to State Government servants shall be applicable to such employees for the period of their service rendered under the State Government i.e. with effect from the date of taking over. Such period shall be governed under the provisions of the OCS(Pension) Rules, 1992. Service period rendered in privately managed aided educational institutions prior to the date of taken over to Government fold shall be governed under the provisions of the Odisha Aided Educational Institutions Employees' Retirement Benefit Rules, 1981. Such provision shall be applicable to the employees who have joined in service prior to 1.1.2005.

Looking to the provisions contained in Clause 2.3 of the Resolution dated 17.9.2016, this Court finds, taking into account the whole background involving the case at hand, the Bhagirathi Mishra is entitled to the benefits of the Rules, 1981.

9. Now coming to deal with merit of the case, on perusal of the charges involving the criminal cases, this Court finds, all the criminal cases were instituted at the instance of the Managing Committee of the School on the premises of

misappropriation etc. of the Institution money and for the acquittal of the original petitioner Bhagirathi Mishra in all the criminal cases, it appears, said Bhagirathi Mishra, has been falsely implicated in all the criminal cases. It is here, keeping in view the claims made in the writ petition, this Court, hereinabove, has already taken note of the acquittal of the original petitioner from all the three criminal cases initiated against him. Therefore, it is presumed that there was no criminal case involving the original petitioner. This Court further observes that had there been no criminal case initiated involving the original petitioner, the original petitioner would have been continuing in service at least till his death on 12.8.1999. Looking to the provision contained in the Rules, 1974 particularly the provision at Chapter VI Rule 24 of the Rule 1974, this Court finds, the School authority had the power to impose penalty on an employee on the ground of conduct, which laid to his conviction on a criminal charge, but keeping in view the acquittal of the original petitioner in the criminal cases, this Court finds, the ground for taking action on the employee did not remain. It is, at this stage, reading the provisions in Rules, 1981, this Court finds, an employee will be eligible for gratuity provided he has a qualifying service up to his date of retirement of 5 years or more but less than 10 years, besides this, the employees is also eligible to pension, if he has completed not less than 10 years of qualifying services up to the date of his retirement, but maximum period of qualifying service to be taken into account for the purpose of pension shall not exceed three years and an employee will be entitled to pension 50% of the last month pay. For the petitioner's acquittal in all the criminal cases and this being the sole reason of termination, the reason having been lost its force for the acquittal of the original petitioner in all the three criminal cases, the original petitioner would be deemed to be continuing in service at least till 12.8.1999 on which date Bhagirath Mishra died. In the case of ***Man Singh*** *versus* ***State of Rajasthan*** as reported in **1998(1)WLC(Raj.)445** where the Court has ruled that where the termination order had been passed on the ground that the employee therein stood convicted by the criminal court and no departmental enquiry had ever been held, in the event of acquittal in the Criminal Case, the Court ruled as the ground of termination had disappeared, the employee was entitled for reinstatement.

Considering that the original petitioner was terminated from service on 27.9.1994 and died on 12.8.1999, but however, he has not worked for all these period, but keeping in view that he has been prevented to work for no fault of him, the original petitioner would be entitled at the rate minimum 75% of the back wages for the period from 27.9.1994 up to 12.8.1999. So far as the pensionary benefits to the original petitioner is concerned, since the original petitioner has died prematurely, this Court therefore, while allowing the writ petition, directs the Commissioner-cum-Secretary, Department of School & Mass Education, Government of Odisha to treat the original petitioner-Bhagirathi Mishra, the employee of the Orissa Police High School, Tulsipur to have been continuing in service from 27.9.1994 to till 12.8.1999 and while releasing back wages in favour of

his wife as directed hereinabove with interest @ 6%, looking to the provision contained in the Sub-rules 1& 2 of Rule 8, the wife of the original petitioner would also be entitled to gratuity and the family pension as prescribed therein. Accordingly, the Commissioner-cum-Secretary is also directed to compute the gratuity and the Family pension aspect and make the wife of the original petitioner entitled to family pension following the provisions contained in the Sub-rule-2(b) of the Rule 8 treating the Bhagaban Mishra (the original petitioner) died on 12.8.1999 and releasing the family pension in favour of the petitioner no.1(A) in terms of the provision contained in Rule 1981 within two months at the maximum. This Court here clarifies that the arrear salary, admissible gratuity and the arrear of family pension will all be released in favour of the petitioner no.1(A) along with interest @6% per annum all through but within a period of two months at the maximum.

10. The writ petition succeeds. No cost.

2018 (II) ILR - CUT- 132

B. RATH, J.

W.P.(C). NO. 7371 OF 2003

NARSING SATNAMI .....Petitioner

.Vs.

COLLECTOR, NUAPADA & ORS. .....Opp. Parties

ORISSA LAND REFORMS ACT, 1960 – Sections 22 and 23 – Provisions under – Permission for sale of land within three years – Land in question not sold to the purchaser named in the permission order within the time stipulated but mortgaged to another person after the time – Mortgagee claims to have purchased the land – Whether the sale or mortgage to a person not named in the permission after the time stipulated is valid – Held, No.

"Admittedly, the mortgage deed / sale deed involved herein was executed in 1985, but for the conditions imposed therein and for return of possession of the land by the mortgagee in favour of the petitioner, there remain no doubt that the document was a mortgage deed and further even assuming for the sake of argument that the document becomes a sale deed, but for being sold in favour of a person other than the person assigned in the permission order, the sale deed even otherwise becomes bad." *(Para 6)*

For Petitioner : Mr. B. Panigrahi.
For Opp. Party : Mr.K.K. Mishra, A.G.A.

JUDGMENT Date of Hearing & Judgment : 26.07.2018

B. RATH, J.

Heard Shri B. Panigrahi, learned counsel appearing for the petitioner and Shri K.K. Mishra, learned Addl. Government Advocate appearing for the State. In

spite of appearance of a set of counsel on behalf of opposite party no.2, nobody is present at the time of hearing.

2. This writ petition is filed challenging the orders at Annexures-4 and 5 passed by the appellate authority as well as the revisional authority involving the proceeding under Section 23 of the Orissa Land Reforms Act.

3. Short background involving the case is that the petitioner being the owner of the land sought for permission for sale of land mentioned therein from the competent authority under Section 22 of the Orissa Land Reforms Act (for short "the OLR Act") for sale of the land specified therein and vide Annexure-1 the Sub-Divisional Officer while allowing the application granted permission to the petitioner to sell the land involved therein in favour of Ashok Kanti Bose at a cost not less than Rs.17,000/- by his order dated 19.05.1982. Vide Annexure-2 a certificate of permission was also issued, but however the certificate did not disclose the name of the buyer. After three years the petitioner sold Ac.8.00 and odd and for the balance land the petitioner entered into with a mortgage deed with opposite party no.2 with a condition for return of the land after ten years. It is submitted that after the expiry of period after taking possession of the land from opposite party no.2 back, the petitioner filed application under Section 23 of the OLR Act for declaring the mortgage deed which was in the form of sale deed on the premises of invalid document for the sale not been taking place within the time stipulation. The proceeding under Section 23 of the OLR Act was allowed vide Annexure-3. The opposite party no.2 being aggrieved by the original order involving proceeding under Section 23 of the OLR Act, preferred appeal and the appeal was allowed reversing the order of the revisional authority in favour of opposite party no.2. A revision being filed by the petitioner was also dismissed vide Annexure-5 giving rise to the present writ petition.

4. Challenging the orders at Annexures-4 and 5, Shri Panigrahi, learned counsel appearing for the petitioner submitted that admittedly, the deal between the petitioner and opposite party no.2 was that of a mortgage deed, but however for the disclosures therein it was misunderstood to be a sale deed and, therefore, there was some complication between the petitioner as well as opposite party no.2 resulting the petitioner undertaking a proceeding under Section 23 of the OLR Act. It is in the above background of the matter and taking this Court to the grant of permission under Section 22 of the OLR Act by the competent authority in 1982 and even assuming the documents being a sale deed for being entered into after expiry of the period granted therein, Shri Panigrahi, learned counsel appearing for the petitioner contended that such sale deed becomes bad. The original authority though understood the matter and, therefore, allowed the application under the Section 23 of the OLR Act, the appellate authority as well as the revisional authority failed in appreciating this legal aspect of the matter and, accordingly, arrived at the wrong and erroneous conclusion, as such, are challenged herein. In the circumstances, Shri

Panigrahi, learned counsel for the petitioner prayed this Court for interference in the orders at Annexures-4 and 5 and set-aside both.

5. Shri K.K. Mishra, learned Addl. Government Advocate appearing for the State on the other hand taking this Court to the observations in Annexures-4 as well as Annexure-5 submitted that for the discussions and observations therein appears no infirmity in the impugned orders. Consequently, Shri Mishra, learned Addl. Government Advocate makes a request to this Court for not interfering in the impugned orders.

6. Considering the rival contentions of the parties and looking to the entire background narrated hereinabove, this Court finds, direction for sale of the land to the petitioner and looking to the mandate of provision of the OLR Act, the sale, if any, on the basis of Annexures-1 and 2 would have taken place within three years that too involving the person named therein. Admittedly, the mortgage deed / sale deed involved herein was executed in 1985, but for the conditions imposed therein and for return of possession of the land by the mortgagee in favour of the petitioner, there remain no doubt that the document was a mortgage deed and further even assuming for the sake of argument that the document becomes a sale deed, but for being sold in favour of a person other than the person assigned in the permission order, the sale deed even otherwise becomes bad. As a consequence, this Court finds, though the original authority appreciating the legal aspect of the matter, but both the appellate authority and revisional authority failed in appreciating this legal aspect of the matter and thereafter arrived at wrong and erroneous impugned orders. As a consequence, this Court interfering with the impugned orders at Annexures-4 and 5, sets aside the same.

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

2018 (II) ILR - CUT- 134

S.K. SAHOO, J.

CRLMC NO. 2082 OF 2010

RAMESH CHANDRA NAIK & ORS. .....Petitioners

.Vrs.

STATE OF ORISSA .....Opp. party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Prayer for quashing of the order taking cognizance of offences under sections 312, 315, 316, 109/34 of the Indian Penal Code, Sections 23 and 25 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT Act) and Section 5(3)(4) of the Medical Termination of Pregnancy Act, 1971 – Petitioners are doctors – Allegation of destruction of female foetus – FIR by police and

subsequent investigation by Crime Branch – Charge sheet submitted – Magistrate took cognizance of all the offences – Whether correct? – Held, no, since cognizance of offences under sections 23 and 25 of the PCPNDT Act has been taken on the basis of the charge sheet submitted by police and not on the basis of a complaint petition as envisaged under section 28 of the PCPNDT Act, the learned Magistrate has committed illegality in taking cognizance of such offences and therefore, the impugned order of taking cognizance of offences under sections 23 and 25 of the PCPNDT Act stands quashed – The authorities mentioned under clause (a) of sub-section (1) of section 28 of the PCPNDT Act is at liberty to file complaint petition within four weeks from today before the appropriate Court for taking cognizance of offences under the PCPNDT Act which will be considered in accordance with law.

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power of High court – Exercise thereof – Held, the High Court should not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, the accusation would not be sustained – The powers possessed by the High Court are very wide and the very plenitude of the power requires great caution in its exercise – Section 482 of the Code is not an instrument handed over to an accused to short-circuit a legitimate prosecution and bring about its sudden death. (Paras 6 & 7)

Case Laws Relied on and Referred to :-

1. (2016) 10 SCC 265 : Voluntary Health Association of Punjab -Vrs.- Union of India.
2. A.I.R. 1986 S.C. 2160 : A.K. Roy and Another -Vrs.- State of Punjab
3. 1994 SCC (Criminal) 785 : Directorate of Enforcement -Vrs.- Deepak Mahajan.
4. (2004) 27 OCR 836 : Chandra Sekhar Pani –Vrs.- State of Orissa.

For Petitioners : Mr. Samir Kumar Mishra. K.R. Mohanty
J. Pradhan, P. Prusty, D. K. Pradhan

For Opp. Party : Mr. Prem Kumar Patnaik, Addl. Govt. Advocate

JUDGMENT Date of Hearing: 29.03.2018 Date of Judgment: 03.04.2018

S. K. SAHOO, J.

Yatra Naaryastu Poojyante Ramante Tatra Devataah which means where women are honoured, divinity blossoms there. Woman is the creator of the universe. A woman plays her adorable role as 'Janani Bhagini Jaya'. Every man needs a mother, a sister and a wife. It is said that behind every successful man, there is a woman. She is graceful. She is compassionate. She bestows all her love for everybody in the family. She is the epitome of sacrifice and strength. She has occupied every significant place in the history of religion, art, literature, politics, sports and

even in spiritual path and excelled in discharging her duty. In spite of such glorious contribution of womanhood to our society, in the 21st century when one fails to realize her worth and becomes instrumental in cases of female foeticide and ending the lives of the defenceless angles sent by God in the mother's womb in a cruel manner, the concept of equal right and equality of status as envisaged in the Constitution appears unrealistic and it creates a dent on the unthinkable conduct of a civilised society.

In case of **Voluntary Health Association of Punjab -Vrs.- Union of India reported in (2016) 10 Supreme Court Cases 265**, Hon'ble Justice Dipak Misra speaking for the Bench observed as follows:-

> "40. It needs no special emphasis that a female child is entitled to enjoy equal right that a male child is allowed to have. The constitutional identity of a female child cannot be mortgaged to any kind of social or other concept that has developed or is thought of. It does not allow any room for any kind of compromise. It only permits affirmative steps that are constitutionally postulated. Be it clearly stated that when rights are conferred by the Constitution, it has to be understood that such rights are recognised regard being had to their naturalness and universalism. No one, let it be repeated, no one, endows any right to a female child or, for that matter, to a woman. The question of any kind of condescension or patronization does not arise.
>
> 41. When a female foetus is destroyed through artificial means which is legally impermissible, the dignity of life of a woman to be born is extinguished. It corrodes the human values..."

In case of **Voluntary Health Association of Punjab -Vrs.- Union of India reported in (2013) 4 Supreme Court Cases 1**, Hon'ble Justice Dipak Misra observed as follows:-

> "14. Female foeticide has its roots in the social thinking which is fundamentally based on certain erroneous notions, egocentric traditions, perverted perception of societal norms and obsession with ideas which are totally individualistic sans the collective good. All involved in female foeticide deliberately forget to realise that when the foetus of a girl child is destroyed, a woman of the future is crucified. To put it differently, the present generation invites the sufferings on its own and also sows the seeds of suffering for the future generation, as in the ultimate eventuate, the sex ratio gets affected and leads to manifold social problems. I may hasten to add that no awareness campaign can ever be complete unless there is real focus on the prowess of women and the need for women empowerment.
>
> xx xx xx xx xx
>
> 16. It is not out of place to state here that the restricted and constricted thinking with regard to a girl child eventually leads to female foeticide. A foetus in the womb, because she is likely to be born as a girl child, is not allowed to see the mother earth."

2. The petitioners Ramesh Ch. Naik, Surendra Kumar Sarangi, Aurobinda Mohapatra, Prasanta Kumar Sahoo, Ritanjali Mishra and Sanjay Chandra Rao who are all doctors have approached this Court in an application under section 482 of Cr.P.C. challenging the impugned order dated 30.09.2008 of the learned Sub-divisional Judicial Magistrate, Nayagarh passed in G.R. Case No.430 of 2007 in taking cognizance of offences under sections 312, 315, 316, 109/34 of the Indian

Penal Code, sections 23 and 25 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereafter 'PCPNDT Act') and section 5(3)(4) of the Medical Termination of Pregnancy Act, 1971 (hereafter 'MTP Act') and issuance of process against them. The said case arises out of Nayagarh P.S. Case No.234 of 2007 which also corresponds to CID, CB, Orissa, Cuttack P.S. Case No.18 of 2007.

3. On 14.07.2007 on the first information report of Sri Tareque Ahemad, Inspector in charge, Nayagarh police station, Nayagarh P.S. Case No.234 of 2007 was registered under sections 312, 315, 318 read with section 34 of the Indian Penal Code.

It is the prosecution case that on 14.07.2007 at 7.00 p.m. while witnessing news in a local television channel, the informant came across a news item that seven stillborn babies were lying in an abandoned house on the foot of a hillock locally called as Duburi Hill by the side of Lathipada village road. The informant after entering the said fact in Nayagarh P.S. station diary entry No. 287 dated 14.07.2007 proceeded to the spot along with other police officials to verify the authenticity of such news item. In village Ramchandra Prasad, he contacted villagers who reported that they had seen premature female fetuses of six to seven months lying dead inside the abandoned broken house at about 5.30 p.m. The informant along with the villagers of Ram Chandi Prasad proceeded to the spot where the villagers pointed out the place where the dead female fetuses were lying. Though empty polythene bags containing patches of blood and saliva were lying at the spot but the dead female fetuses were found missing. The informant seized the four polythene bags in presence of the witnesses at the spot at 8.30 p.m. and he searched the vicinity of Duburi foot hill but could not locate any dead body. During inquiry, the informant ascertained that in the afternoon, some cowherd boys while tending cattle noticed polythene bags containing dead female fetuses were being dragged by crows and dogs. Getting such information, those cowherd boys came to the spot and noticed seven female fetuses of about six to seven months were lying dead in polythene bags. The media persons also reached there and took photographs. Since it became dark, they left the place. The villagers told that the dead bodies might have been eaten by dogs, jackles and wolves. They further told that the dead bodies might have been thrown by the workers of Nursing Homes of Nayagarh where the doctors in connivance with Nursing Home owners after determining the sex were causing miscarriage illegally with contact of pregnant women to prevent female child being born alive and secretly disposing of the dead bodies to conceal their birth. They further told that about a month back also, they had noticed three of such female fetuses lying dead in the same place but they had not disclosed it anywhere. The informant found proof of complicity and involvement of doctors, Nursing Home owners and all the concerned pregnant women causing miscarriage to prevent female child being born and secretly disposing of the dead bodies to conceal their birth and accordingly, he drew up a plain paper F.I.R. which was registered against

(i) the doctors of Nayagarh (ii) visiting doctors to the Nursing Homes, clinics and ultrasound centers of Nayagarh (iii) owners of Nursing Homes, clinics, ultrasound centers of Nayagarh and (iv) workers working at Nursing Homes, clinics and ultrasound centers of Nayagarh.

Sri K.S. Nayak, Sub Inspector of Police of Itamati outpost was directed by the Inspector in charge of Nayagarh police station to investigate the case. During course of investigation, the Investigating Officer examined the witnesses, visited the spot and prepared spot visit note. On 18.07.2007 he seized ultrasound machines from Rashmi Diagnostics, Nayagarh, Matru Shakti Complex and Sun Apollo Diagnostics, Nayagarh.

The case was taken over by CID, CB, Orissa, Cuttack and the very same first information report was re-registered on 21.07.2007 as CID, CB, Orissa, Cuttack P.S. Case No.18 of 2007 under sections 312, 315, 318 read with section 34 of the Indian Penal Code. The investigating officer K.S. Nayak handed over the charge of investigation of the case to D.P. Majumdar, Dy. S.P., CID, CB, Cuttack on 22.07.2007. The new investigating officer visited the spot, examined the witnesses. Naragarh police discovered a disposal pit in the barren land belonging to Smt. Sabita Sahoo, W/o.- Dr. Nabrakrushna Sahoo, a gynaecologist and owner of Krishna Nursing Home, Nayagarh where from 132 polythene packets were recovered and opening the bags, skull bones and other bones said to be of the fetuses being aborted in the Nursing Home were found. The I.O. arrested some of the accused persons and forwarded them to Court. He verified the clinics and ultrasound centers of Matrushakti, Satkar Clinics, Krishna Clinics, Rashmi Hospital in presence of the A.D.M.O., Executive Magistrate and others. Total five cases were instituted and inventory of articles found in the clinics were made by the respective Investigating Officers in those five cases. The I.O. placed requisition before the C.D.M.O., Nayagarh to provide information on the authority for declaring the C.D.M.O. as Appropriate Authority under the provisions of PCPNDT Act and particulars regarding the Nursing Homes and ultrasound centers functioning in Nayagarh town. Requisition was also placed before the General Manager of the local television channel for supply of video footing relating to the telecast of disposal of the female fetuses on the foot of Duburi hill on 14.07.2007. The I.O. moved a petition before the learned S.D.J.M., Nayagarh for passing necessary orders for sending the ultrasound machines to S.C.B. Medical College and Hospital, Department of Radiology, Cuttack to conduct examination of the hard disk and retrieve the details of the tests performed. As per the order of the learned S.D.J.M., Nayagarh, the exhibits containing polythene packets seized in the case on 14.07.2007 were sent to S.F.S.L., Rasulgarh. The I.O. took over the charge of the ultrasound machines of Satkar Clinics and Patra Diagnostics and also produced the copies of the seizure lists, inventory lists and zimanama in respect of Patra Diagnostics and Satkar Clinics and the learned S.D.J.M., Nayagarh was pleased to pass order allowing the I.O. to

carry the ultrasound machines for necessary examination at S.C.B. Medical College and Hospital, Cuttack. The I.O. further received five ultrasound machines from the Inspector in charge of Nayagarh police station which were also produced before the Superintendent of S.C.B. Medical College and Hospital, Cuttack for its examination in the Department of Radiology. The I.O. received report from the Prof. and H.O.D. of the Department of Radiology in respect of five ultrasound machines that those machines did not contain any hard disk and therefore, it was not possible to retrieve any past activities of those machines. Some journalists of the local television who showed footage of dead female fetuses were examined. It was found that none of the five ultrasound centers of Nayagarh district were having any valid registration. The shortcomings and lapses on the part of the Nursing Homes and Clinics and ultrasound centers of Nayagarh district were pointed out by a team of doctors deputed by the Government in their report which was also seized. The I.O. also placed requisitions with the C.D.M.O., Nayagrh on 21.09.2007 to file a complaint as Appropriate Authority regarding the disposal of seven fetuses on 14.07.2007 at the foot of Duburi hill. The C.D.M.O. replied that none of the fetuses disposed of on the foot of Duburi Hill on 14.07.2007 were aborted/terminated at Nayagarh Hospital and that after registration of Nayagarh P.S. Case No. 234 of 2007, he has intimated the fact to Collector on 18.07.2007 which might be taken as the complaint of the Appropriate Authority under the provisions of PCPNDT Act. The I.O. received the opinion of the chemical examiner which indicated that traces of blood with human origin were found from the four polythene packets sent for chemical examination. On 10.11.2007 Mr. D.K. Mohanty, Inspector CID, CB, Cuttack took over charge of investigation of the case. He prayed before the learned S.D.J.M., Nayagarh for recording the 164 Cr.P.C. statements of some witnesses. He also examined some witnesses, arrested some of the accused persons and forwarded them to Court. After completion of investigation, on 15.09.2008 the I.O. submitted chargesheet under sections 312, 315, 316, 109/34 of the Indian Penal Code and sections 23 and 25 of PCPNDT Act and section 5(3)(4) of MTP Act against eleven accused persons including the six petitioners.

4. Mr. Samir Kumar Mishra, learned counsel appearing for the petitioners contended that the F.I.R. on the face of it does not in any manner implicate any of the petitioners with the alleged crime and no legally admissible materials were collected during investigation to prima facie make out a case against the petitioners. The statements of witnesses namely Gopal Dalei, Sudarsan Ghadei and Iswar Naik have been recorded under section 164 Cr.P.C. Though witness Iswar Naik has stated that one Basanti who allegedly went for disposal of fetuses is a sweeper in Matrushakti Hospital, there is nothing on record to justify such bald claim of witness Iswar Naik. He contended that no female fetus has been seized except some statements showing that they have seen fetuses which statements on the face of it is inconceivable in view of the fact that the fetuses were allegedly wrapped in bag.

It is further contended that while submitting charge sheet, in the brief facts of the case, the Investigating Officer has mentioned that seven stillborn babies were found at the foot of Duburi Hills on 14.07.2007. The medical terminology of 'stillborn babies' is the birth of a baby who is born without any sign of life at or after twenty four weeks of pregnancy. The baby might have died during the pregnancy (intrauterine death) or during labour or birth. Therefore, the prosecution case on the face of it is not relating to termination of pregnancy. It is further contended that no person of nearby villages or any person residing near Duburi Hills nor the people who were grazing cattle at the time of alleged occurrence have been examined to corroborate the claim as mentioned in the F.I.R. Therefore, prima facie case relating to commission of alleged offences for which the petitioners are sought to be prosecuted are not made out.

It is further contended that during the course of hearing of the case, a register purportedly to be MTP register has been produced. The counsel for the petitioners as well as the State was permitted to inspect the said register in presence of the Deputy Registrar. On inspection of the register, it is noticed that the names of some of the petitioners have been mentioned either in abbreviated manner or in full in the said register. The petitioners have not put their signatures in the register and the investigating authority has not collected any materials to clarify as to under what circumstances the names of the petitioners were mentioned. It is further contended that barring few entries which do not relate to all the petitioners, the rest of the entries have no close proximity with the date of discovery of the alleged fetuses. The informant on being examined by the Crime Branch has specifically stated that he could not be able to find out from which clinic/Nursing Home/ Hospital, the fetuses have been disposed of at the foot of Duburi hill. The informant has stated that rivalry was going on between Nursing Homes of Nayagarh district for which some Nursing Homes jointly might have thrown the fetuses with a view to defame the other Nursing Homes with whom they were not pulling on well to put them into trouble.

It is further contended that section 28(1)(a) of the PCPNDT Act specifically mandates that no Court shall take cognizance of an offence under the Act except on a complaint being made by the Appropriate Authority and in the instant case, C.D.M.O. is the Appropriate Authority. The Investigating Officer during the course of investigation sought for clarification with regard to the Appropriate Authority and after being informed that the C.D.M.O. is the Appropriate Authority, he placed a requisition with the C.D.M.O., Nayagarh to file complaint as Appropriate Authority. Intimation was received from the C.D.M.O., Nayagarh that none of the fetuses disposed of at Duburi foot hill on 14.07.2007 were aborted/terminated at Nayagarh Hospital. In view of such position, the prosecution of the petitioners is absolutely without any basis and cannot be sustained when the Appropriate Authority has given a clean chit with regard to such alleged disposal of female fetuses. It is contended that continuance of the criminal proceeding amounts to abuse of process of Court and therefore, in order to secure ends of justice, the proceeding should be quashed.

5. Mr. Prem Kumar Patnaik, learned Additional Govt. Advocate placed the statements of witnesses namely Gopal Dalai, Sudarsan Ghadei who were the sweepers of Matrushakti Hospital, Surya Narayan Biswal, Upendra Kalasa, Ragini Jena. He further submitted the MTP register seized from Matrushakti Hospital indicates that the petitioners have conducted number of MTP operations and the statements of witnesses and MTP register entries clearly reveals prima facie case against the petitioners. It is further contended that initially the case was registered under sections 312, 315, 318 read with section 34 of the Indian Penal Code and during course of investigation, the commission of offences under sections 23 and 25 of the PCPNDT Act was found and accordingly chargesheet was submitted and therefore, no illegality has been committed by the Magistrate in taking cognizance of offences and issuing process against the petitioners.

6. I shall first deal with the order of taking cognizance under sections 23 and 25 of the PCPNDT Act.

Section 28 of the PCPNDT Act enumerates on what basis a Court can take cognizance of an offence under the Act and which Court is empowered to try the offence punishable under the Act. Cognizance of an offence under the Act can be taken on the basis of a *complaint* made by the (i) Appropriate Authority; (ii) any officer authorized in that behalf by the Central Government or State Government and also (iii) any officer authorized in that behalf by the Appropriate Authority. It could also be taken on the basis of a complaint made by a person, who had given a notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the Court. The later situation would arise in a case where the Appropriate Authority had failed to initiate action even in spite of the notice of the person concerned. In the later situation, after the complaint is filed, the Court is empowered to direct the Appropriate Authority to make available copies of the relevant records in its possession to the person concerned if he makes such a demand before the Court. A Metropolitan Magistrate or a Judicial Magistrate of first class is empowered to try any offence punishable under the Act. The explanation contained under clause (b) of sub-section (1) of section 28 states that the term 'person' includes a social organization. Therefore, the legislature in order to prevent the social evil has allowed any person to set the law in motion under the Act by approaching the Court after fulfilling the criteria laid down under clause (b) of sub-section (1). The word 'may' as it appears in sub-section (3) of section 28 of the PCPNDT Act gives discretion to the Court to decide whether the complainant is entitled to the copies of the relevant records as sought for from the Appropriate Authority. Though the complainant has got right to demand the copies of the relevant records but he has no vested right to get the same. The word 'may' cannot be interpreted as 'shall' or 'must'. The Court has to consider various factors including the right of privacy of an individual who is likely to be affected, the purpose and object of the legislation, the

right of the person to receive the documents and the violation, if any, of the provisions of the Act and Rules.

In case of **A.K. Roy and Another -Vrs.- State of Punjab reported in A.I.R. 1986 S.C. 2160** where a question was raised whether the Food Inspector, Faridkot was competent to lodge a complaint against the appellants under section 20(1) of the Act for commission of an offence punishable under section 16(1)(a)(ii) of the Prevention of Food Adulteration Act, 1954 (for short 'the Act') by virtue of the delegation of powers by the Food (Health) Authority, Punjab, the Hon'ble Court held as follows:-

> "10. A careful analysis of the language of Section 20(1) of the Act clearly shows that it inhibits institution of prosecutions for an offence under the Act except on fulfillment of one or the other or the two conditions. Either the prosecutions must be instituted by the Central Government or the State Government or a person authorised in that behalf by the Central Government or the State Government, or the prosecutions should be instituted with the written consent of any of the four specified categories of authorities or persons. If either of these two conditions is satisfied, there would be sufficient authority for the institution of such a prosecution for an offence under the Act. The provision contained in Section 20(1) of the Act does not contemplate the institution of a prosecution by any person other than those designated. The terms of Section 20(1) do not envisage further delegation of powers by the person authorised, except that such prosecution may be instituted with the written consent of the Central Government or the State Government or the person authorised. The use of the negative words in Section 20(1) "No prosecution for an offence under this Act...shall be instituted except by or with the written consent of" plainly make the requirements of the section imperative. That conclusion of ours must necessarily follow from the well-known rule of construction of inference to be drawn from the negative language used in a statute stated by Craies on Statute Law, 6th edn., p. 263 in his own terse language :
>
> If the requirements of a statute which prescribe the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding.
>
> Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other modes of performance are necessarily forbidden. The intention of the Legislature in enacting Section 20(1) was to confer a power on the authorities specified therein which power had to be exercised in the manner provided and not otherwise.
>
> 11. The first part of Section 20(1) of the Act lays down the manner of launching prosecutions for an offence under the Act, not being an offence under Section 14 or Section 14A. The second part provides for delegation of powers by the Central Government or the State Government. It enables that prosecutions for an offence under the Act can also be instituted with the written consent of the Central Government or the State Government or by a person authorised in that behalf, by a general or special order issued by the Central Government or the State Government. The use of the words 'in this behalf in Section 20(1) of the Act shows that the delegation of such power by the Central Government or the State Government by general or special order must be for a specific purpose, to authorise a designated person to institute such prosecutions on their behalf. The terms of Section 20(1) of the Act do not postulate further delegation by the person so authorised; he can only give his consent in writing when he is satisfied that a prima facie case exists in the facts of a particular case and records his reasons for the launching of such prosecution in the public interest."

'Appropriate Authority' as per section 2(a) of the PCPNDT Act means the Appropriate Authority appointed under section 17 of the Act. The procedure for appointment of Appropriate Authority has been enumerated in section 17 of the Act. The functions of Appropriate Authority have also been laid down under sub-section (4) of section 17 of the Act. The functions include investigating complaints of breach of the provisions of the Act or the rules made thereunder and take immediate action and also to take appropriate legal action against the use of any sex selection technique by any person at any place, suo motu or brought to its notice and also to initiate independent investigations in such matter. The Appropriate authority is empowered under section 30 of the Act to enter and search at all reasonable times to any Genetic Counseling Centre, Genetic Laboratory, Genetic Clinic or any other place and examine any record etc. and seize and seal the same. Under sub-rule (3) of Rule 18-A of Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (hereinafter 'PCPNDT Rules'), the Appropriate Authority is duty bound to attend to all complaints and maintain transparency in the follow-up action of the complaints and to investigate all the complaints within twenty four hours of receipt of the complaint and complete the investigation within forty-eight hours of receipt of such complaint.

Therefore, the Appropriate Authority has been given enormous power in the matter of investigation and also in taking appropriate legal action against the violators of provisions of the Act. PCPNDT Act is a special enactment. Section 5 of the Cr.P.C. provides that where a special or local law provides an exclusive procedure for dealing with the offence under that law, the provisions of the Cr.P.C. to that extent so provided in the special law stands excluded. If a provision is clearly expressed in any special law or local law that would be called 'specific provisions'. In other words, if the special Act does not indicate the specific provisions for enquiry into, trial or otherwise dealing with such offences then the procedure of the Code of Criminal Procedure would be applicable. Section 4 of Cr.P.C. also makes it clear that if an offence is committed under a special law then the provisions of that law would govern the investigation and trial of such offence and a police officer is not empowered either to submit chargesheet or otherwise proceed under Chapter-XII of the Cr.P.C. The powers under the Cr.P.C. are thus subject to any special provisions that might be made with regard to the exercise or regulation of those powers by any special Act. In case of **Directorate of Enforcement -Vrs.- Deepak Mahajan reported in 1994 Supreme Court Cases (Criminal) 785**, it has been held that section 4 of Cr.P.C. is comprehensive and section 5 of Cr.P.C. is not in derogation of section 4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of section 4(2). In short, the provisions of the Code would be applicable to the extent in the absence of any contrary provision in the special Act or any special provision excluding the jurisdiction and applicability of the Code. The second link of section 4(2) of Cr.P.C. itself limits the application of the provisions of the Code. In case of

Chandra Sekhar Pani –Vrs.- State of Orissa reported in (2004) 27 Orissa Criminal Reports 836, it is held that the two provisions i.e., sections 4 and 5 of Cr.P.C. clearly indicate that when a special law prescribed for a special form or procedure, the procedure contained in the Cr.P.C. is not to be followed.

The PCPNDT Act in section 28 lays down the restriction for a Court in taking cognizance of an offence under the Act except on a complaint being made by certain categories of authorities or any person after fulfilling certain criteria. As per section 2(d) of Cr.P.C., complaint means any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. In the explanation to section 2(d) of Cr.P.C., it lays down that a report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint and the police officer by whom such report is made shall be deemed to be the complainant.

Section 27 of the PCPNDT Act states that every offence under the Act is cognizable. Section 154 of Cr.P.C. states that every information relating to the commission of a cognizable offence given to the officer in charge of a police station has to be registered as F.I.R. and as per section 156 of Cr.P.C. any officer in charge of a police station can investigate any cognizable case committed within the local limits of the police station even without the order of a Magistrate. In spite of the right conferred on the police officer in the Code in registering the first information report and also investigating a case which relates to cognizable offence, in view of the special provision in the special Act, lodging of first information report for the commission of an offence under PCPNDT Act and submission of charge sheet for such offence is not permissible. Cognizance of any offence under the PCPNDT Act can be taken by a Court basing only on a complaint petition and that to being filed by the authorities mentioned in clause (a) of sub-section (1) of section 28 or by any person as mentioned in clause (b) of sub-section (1) of section 28. If a complaint petition as envisaged under section 28 of the PCPNDT Act is presented before a Court, the procedure laid down in Chapter-XV of Cr.P.C. is to be followed before issuance of process against the accused.

Learned counsel for the State produced Gazette notification of the Office Memorandum dated 27.07.2007 issued by Govt. of Orissa, Health and Family Welfare Department which indicates that in pursuance of Office Memorandum dated 12.02.2007 of Ministry of Health and Family Welfare, Govt. of India, the District Magistrate has been declared as District Appropriate Authority under section 17(2) of PCPNDT Act, 1994 amended in 2002. The State Govt. by virtue of such Office Memorandum appointed District Appropriate Authority and Sub-district Appropriate Authority. This notification superseded the earlier notification of the Department dated 24.01.2002 appointing C.D.M.O. of each district as the Appropriate Authority. The case diary indicates that during course of investigation, the Investigating Officer

placed requisitions with the C.D.M.O., Nayagrh to file a complaint as Appropriate Authority regarding the disposal of seven fetuses on 14.07.2007 at the foot of Duburi hill but the C.D.M.O. replied, inter alia, that after registration of Nayagarh P.S. Case No. 234 of 2007, he has intimated the fact to Collector on 18.07.2007 which might be taken as the complaint of the Appropriate Authority under the provisions of PCPNDT Act.

In view of the foregoing discussion, since cognizance of offences under sections 23 and 25 of the PCPNDT Act has been taken on the basis of the chargesheet submitted by police and not on the basis of a complaint petition as envisaged under section 28 of the PCPNDT Act, I am of the humble view that the learned Magistrate has committed illegality in taking cognizance of such offences and therefore, the impugned order of taking cognizance of offences under sections 23 and 25 of the PCPNDT Act stands quashed. The authorities mentioned under clause (a) of sub-section (1) of section 28 of the PCPNDT Act is at liberty to file complaint petition within four weeks from today before the appropriate Court for taking cognizance of offences under the PCPNDT Act which will be considered in accordance with law.

7. So far as the other offences are concerned, after going through the case records produced by the learned counsel for the State, the statements of witnesses and documents seized, I find prima facie case for commission of offences under sections 312, 315, 316, 109/34 of the Indian Penal Code and section 5(3)(4) of the MTP Act is clearly made out. At the stage of taking cognizance of offence and issuance of process, the Magistrate has to be satisfied whether prima facie case is made out or not and whether there is sufficient ground for proceeding against the accused and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial. A detailed discussion of the merits or demerits of the case is not required to be gone into at that stage. While exercising jurisdiction under section 482 of the Code, the High Court should not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, the accusation would not be sustained. That is the function of the trial Judge. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Section 482 of the Code is not an instrument handed over to an accused to short-circuit a legitimate prosecution and bring about its sudden death.

In view of the above, I find no perversity in the impugned order of taking cognizance so far as the offences under sections 312, 315, 316, 109/34 of the Indian Penal Code and section 5(3)(4) of the MTP Act and therefore, I am not inclined to interfere with the same.

Accordingly, the CRLMC application is allowed in part. The impugned order of taking cognizance of offences under sections 23 and 25 of the PCPNDT Act

stands quashed. The order of taking cognizance of offences under sections 312, 315, 316, 109/34 of the Indian Penal Code and sections 5(3)(4) of the MTP Act is upheld. Since it is a case of the year 2007, the trial of the case be expedited. The MTP registers which have been received from the Court below be sent back in sealed cover to the concerned Court.

2018 (II) ILR - CUT- 146

S.K. SAHOO, J.

CRLREV NO. 298 OF 2016

MANORANJAN SAMAL .....petitioner

.Vs.

STATE OF ORISSA (VIG.) .....Opp. Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 239 – Discharge petition – Rejection thereof and framing of charges under section 13(2) read with section 13(1)(d)(ii) and section 7 of the Prevention of Corruption Act, 1988 – Plea of invalid sanction taken before the trial court – Not considered – Whether the plea of invalid sanction was required to be dealt with by the Trial court – Held, Yes.

"If the trial commenced at the stage of section 239 of Cr.P.C. and issue relating to the legality and validity of the sanction order can be raised in the course of trial, since the petitioner raised such issue before the trial Court during consideration of his discharge petition, it was improper on the part of the Court not to deal with the same and not to apply its mind to such vital issue. Courts are there in India to decide an issue raised in a case legally, impartially and objectively and not to act at its whim and pleasure. An order dismissing the discharge petition and framing of charges against an accused undoubtedly decides an important aspect of the trial and it is the duty of the Court to apply its judicial mind to the materials and come to a clear conclusion that prima facie case has been made out on the basis of which it would be justified in framing charges. The contention raised by the learned Standing Counsel for the Vigilance Department that any finding at that stage relating to invalid sanction or otherwise would have given scope to the petitioner to say that the Court has already pre-judged a vital issue, is equally fallacious. Since in view of the ratio laid down in case of Nanjappa (supra), in case the sanction is found to be invalid, the Court can discharge the accused and the petitioner was raising such issue before the trial Court, he cannot have any grievance on the consideration of such issue. If after consideration, the finding goes against him, he can approach the higher Court but certainly he cannot say that the Court has prejudged the issue. A Court should be fully aware of its power, limitations at each stage of the proceeding otherwise there is every chance of failure of justice." *(Para 7)*

(B) PREVENTION OF CORRUPTION ACT,1988 – Section 19 – Sanction for prosecution against Govt. employee – Requirement and validity thereof – Whether can be looked into in a revision petition – Principles – Indicated.

When there is an express legal bar enacted in the 1988 Act to the very taking of cognizance of offences, inter alia, under sections 7 and 13 of the Act by the Court except with previous sanction by the competent authority and such a bar is intended to provide specific protection to an accused, as the sanction order in respect of the petitioner is held to be invalid being granted by an incompetent authority which goes to the root of the prosecution case, on a careful analysis, I am of the view that impugned orders are liable to be set aside. I am conscious of the fact that the power of quashing the charge framed in terms of section 240 of Cr.P.C. should be exercised very sparingly and with circumspection and that too in the rarest of rare cases but since I am of the view that quashing in the present case is absolutely essential to prevent patent miscarriage of justice and to do real and substantial justice, I have to accept the prayer made in this petition, however in view of the observation made in case of ***Nanjappa*** *(supra), the prosecution is at liberty to obtain a fresh sanction order for prosecution of the petitioner from the competent authority and proceed in accordance with law." (Para 8)*

Case Laws Relied on and Referred to :-

1. A.I.R. 2015 S.C. 3060 : Nanjappa -Vrs.- State of Karnataka.
2. A.I.R. 2005 S.C. 3606 : State of Goa -Vrs.- Babu Thomas.
3. A.I.R. 2007 S.C. 1274 : Parkash Singh Badal -Vrs.- State of Punjab .
4. (2012) 1 SCC 532 : Dinesh Kumar -Vrs.- Chairman, Airport Authority of India.
5. (2015) 16 SCC 163 : Director, C.B.I.-Vrs.- Ashok Kumar Aswa.l
6. (2012) 9 SCC 460 : Amit Kapoor -Vrs.- Ramesh Chander.
7. A.I.R. 2000 S.C. 2583: State of Madhya Pradesh -Vrs.- Mohanlal Soni.
8. (2004) 1 SCC 691 : State of M.P. -Vrs.- Awadh Kishore Gupta.
9. A.I.R. 2015 S.C. 3060 : Nanjappa -Vrs.- State of Karnataka.
10. A.I.R. 2005 S.C. 3606 : State of Goa -Vrs.- Babu Thomas.
11. A.I.R. 2007 S.C. 1274 : Parkash Singh Badal -Vrs.- State of Punjab .
12. (2012) 1 SCC 532 : Dinesh Kumar -Vrs.- Chairman, Airport Authority of India..
13. (2015) 16 SCC 163 : Director, C.B.I. -Vrs.- Ashok Kumar Aswal.
14. A.I.R. 1957 S.C. 389 : The State of Bihar -Vrs.- Ram Naresh Pandey .
15. A.I.R. 1980 S.C. : 962 : V.C. Shukla -Vrs.- State through C.B.I..
16. ILR (1995) MP 526 : Hanumantsing Kubersing -Vrs.- State of Madhya Pradesh.

For Petitioner : Mr. Harmohan Dhal P.K. Mohanty-2, G.C. Sahu.

For Opp. Party : Mr. Sangram Das, Standing Counsel (Vig. Department)

JUDGMENT Date of Judgment: 18.06.2018

S. K. SAHOO, J.

The petitioner Manoranjan Samal has filed this revision petition under section 401 read with section 397 of the Code of Criminal Procedure, 1973 to set aside the impugned order dated 16.02.2016 passed by the learned Special Judge (Vigilance), Balasore in T.R. Case No.47 of 2010 in rejecting his petition under section 239 of Cr.P.C. for discharge with a further prayer to set aside the impugned order dated 13.09.2016 in framing charges under section 13(2) read with section 13(1)(d)(ii) and section 7 of the Prevention of Corruption Act, 1988 (hereafter for short '1988 Act'). The said case arises out of Balasore Vigilance P.S. Case No.17 of 2010.

2. The case was registered under section 7 of 1988 Act on 20.05.2010 on the first information report submitted by one Kali Charan Sahoo of village-Rajpur wherein he stated that he is a business man dealing with paddy and used to collect paddy from different cultivators of Balasore and Bhadrak districts and sell it at Medinipur of West Bengal. He further stated that he was making necessary tax payment at R.M.C. as per the rules of the Government at the rate of two per cent on the fixed rate of paddy and used to produce the tax payment receipts at Forest Gate, Jaleswar before the staff of R.M.C. It is further stated in the F.I.R. that the employees of R.M.C. who were posted at the Forest Gate namely Srustidhar Behera, Market Sarkar and the petitioner who was the yardman were demanding Rs.50/- to Rs.300/- from each vehicle for passing through the gate. If the demand was not fulfilled, both the accused persons were not leaving the vehicles and not putting stamp on the receipts and even they used to take away the receipts of the R.M.C. If the vehicles carrying paddy were passing the gate without complying the demand of both the accused persons then they were to pay further tax in the border toll gate. The R.M.C. staff posted in the gate were collecting bribe forcibly from all the businessmen dealing with paddy and rice. It is further stated that on 21.05.2010 in the morning hours, he would carry trucks load of paddy purchasing it from Bhadrak to Medinipur and he has already made necessary tax payment at R.M.C., Bhadrak and obtained receipts and he was expecting that while passing through the R.M.C. gate at Rajghat, for the purpose of stamping the receipts, the two accused persons would demand Rs.550/- otherwise they would not put any stamp. He further asserted that against his will, he was going to make payment of bribe money of Rs.550/- to the two accused persons including the petitioner.

During course of investigation, the trap was laid after making preparation to lay a trap and the petitioner and the co-accused Srustidhar Behera were caught while demanding and accepting the bribe money from the informant. The informant and other witnesses gave their statements relating to demand and acceptance of bribe money. The fingertips washes of the accused persons were taken in sodium carbonate solution which proved positive. The chemical examiner found traces of phenolphthalein powder in the material exhibits. After obtaining sanction for prosecution from Sub-collector -cum- Chairman, R.M.C., Jaleswar, Balasore, charge sheet under sections 13(2) read with 13(1)(d) and section 7 of 1988 Act was submitted against the petitioner and co-accused Srustidhar Behera on 20.09.2010.

On submission of charge sheet, the learned Special Judge (Vigilance), Balasore took cognizance of the offences which was challenged by the petitioner before this Court in an application under section 482 of Cr.P.C. in CRLMC No.1479 of 2012 and the same was dismissed as not pressed on 18.07.2012 with a liberty to file appropriate application at the stage of framing of charge.

At the stage of framing of charge, when the petitioner filed a petition for discharge, the learned trial Court has been pleased to hold that a strong prima facie

case with regard to the demand of illegal gratification is available against both the accused persons. It was further held that meticulous examination of the materials at that stage is not necessary and accordingly, the petition was dismissed vide order dated 16.02.2016 and subsequently on 13.09.2016 the learned trial Court framed the charges.

3. Mr. Harmohan Dhal, learned counsel appearing for the petitioner challenging the impugned orders contended that there are discrepancies in the statement of the informant recorded under section 164 Cr.P.C. vis-a-vis with that of the overhearing witness relating to the acceptance and recovery of bribe. He argued that both the informant and the overhearing witness in their statements recorded under section 161 Cr.P.C. have implicated co-accused Srustidhar Behera to have made the demand and accepted the bribe money and in view of such statements, no prima facie case is made out against the petitioner. It is further contended that since the petitioner was working as Yardman of R.M.C., Jaleswar, the Sub-Collector, Balasore –cum- Chairman, R.M.C., Jaleswar was not the competent authority to accord sanction for prosecution against the petitioner as he was neither the appointing authority nor the disciplinary authority and it is the Market Committee of the R.M.C. who is the appointing authority and disciplinary authority in respect of a Yardman and since the Market Committee has not accorded any sanction for prosecution of the petitioner, the continuance of prosecution against the petitioner on the basis of sanction given by an incompetent authority is bad in law. Mr. Dhal, citing some of the provisions of the Odisha Agricultural Produce Markets Act, 1956 (hereafter '1956 Act') and the Odisha Agricultural Produce Markets Rules, 1958 (hereafter '1958 Rules') submitted that the provisions of the 1956 Act and 1958 Rules make it clear that it is the Market Committee who is the appointing authority as well as disciplinary authority of the petitioner and not the Chairman of R.M.C. He asserted that since valid sanction is the pre-requisite for taking cognizance of any offence under the 1988 Act as stipulated under section 19 of the said Act, the learned trial Court was not justified in not dealing with the contentions raised relating to invalid sanction while considering the petition for discharge. Learned counsel relied upon the decisions of the Hon'ble Supreme Court in case of **Nanjappa -Vrs.- State of Karnataka reported in A.I.R. 2015 S.C. 3060**, **State of Goa -Vrs.- Babu Thomas reported in A.I.R. 2005 S.C. 3606** and **Parkash Singh Badal -Vrs.- State of Punjab reported in A.I.R. 2007 S.C. 1274.**

Mr. Sangram Das, learned Standing Counsel for the Vigilance Department on the other hand while not countering the invalidity of the sanction order contended that the plea of invalid sanction is different than absence of sanction and such a plea being essentially a question of fact is to be determined during course of trial and the petitioner is at liberty to raise such issue at the appropriate stage which is to be decided by the learned trial Court in accordance with law. Learned counsel emphatically contended that the learned trial Court has rightly not dealt with the contentions raised relating to invalid sanction while considering the petition for

discharge otherwise any finding thereon would have given scope to the petitioner to say that the Court has already pre-judged a vital issue. He argued that discrepancies if any, in the statements of the informant vis-à-vis the overhearing witness is to be appreciated by the learned trial Court at the appropriate stage and at this stage, it is not expected of the Court to hold a mini trial. It is further contended that not only there are prima facie materials on record against the petitioner for framing the charges but also there is no illegality or infirmity in the impugned orders passed by the learned trial Court and therefore, the revision petition should be dismissed. Learned counsel apart from relying upon the decision of the Hon'ble Supreme Court in case of **Parkash Singh Badal** (supra) also placed reliance in the cases of **Dinesh Kumar -Vrs.- Chairman, Airport Authority of India reported in (2012) 1 Supreme Court Cases 532** and **Director, C.B.I.-Vrs.- Ashok Kumar Aswal reported in (2015) 16 Supreme Court Cases 163**.

4. In view of sub-section (1) of section 5 of 1988 Act, a Special Judge in trying the accused persons shall follow the procedure prescribed by the Cr.P.C., for the trial of warrant cases by the Magistrates. Chapter XIX of Cr.P.C. deals with the trial of warrant cases by the Magistrates. Section 239 of Cr.P.C. which appears in the said chapter enumerates as to when the accused shall be discharged. In view of such provision, when the Magistrate considers the charge against the accused to be groundless which means without any basis or foundation, the accused can be discharged. For arriving at such a conclusion, the Court has to consider the police report and the documents sent with it under section 173 of Cr.P.C. The Court can also make examination of the accused, if it is necessary. Opportunity of hearing has to be provided to both the prosecution and the accused at that stage. The truth, veracity and effect of the materials proposed to be adduced by the prosecution during trial are not to be meticulously adjudged. The likelihood of the accused in succeeding to establish his probable defence cannot be a ground for his discharge. The object of discharge under section 239 of Cr.P.C. is to save the accused from unnecessary and prolonged harassment. When the allegations are baseless or without foundation and no prima facie case are made out, it would be just and proper to discharge the accused to prevent abuse of process of the Court. If there is no ground for presuming that accused has committed an offence, the charges must be considered to be groundless. The ground may be any valid ground including the insufficiency of evidence to prove the charge. When the materials at the time of consideration for framing the charge are of such a nature that if unrebutted, it would make out no case whatsoever, the accused should be discharged.

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

> "12. Section 397 of the Code vests the Court with the power to call for and examine the records of an inferior Court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error

and it may not be appropriate for the Court to scrutinize the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

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

xxx xxx xxx xxx

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

xxx xxx xxx xxx

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

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

In case of **State of Madhya Pradesh -Vrs.- Mohanlal Soni reported in A.I.R. 2000 S.C. 2583**, it is held that at the stage of framing charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence to conclude whether the materials produced are sufficient or not for convicting the accused. If the evidence which the prosecution proposes to produce to prove the guilt of the accused, even if fully accepted before it is challenged by the cross-examination or rebutted by the defence evidence, if any, cannot show that accused committed the particular offence then the charge can be quashed.

In case of **State of M.P. -Vrs.- Awadh Kishore Gupta reported in (2004) 1 Supreme Court Cases 691**, it is held that when charge is framed, at that stage, the Court has to only prima facie be satisfied about existence of sufficient ground for proceeding against the accused. For that limited purpose, the Court can evaluate materials and documents on records but it cannot appreciate evidence.

5. Adverting to the contentions raised by the learned counsel for the petitioner relating to the discrepancies in the statement of the informant vis-a-vis the overhearing witness, it appears that in the first information report itself, the demand of bribe money by both the accused persons including the petitioner from each vehicle for passing through the gate finds place. The informant in his 161 Cr.P.C. statement has also stated about the demand of Rs.600/- made by the petitioner and the co-accused just before the trap and acceptance of bribe money by co-accused Srustidhar Behera. The over hearing witness Dhruba Charana Behera in his 161 Cr.P.C. statement has also corroborated the statement of the informant in that respect. In the 164 Cr.P.C. statement, the informant has also stated about the demand of bribe by both the accused persons including the petitioner and acceptance of bribe money by co-accused Srustidhar Behera. Of course in the 164 Cr.P.C. statement, the over hearing witness has stated in a different manner that the petitioner accepted the bribe money but since appreciation of evidence is not permissible at this stage and no finding can be given as to whether in view of the contradictory 164 Cr.P.C. statement of the over hearing witness, it would be sufficient or not for convicting the petitioner, I am unable to accept the contention of petitioner's counsel that in view of such discrepancies, no prima facie case is made out against the petitioner.

6. Before dealing with the next submission made by the learned counsel for the petitioner relating to invalid sanction, it would be worthwhile to discuss the citations placed by the respective parties.

In case of **Nanjappa -Vrs.- State of Karnataka reported in A.I.R. 2015 S.C. 3060**, it is held as follows:-

> "15. The legal position regarding the importance of sanction under section 19 of the Prevention of Corruption Act is thus much too clear to admit equivocation. The statute forbids taking of cognizance by the Court against a public servant except with the previous sanction of an authority competent to grant such sanction in terms of clauses (a), (b) and (c)

to section 19(1). The question regarding validity of such sanction can be raised at any stage of the proceedings. The competence of the Court trying the accused so much depends upon the existence of a valid sanction. In case the sanction is found to be invalid, the Court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for prosecution in accordance with law. If the trial Court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be non-est in the eyes of law and shall not forbid a second trial for the same offences, upon grant of a valid sanction for such prosecution.

16.....The first relates to the effect of sub-section (3) to section 19, which starts with a non-obstante clause.....What is noteworthy is that sub-section (3) has no application to proceedings before the Special Judge, who is free to pass an order discharging the accused, if he is of the opinion that a valid order sanctioning prosecution of the accused had not been produced as required under section 19(1).....It does not forbid a Special Judge from passing an order at whatever stage of the proceedings holding that the prosecution is not maintainable for want of a valid order sanctioning the same. The language employed in sub-section (3) is, in our opinion, clear and unambiguous.....Suffice it to say, that a conjoint reading of sub-sections 19(3) and (4) leaves no manner of doubt that the said provisions envisage a challenge to the validity of the order of sanction or the validity of the proceedings including finding, sentence or order passed by the Special Judge in appeal or revision before a higher Court and not before the Special Judge trying the accused..."

In case of **State of Goa -Vrs.- Babu Thomas reported in A.I.R. 2005 S.C. 3606**, it is held as follows:-

"10. In the present case, the appellant does not dispute that the sanction order dated 2.1.95 was issued under the signatures of the Company Secretary. There was no reference to the decision/resolution being passed by the Board of Directors pursuant to which the sanction order was issued under the signatures of the Company Secretary. It is also not disputed that the second sanction order dated 7.9.97 issued by the Chairman and Managing Director of the Company also did not refer to any resolution/decision taken by the Board collectively pursuant to which the second sanction order was issued. In the facts and circumstances, as adumbrated above, the view taken by the High Court cannot be said to be unjustified.

xxx xxx xxx xxx

12.....According to the counsel for the appellant no failure of justice has occasioned merely because there was an error, omission or irregularity in the sanction required because evidence is yet to start and in that view the High Court has not considered this aspect of the matter and it is a fit case to intervene by this Court. We are unable to accept this contention of the counsel. The present is not the case where there has been mere irregularity, error or omission in the order of sanction as required under sub-section (1) of section 19 of the Act. It goes to the root of the prosecution case. Sub-section (1) of section 19 clearly prohibits that the Court shall not 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 as stated in clauses (a), (b) and (c).

13. As already noticed, the sanction order is not a mere irregularity, error or omission. The first sanction order dated 2.1.95 was issued by an authority that was not a competent authority to have issued such order under the Rules. The second sanction order dated 7.9.97 was also issued by an authority, which was not competent to issue the same under the relevant rules, apart from the fact that the same was issued retrospectively w.e.f. 14.9.94, which is bad. The cognizance was taken by the Special Judge on 29.5.95. Therefore, when the Special Judge took cognizance on 29.5.95, there was no sanction order under the law

authorising him to take cognizance. This is a fundamental error which invalidates the cognizance as without jurisdiction."

In case of **Parkash Singh Badal -Vrs.- State of Punjab reported in A.I.R. 2007 S.C. 1274**, it is held as follows:-

"29.The effect of sub-sections (3) and (4) of section 19 of the Act are of considerable significance. In sub-section (3), the stress is on "failure of justice" and that too "in the opinion of the Court". In sub-section (4), the stress is on raising the plea at the appropriate time. Significantly, the "failure of justice" is relatable to error, omission or irregularity in the sanction. Therefore, mere error, omission or irregularity in sanction is considered not fatal unless it has resulted in failure of justice or has been occasioned thereby. Section 19(1) is a matter of procedure and does not go to root of jurisdiction as observed in para 95 of the Narasimha Rao's case [(1998) 4 SCC 626] . Sub-section (3)(c) of section 19 reduces the rigour of prohibition. In section 6(2) of the Old Act (section 19(2) of the Act) question relates to doubt about authority to grant sanction and not whether sanction is necessary.

xxx xxx xxx xxx

48. The sanction in the instant case related to offences relatable to Act. There is a distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. The former question can be agitated at the threshold but the latter is a question which has to be raised during trial."

In case of **Dinesh Kumar -Vrs.- Chairman, Airport Authority of India reported in (2012) 1 Supreme Court Cases 532**, it is held as follows:-

"9. While drawing a distinction between the absence of sanction and invalidity of the sanction, this Court in Parkash Singh Badal (2007) 1 SCC 1 expressed in no uncertain terms that the absence of sanction could be raised at the inception and threshold by an aggrieved person. However, where sanction order exists, but its legality and validity is put in question, such issue has to be raised in the course of trial. Of course, in Parkash Singh Badal : (2007) 1 SCC 1, this Court referred to invalidity of sanction on account of non-application of mind.

10. In our view, invalidity of sanction where sanction order exists, can be raised on diverse grounds like non-availability of material before the sanctioning authority or bias of the sanctioning authority or the order of sanction having been passed by an authority not authorised or competent to grant such sanction. The above grounds are only illustrative and not exhaustive. All such grounds of invalidity or illegality of sanction would fall in the same category like the ground of invalidity of sanction on account of non-application of mind - a category carved out by this Court in Parkash Singh Badal : (2007) 1 SCC 1, the challenge to which can always be raised in the course of trial."

In case of **Director, C.B.I. -Vrs.- Ashok Kumar Aswal reported in (2015) 16 Supreme Court Cases 163**, it is held as follows:-

"15. All the above apart, time and again, this Court has laid down that the validity of a sanction order, if one exists, has to be tested on the touchstone of the prejudice to the accused which is essentially a question of fact and, therefore, should be left to be determined in the course of the trial and not in the exercise of jurisdiction either under section 482 of the Code of Criminal Procedure, 1973 or in a proceeding under Article 226/227 of the Constitution."

7. Keeping in view the citations placed by the respective sides, it is not in dispute that it was specifically urged on behalf of the petitioner before the learned

trial Court during the hearing of the discharge petition as appears from the impugned order that the authority which accorded sanction for prosecution against the petitioner was not competent one. The learned trial Court did not deal with such aspect.

In view of Chapter XIX of Cr.P.C., which deals with trial of warrant cases by Magistrates which is applicable to the trial of offences under the 1988 Act as envisaged under section 5, it can be said while considering the discharge petition under section 239 of Cr.P.C., the trial has commenced. The submission of learned Standing Counsel for the Vigilance Department that 'trial' commences only with recording of evidence is basically fallacious.

In case of **The State of Bihar -Vrs.- Ram Naresh Pandey reported in A.I.R. 1957 S.C. 389**, it is held as follows:-

> "9. There is hardly anything in this definition which throws light on the question whether the word 'trial' is used in the relevant section in a limited sense as excluding an inquiry. The word 'trial' is not defined in the Code. 'Trial' according to Stroud's Judicial Dictionary means "the conclusion, by a competent tribunal, of questions in issue in legal proceedings, whether civil or criminal" [Stround's Judicial Dictionary, 3rd Ed., Vol. 4, p. 3092.] and according to Wharton's Law Lexicon means "the hearing of a cause, civil or criminal, before a judge who has jurisdiction over it, according to the laws of the land" [Wharton's Law Lexicon, 14th Ed., p. 1011.]. The words 'tried' and 'trial' appear to have no fixed or universal meaning. No doubt, in quite a number of sections in the Code to which our attention has been drawn the words 'tried' and 'trial' have been used in the sense of reference to a stage after the inquiry. That meaning attaches to the words in those sections having regard to the context in which they are used. There is no reason why where these words are used in another context in the Code, they should necessarily be limited in their connotation and significance. They are words which must be considered with regard to the particular context in which they are used and with regard to the scheme and purpose of the provision under consideration."

In case of **V.C. Shukla -Vrs.- State through C.B.I. reported in A.I.R. 1980 S.C. 962**, it is held as follows:-

> "48.....We are, however, unable to agree with this argument because it appears that the enactment of section 251-A by virtue of the amendment of 1955, the words 'commencement of trial' were introduced for the first time which clearly denote that the trial starts in a warrant case right from the stage when the accused appears or is brought before the Court. This appears to us to be the main intent and purpose of introducing the words 'commencement of trial' by the amendment Act of 1955 which did not appear in the Code of 1898 or in the various amendments made before the Act of 1955 to the Code. Thus, if the trial begins at that stage, it cannot be said that the proceedings starting with section 251-A onwards amount to an inquiry within the meaning of Section 2(j) of the Code. Furthermore, it would appear that the amendment of 1955 in fact simplified the entire procedure for trial of warrant cases by a Magistrate by not requiring the Magistrate to record any evidence before framing of the charge or discharging the accused. All that the Magistrate had to do was to satisfy himself that the documents referred to in section 173 had been furnished to the accused and if that had not been done, to direct that the documents should be furnished. Thereafter, the Magistrate on consideration of the documents referred to in section 173 only and without recording any evidence, was to examine the accused if he considered necessary, and after hearing the parties proceed either to frame the charge or to discharge the accused.

> *In other words, the simplified procedure introduced by the amendment of 1955, which is now retained by the Code in Ss. 238 to 240, amounts to a trial from beginning to end*. The fact that no evidence is to be recorded before framing of the charge and the Magistrate has to proceed only on the documents referred to under section 173, i.e., the statement recorded in the case diary, and other papers or materials collected by the police, clearly shows that these proceedings are not an inquiry at all because the scheme of the Code generally appears to be that whenever an inquiry is held, evidence or affidavits have to be recorded by the Court before passing an order. *This, therefore, an additional reason to hold that the proceedings starting from section 251-A in the previous Code and section 238 in the Code of 1973, do not amount to an inquiry at all but amount to the starting of a trial straightaway.* Contrasted with the procedure which prevailed under the Code of 1898, prior to the amendment of 1955, there was express provision for recording of evidence before the charge and that procedure undoubtedly amounted to an inquiry which has now been dropped by the amendment of 1955 and retained by the Code. For these reasons, therefore, *we are satisfied that the proceedings starting with section 238 of the Code including any discharge or framing of charges under section 239 or section 240 amount to a trial.* The question of a pre-trial, as suggested by the counsel for the appellant, does not arise on a plain interpretation of the language of Ss. 238 and 239 which were the same as section 251-A under the Code of 1898 as amended by the Act of 1955."

In case of **Hanumantsing Kubersing -Vrs.- State of Madhya Pradesh reported in ILR (1995) MP 526**, a Full Bench of Madhya Pradesh High Court held that in warrant cases instituted on a police report, proceedings starting with section 238 including discharge or framing of charges under section 239 or section 240 amount to a trial.

If the trial commenced at the stage of section 239 of Cr.P.C. and issue relating to the legality and validity of the sanction order can be raised in the course of trial, since the petitioner raised such issue before the trial Court during consideration of his discharge petition, it was improper on the part of the Court not to deal with the same and not to apply its mind to such vital issue. Courts are there in India to decide an issue raised in a case legally, impartially and objectively and not to act at its whim and pleasure. An order dismissing the discharge petition and framing of charges against an accused undoubtedly decides an important aspect of the trial and it is the duty of the Court to apply its judicial mind to the materials and come to a clear conclusion that prima facie case has been made out on the basis of which it would be justified in framing charges. The contention raised by the learned Standing Counsel for the Vigilance Department that any finding at that stage relating to invalid sanction or otherwise would have given scope to the petitioner to say that the Court has already pre-judged a vital issue, is equally fallacious. Since in view of the ratio laid down in case of ***Nanjappa*** (supra), in case the sanction is found to be invalid, the Court can discharge the accused and the petitioner was raising such issue before the trial Court, he cannot have any grievance on the consideration of such issue. If after consideration, the finding goes against him, he can approach the higher Court but certainly he cannot say that the Court has pre-judged the issue. A Court should be fully aware of its power, limitations at each stage of the proceeding otherwise there is every chance of failure of justice.

8. Now the question which crops up for consideration is whether the Sub-Collector, Balasore –cum- Chairman, R.M.C., Jaleswar was the competent authority to accord sanction for prosecution under section 19(1) of 1988 Act against the petitioner who was the Yard man of R.M.C., Jaleswar? If the answer is given in affirmative then the trial would continue till its logical end. However, if the answer is given in negative then the order of taking cognizance and obviously the order of framing charges would be quashed.

To consider this vital issue, the discussions of some of the provisions of the 1956 Act and the 1958 Rules are necessary. Section 2(viii) of the 1956 Act states that the Market Committee means a committee established under Section 5. Section 5 of the 1956 Act deals with establishment of Market Committee by the State Government for every market area. Section 6 of the 1956 Act deals with constitution of Market Committee which shall consist of seventeen members which, inter alia, indicates that there shall be a Chairman and a Vice-Chairman for every Market Committee, who shall be nominated by the State Government. Section 9 of the 1956 Act empowers the Market Committee to employ such officers and employees as may be necessary for the management of the market and to pay such officers and employees such salaries as the Market Committee thinks fit. Rule 33(1) of the 1958 Rules states that the Market Committee for proper management of the market may appoint such officers and servants as may be necessary and in view of Rule 33(4), the Market Committee shall be the Disciplinary Authority in respect of all officers and servants of the Committee. Rule 25 of the 1958 Rules deals with the functions and powers of the Chairman which, inter alia, states that the Chairman shall be the controlling and supervising officer of the Market Committee and all officers and servants of the Market Committee shall, subject to the rules and the direction, if any, given by the Market Committee, be subject to his control. Rule 26 of the 1958 Rules, inter alia, states that every meeting of Market Committee shall be presided by the Chairman who is also entitled to speak and vote on all questions at the meeting and all questions which may come up before the Committee at any meeting shall be decided by the vote of the majority of the members present at the meeting and in every case of equality of votes, the President of the meeting shall have and exercise a second or casting vote.

In view of the aforesaid sections of 1956 Act and 1958 Rules, it is clear that the Market Committee is the Appointing Authority as well as Disciplinary Authority so far as the petitioner is concerned who was the Yard man of R.M.C., Jaleswar, Balasore. The Chairman is one of the members of Market Committee who has to be nominated by the State Government. The Chairman is of course the controlling and supervising officer of the Market Committee and all the officers and servants of the Market Committee are under his control and he has to preside over every meeting of the Market Committee but he cannot be said to be alone the competent sanctioning

authority for prosecution of the petitioners for alleged commission of offences under the 1988 Act. The sanction aspect for prosecution has to be considered by the Market Committee and not alone by the Chairman. Obviously the majority decision of the Market Committee in that respect would prevail. There is even nothing on record that the Chairman has been entrusted by the Market Committee to take decision relating to sanction of prosecution of the petitioner. No decision/resolution of the Market Committee is there pursuant to which the sanction order was passed. Even though in the sanction order, the Sub-Collector, Balasore -cum- Chairman, R.M.C., Jaleswar has mentioned that he is the competent authority to remove the petitioner, therefore, he accorded sanction for prosecution of the petitioner after going through the relevant prosecution papers but in view of the foregoing discussions, the observation of the Chairman, R.M.C. is misconceived.

A single Judge of Punjab and Haryana High Court in case of **Jarnail Singh and Ors. -Vrs.- State of Punjab** (CRA-S-418-SB of 2005 and CRA-S-404-SB of 2005) decided on 07.04.2015 held as follows:-

> "16. This Committee consists of the Chairman of the Committee, as its President, District Mandi Officer or his nominee, not below the rank of an Assistant District Mandi Officer as expert representative and two other representatives, one each out of the Scheduled Castes and Ex-Servicemen, to be nominated by the Committee from amongst its members. As such, it is the Committee who can take disciplinary action and impose penalties and give punishment to the delinquent officials of the Punjab Market Committees. Sanction order Ex. PW5/A shows that sanction to prosecute was given by the Chairman alone. Chairman, Market Committee, is one of the members of the Committee. May be the Chairman is the President of the Committee but he alone is not competent to give sanction to prosecute. Sanction order Ex. PW5/A nowhere states that meeting of the Committee was called for according sanction to prosecute the accused/appellants or their matter was considered by the Committee and thereafter, the Committee being satisfied that the accused/appellants have committed the offence under Section 7 and 13(i)(d)/13(2) of the Act and only then accorded sanction. As sanction to prosecute was not given by the authority, which was competent to give sanction and was also the punishing authority, the sanction is not a valid sanction. Chairman of the Market Committee, of course written in sanction order that he is competent to dismiss the accused/appellants yet this observation of the Chairman is misconceived. He alone cannot do so. It is the Committee who can dismiss the accused/appellants. "State of Goa v. Babu Thomas : 2005(4) RCR (Criminal) 349 (SC)" is the judgment of the Division Bench of the Hon'ble Apex Court of India. It is fully applicable to the present case. In the aforesaid judgment the power of appointment and dismissal vested in Board of Directors. Sanction for prosecution was issued by Chairman of the company. Under those circumstances, it was held by the Hon'ble Apex Court that it is not valid sanction. Order of Court taking cognizance was set aside.
>
> 17. In the case in hand as well, power of appointment and dismissal is with the Committee whereas the sanction for prosecution has been given by the Chairman alone. As such, it is not a valid sanction and for this very reason, the Court cannot take cognizance and the accused/appellants are entitled to acquittal."

The learned Standing Counsel for the Vigilance Department did not counter the invalidity of sanction order. Therefore, in view of the relevant provisions of the 1956 Act and the 1958 Rules, the sanction order issued by the Sub-Collector,

Balasore –cum- Chairman, R.M.C., Jaleswar for prosecution of the petitioner for offences under 1988 Act is invalid. When there is an express legal bar enacted in the 1988 Act to the very taking of cognizance of offences, inter alia, under sections 7 and 13 of the Act by the Court except with previous sanction by the competent authority and such a bar is intended to provide specific protection to an accused, as the sanction order in respect of the petitioner is held to be invalid being granted by an incompetent authority which goes to the root of the prosecution case, on a careful analysis, I am of the view that impugned orders are liable to be set aside. I am conscious of the fact that the power of quashing the charge framed in terms of section 240 of Cr.P.C. should be exercised very sparingly and with circumspection and that too in the rarest of rare cases but since I am of the view that quashing in the present case is absolutely essential to prevent patent miscarriage of justice and to do real and substantial justice, I have to accept the prayer made in this petition, however in view of the observation made in case of **Nanjappa** (supra), the prosecution is at liberty to obtain a fresh sanction order for prosecution of the petitioner from the competent authority and proceed in accordance with law.

9. In the light of foregoing discussion, I am of the considered opinion that the impugned orders passed by the learned trial Court in rejecting the petition filed by the petitioner under section 239 of Cr.P.C. and framing of charges under section 7 and section 13(2) read with section 13(1)(d)(ii) of the Prevention of Corruption Act, 1988 against the petitioner is not sustainable in the eye of law and the same is hereby set aside.

Anything said or any observation made in this judgment shall not influence the mind of the learned trial Court to adjudicate the trial in respect of co-accused Srustidhar Behera in accordance with law.Accordingly, the CRLREV petition is allowed.

2018 (II) ILR - CUT- 159

S.K. SAHOO, J.

BLAPL No. 5738 OF 2017

NATHA RAKSHA .....Petitioner

.Vs.

STATE OF ORISSA .....Opp. Party

CODE OF CRIMINAL PROCEDURE,1973 – Section 439 – Bail application – Consideration thereof – Plea of extending the benefit of parity as co-accused has already been released on bail – Whether parity can be granted in all cases – Held, No. – Principles – Discussed.

"In case of Preeti Bhatia -Vrs.- Republic of India reported in (2015) 61 Orissa Criminal Reports 131, it is held that there is absolute hidebound rule that bail must necessarily be granted to the co-accused where another co-accused had been granted bail. A Judge is

not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains no cogent reasons or if the same has been passed in flagrant violation of well settled principle of law and ignores to take into consideration the relevant facts essential for granting bail. Such an order can never form the basis for a claim of parity. It will be open to the Judge to reject the bail application of the applicant before him as no Judge is obliged to pass orders against his conscience merely to maintain consistency. The grant of bail is not a mechanical act."

Case Laws Relied on and Referred to :-

1. (2015) 61 OCR 131 : Preeti Bhatia -Vrs.- Republic of India

For petitioner : Mr. V. Narasingh

For State : Mr. Prem Kumar Patnaik, Addl. Govt. Adv.

ORDER Date of Order : 18.07.2018

S.K. SAHOO, J.

Heard Mr.V.Narasingh, learned counsel for the petitioner and Mr. Prem Kumar Patnaik, learned Addl. Govt. Advocate for the State.

This is an application under Section 439 Cr.P.C. for grant of bail to the petitioner in connection with Hirakud P.S. Case No. 100 of 2016 corresponding to S.T. Case No. 108/171 of 2016-17 pending in the Court of learned Sessions Judge, Sambalpur for offences punishable under sections 363/342/376(2)(i)/376-D of the Indian Penal Code and sections 4 and 6 of the POCSO Act.

Learned counsel for the petitioner submitted that the petitioner is in judicial custody since 22.04.2016 and he has been charge sheeted under sections 363/342/376(2)(i)/376-D of the Indian Penal Code and sections 4 and 6 of the POCSO Act. It is further contended that the informant Ajay Bag lodged the first information report on 21.04.2016 which is about two weeks after the alleged incident in consultation with the victim and the victim has named only one accused namely Sadasib along with two to three others to have committed rape on her. It is further contended that on the very day of lodging of the first information report, the statement of the victim was recorded and she stated that she can identify those persons who committed rape on her. It is further contended that when the 164 Cr.P.C. statement of the victim was recorded on 26th April, 2016, she again implicated Sadasib and three of his friends to have committed rape on her but not named the petitioner but in the T.I. parade which was conducted on 17.06.2016, the victim identified the petitioner and three others including Sadasib to have committed the crime. It is further contended that during trial, the victim has been examined as P.W.1 and she has named the petitioner along with others including Sadasib to have committed rape on her when she was 15 years of age. It is argued that in her deposition, the victim has named the petitioner and if she was aware about the name of the petitioner, had the petitioner been involved in the crime, she should would have named him on being asked by her brother at the time of lodging the first information report as well as giving her statement before police as well as before the Magistrate. It is contended that since the victim has named only co-accused Sadasib to have committed the crime along with other unnamed persons, therefore, the implication of the petitioner is an afterthought story. It is further contended that two of the co-accused persons namely Deepak Kumar Adha

and Bunty @ Upendra Kumar Rana have been granted bail and the petitioner is similarly situated. Learned counsel for the petitioner placed the statement of co-accused Deepak Kumar Adha as well as the statements of Abhiram Sahoo, Arati Ranabida and Manoj Prasad and submitted that in view of the period of detention of the petitioner in judicial custody for more than two years and when the victim has already been examined and there is no chance of tampering with the evidence or absconding of the petitioner, the bail application may be favourably considered.

Learned counsel for the State on the other hand submitted that not only the victim identified the petitioner in the T.I. parade but she has attributed specific overt act against the petitioner during trial being examined as P.W.1. It is further contended that the victim girl was minor as on the date of occurrence and she was subjected to gang rape and therefore, in view of the punishment prescribed for such offences, the bail application of the petitioner should be rejected.

Adverting to the contentions raised by the learned counsel for the respective parties, it appears that there are prima facie materials to show that the victim was a minor as on the date of occurrence and as per her statement, she has been gang raped. It is correct that the name of the petitioner does not find place in the F.I.R. or in her statements recorded under sections 161 as well as 164 Cr.P.C but the victim has identified the petitioner in the T.I. parade and also implicated him in the commission of gang rape during trial being examined as P.W.1. The co-accused Deepak Kumar Adha who has been enlarged on bail stands on a different footing in as much as not only his name does not find place in the statement of the victim as well as in the F.I.R. but also the victim has accepted such position in her evidence and she has also not stated specifically against co-accused Deepak Kumar Adha to have committed rape on her. So far as the co-accused Bunty @ Upendra Kumar Rana is concerned, on perusal of the order of this Court passed in BLAPL No. 4424 of 2016 vide order dated 20.10.2016, it indicates that the bail was granted relying on the statement of the learned counsel for the petitioner as well as the learned counsel for the State that the said accused was not identified in the T.I. parade. In view of the material placed today by the learned counsel for the State, it appears that the submission which was made by the respective sides during the consideration of the bail application of Bunty @ Upendra Kumar Rana is not correct in as much as Bunty @ Upendra Kumar Rana has been identified by the victim in the T.I. parade which was held on 17.06.2016.

In case of **Preeti Bhatia -Vrs.- Republic of India reported in (2015) 61 Orissa Criminal Reports 131**, it is held that there is absolute hidebound rule that bail must necessarily be granted to the co-accused where another co-accused had been granted bail. A Judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains no cogent reasons or if the same has been passed in flagrant violation of well settled principle of law and ignores to take into consideration the relevant facts essential for granting bail. Such an order can never form the basis for a claim of parity. It will be open to the Judge to reject the bail application of the applicant before him as no Judge is obliged to pass orders against his conscience merely to maintain consistency. The grant of bail is not a mechanical act.

When the co-accused Deepak Kumar Adha does not stand on the similar footing like the petitioner and when co-accused Bunty @ Upendra Kumar Rana has been granted bail on the basis of wrong submissions made by the learned counsel for the respective parties, I am of the view that the orders of those two co-accused persons cannot form the basis for claiming parity for the petitioner. Though the learned counsel for the petitioner pointed out some discrepancies in the evidence of the victim while referring to the statements of other witnesses but since at the stage of consideration of the bail application, detailed examination of the evidence and elaborate discussion on merits of the case is not required to be undertaken, I refrain from discussing such aspects which may have an adverse effect on the trial Court.

After bestowing my anxious consideration to weigh and analyse the materials available on record with utmost care and caution, the nature of accusations, the manner in which a minor girl was duped and wrongfully confined and subjected to gang rape, the punishment prescribed for the offences under which charge sheet has been submitted, prima facie availability of supported materials to establish such accusations, I am of the humble view that merely because the petitioner is in judicial custody for more than two years, it would not be proper to release him on bail. However, the learned trial Court shall do well to expedite the trial. Accordingly, the bail application stands rejected.

2018 (II) ILR - CUT- 162

S. N. PRASAD, J.

W.P.(C) NO. 9952 OF 2018

M/S. RADHA GOBINDA FOODS AND BEVERAGES (PVT.) LTD. .....Petitioner

.Vs.

CENTRAL ELECTRICITY SUPPLY UTILITY OF ODISHA & ORS. .....Opp. Parties

CONSTITUTION OF INDIA,1950 – Articles 226 and 227 – Writ petition challenging the orders passed by the Consumer Dispute Redressal Forum, Cuttack & OMBUDSMAN-I – Grievance of the petitioner against CESU relating to demand of electricity charges – Both the authorities have taken into consideration the entire aspect of the matter – Findings given cannot be said to be at fault – Held, it is the settled position of law that the High Court sitting under Article 226 of the Constitution of India can quash the order of the authority by issuing writ of certiorari if there is any error apparent on the face of record or the order is without jurisdiction or suffers from malice but the petitioner has not raised such questions nor has shown any material contrary to the findings recorded – Writ petition dismissed. (Paras 4 & 5)

Counsel for Petitioner : M/s. Bibekananda Bhuyan, Sujata Sahoo & Puspashree Mohanty.

JUDGMENT Date of Hearing & Judgment: 19.06.2018

S. N. PRASAD, J.

This writ petition is under Article 226 and 227 of the Constitution of India wherein the order dtd.23.03.2018 passed in C.C. Case No.322 of 2018 by the Grievance Redressal Forum, Cuttack and order dtd.28.2.2018 passed in Consumer Representation Case No.OM(1)-44 of 2018 by the OMBUDSMAN-I have been questioned whereby and where under the grievance of the petitioner by raising dispute relating to demand of Rs.20,36,380/- by virtue of issuance of revision of electricity bill has been declined to be interfered with.

2. The brief fact of the case of the petitioner is that the petitioner-company has established a Flour Mill in its factory premises and to run the same, made application before opposite party nos.1 and 2 for supply of electricity to its factory and in pursuance thereto the opposite parties have agreed to supply electricity to the factory premises, in view thereof an agreement has been entered into by fixing terms and conditions for supply of electricity for running the aforesaid factory. The authorities have inspected the installation work and accordingly the petitioner's factory was charged with 250 KVA sub-station on 3.8.2016. The petitioner while continuing the commercial production in the factory and the bills were raised through H.T. meter without replacing it till 19.10.2016.

Further case of the petitioner is that bereft of replacement of such meter, the opposite parties regularly raised bills on every month and the same was being paid by the petitioner without any delay. On 12.1.2018 the opposite parties have inspected the meter of the factory premises of the petitioner and raised bill amounting to Rs.20,36,380/- for the month of December, 2017 which according to the petitioner was without any supporting document and calculation sheet.

According to the petitioner the net consumption of electricity unit was 7319 but in the said bill the current consumption has been shown more than that and the consumption charges has been made to the tune of Rs.84,032.64 and arrear has been shown to the extent of Rs.20,26,998/-. The petitioner, on receipt of said bill, has made an objection but threat of disconnection of electricity line was given, hence he filed an application seeking clarification regarding such arrear reflected in the said bill, but however to no effect, hence he approached to the Consumer Grievance Redressal Forum raising the dispute which has been registered as C.C. Case No.322 of 2018 but the same has been dismissed on the ground that there was arrear for escape billing, as such the demand raised by the opposite parties cannot be said to be unjustified.

The petitioner being aggrieved with the aforesaid order, has approached to the OMBUDSMAN-1 which has been registered as Consumer Representation Case No.OM(I)-44 of 2018 but the OMBUDSMAN-I has also declined to interfere with

respect to the demand raised by the opposite parties hence this writ petition on the ground that neither the Consumer Grievance Redressal Forum nor the OMBUDSMAN-I has appreciated the implication of Regulation 97 and 98 of Orissa Electricity Regulatory Commission Distribution Code, 2004 since according to the petitioner there is applicability of Regulation 98 of OERC Distribution Code and once Regulation 98 of the Code 2004 is applicable, Regulation 97 of the aforesaid Code will be applicable which provides that no demand can be raised beyond the period of 3 months as such the order passed either by the Forum or by the OMBUDSMAN cannot be said to be justified one, hence it has been submitted to quash the aforesaid order.

3. Heard the learned counsel for the petitioner, gone through the pleadings made in the writ petition as also the orders passed by the Grievance Redressal Forum and the OMBUDSMAN-I.

This court after going through the pleading made in the writ petition as also the impugned orders, have found some undisputed facts such as supply of electricity line in the factory premises of the petitioner and raising of arrear amount to the tune of Rs.20,36,380/- in the bill issued for the month of December, 2017.

It is admitted case of the petitioner that initially power supply was made on 30.08.2016 through 3ph 4w 5 / 5Amp, 11Kv / 110v MU, subsequently as per letter No.9314 dtd.26.8.2016 the existing 3ph 4w 5 / 5Amp, 11 Kv / 110v MU was replaced by 3ph 3w 20 / 5Amp, 11Kv / 110v MU keeping all other metering arrangement as it is condition, as a result after replacement of up-graded metering unit the Multiplying Factor changed from "M.F.(100)" to "M.F.(400)".

It is also evident from the material available on record that on 20th October, 2016 and onwards the opposite parties have served monthly bills of M.F.(100) instead of M.F.(400) and on testing it on 12.1.2018, the opposite parties have added an amount of Rs.20,36,380/- for the month of December, 2017. The petitioner's case is that the amount which has been added as Rs.20,36,380/- is without any calculation.

The opposite parties have contended before the Grievance Redressal Forum as also before OMBUDSMAN-I that due to replacement of upgraded metering unit since the multiplying factor changed from M.F.(100) to M.F.(400) and it was clearly mentioned in the field meter testing report that the old meter was replaced in good condition and was not defective but due to clerical mistake the multiplying factor has not been changed in the data base resulted since 20th October, 2016 to 31.12.2017, as such the electricity bill was not raised as per the consumption made by the consumer, the petitioner herein.

On 12.1.2018, the Central MRT, Cuttack has inspected the meter and it was found in the field meter testing report that the multiplying factor has not been changed since 20th October, 2016, hence the differential billing amount calculated on

due / drawn basis and served to the consumer an amount of Rs.19,56,860/-. The field meter verification report was duly signed by the consumer's representative and also acknowledged by the parties. The Grievance Redressal Forum and the OMBUDSMAN-I, after appreciating the factual aspect regarding replacement of upgraded metering unit and not recording of the consumption in the meter after replacement of upgraded metering unit, the multiplying factor which was changed from M.F.(100) to M.F.(400), there is wrong calculation in the meter by not calculating it on the basis of multiplying factor in consequence of replacement of upgraded metering unit, as such the Grievance Redressal Forum and the OMBUDSMAN-I have reached to the conclusion that the petitioner is liable to pay the aforesaid amount since the electricity was consumed and it is due to clerical mistake the aforesaid amount could not be added to the bill, hence it is a case of escape billing, as such declined to accept the contention of the petitioner by rejecting it.

4. The sole contention raised by the petitioner is that even if it will be said to be clerical mistake in not calculating the bill by taking the replacement of upgraded metering unit from M.F.(100) to M.F.(400), even in that situation the opposite parties ought to have calculated the bill only for the period of three months but not beyond that as per the provision made in Regulation 97 of OERC Code, 2004.

It is the further contention of the petitioner that the Grievance Redressal Forum or the OMBUDSMAN-I have given finding regarding non applicability of the provision of Regulation 98 or 97 of the OERC Code, 2004. Thus, this court has gathered from the argument advanced on behalf of learned counsel for the petitioner that he is not disputing the replacement of upgraded metering unit from M.F.(100) to M.F.(400), it is also not been disputed the testing of the metering unit, it is also not been disputed the change of multiplying factor as also the clerical mistake, rather the only contention raised that even accepting all these things, the bill is to be calculated only for the period of three months immediately preceding the date of inspection as per the provision made under the provision of Regulation 97.

This court, in order to appreciate the argument advanced on behalf of learned counsel for the petitioner, has taken into consideration the provision of Regulation 97 and 98 of the OERC Code, 2004 which are being reproduced herein below for better appreciation:-

> *"**97. Billing with Defective Meter** – For the period the meter remained defective or was lost, the billing shall be done on the basis of average meter reading for the consecutive three billing periods succeeding the billing period in which the defect or loss was noticed. It shall be presumed that use of electricity through defective meter was continuing for a period of three months immediately preceding the date of inspection in case of Domestic and Agricultural consumers and for a period of six months immediately preceding the date of Inspection for all other categories of consumers, unless the onus is rebutted by the person, occupier or possessor of such premises or place.*
>
> *98. If the readings of meter working in association with Current Transformer (CT) and Potential Transformer (PT) and other auxiliary equipment, if any, are found to be incorrect*

on account of wrong connection or disconnection of such CTs, PTs and other equipment or on account of omissions or commissions in regard to multiplying factor, erroneous adoption of CT ratio, PT ratio, the billing in such cases shall be done as laid down in Regulation 97."

It is evident from the provision of Regulation 98 that the same is applicable in case if the readings of meter working in association with Current Transformer (CT) and Potential Transformer (PT) and other auxiliary equipment, if any, are found to be incorrect on account of wrong connection or disconnection of such CTs, PTs and other equipment or on account of omissions or commissions in regard to multiplying factor, erroneous adoption of CT ratio, PT ratio, the billing in such cases shall be done as laid down in Regulation 97.

Regulation 97 stipulates the provision that for the period the meter remained defective or was lost, the billing shall be done on the basis of average meter reading for the consecutive three billing periods succeeding the billing period in which the defect or loss was noticed. It shall be presumed that use of electricity through defective meter was continuing for a period of three months immediately preceding the date of inspection in case of Domestic and Agricultural consumers and for a period of six months immediately preceding the date of Inspection for all other categories of consumers, unless the onus is rebutted by the person, occupier or possessor of such premises or place.

It is evident from conjoint reading of the provisions of Regulation 97 and 98 of OERC Code, 2004 that the applicability of Regulation 98 will only come if the reading of meter working in association with current transformer and potential transformer and other auxiliary equipment and found to be incorrect on account of wrong connection or disconnection of such CTs, PTs and other equipment or on account of omission or commission in regard to multiplying factor, erroneous adoption of CT ratio, PT ratio, then only the billing will be made as per the provision of regulation 97 which contains the provision for billing with defective meter and in that situation the billing will be made on the basis of three months period immediately preceding the date of inspection.

The condition laid down under Regulation 98 is regarding reading of meter with current transformer and potential transformer which found to be incorrect and applicability of the provision of Regulation 97 will come when it is a case of defective meter. As has been stated herein above that it is not a case of defective meter, it is also not a case of reading of the meter found to be incorrect on account of wrong connection or disconnection of current transformer and potential transformers or other equipment and it is also not a case of any omission and commission in regard to multiplying factor, rather it is a case of replacement of upgraded metering unit by virtue of which the multiplying factor changed from M.F.(100) to M.F.(400) but it is due to clerical mistake the bill which was issued to the petitioner was on the basis of M.F.(100) instead of preparing it on the basis of M.F.(400) and when it was detected, the arrear has been added in the ensuing bill by making demand of Rs.20,36,380/-, hence according to my considered view it is not a case of

applicability of provision of Regulation 97 and 98 of OERC Distribution Code, 2004, hence the argument advanced on behalf of the petitioner is hereby rejected.

This court, after taking into consideration the finding recorded by the Grievance Redressal Forum as also the MOBUDSMAN-1 is of the view that both the authorities have taken into consideration the entire aspect of the matter regarding replacement of upgraded metering unit and clerical mistake by not applying the actual multiplying factor after its upgradation from M.F.(100) to M.F.(400), hence the finding given by the authorities regarding escape billing cannot be said to be at fault.

In view thereof the petitioner has failed to make out a case of issuance of writ of certiorari by invoking the jurisdiction of this court for quashing the impugned orders.

5. It is settled position of law that the High Court sitting under Article 226 of the Constitution of India can quash the order of the authority by issuing writ of certiorari if there is any error apparent on the face of record or the order is without jurisdiction or suffers from malice but the petitioner has not raised the question of jurisdiction or any malice rather issue has been raised regarding error apparent on the face of record, but this court is not satisfied with the contention raised by the petitioner of having any error apparent on the face of record, rather both the authorities have taken into consideration the factual aspects in detail and after discussing the scope of Regulation 97 and 98 of the Code, 2004, holding it not applicable in the facts of this case, have rightly declined to interfere. In view thereof this court declines to interfere with the orders impugned. In the result the writ petition fails and it is dismissed.

2018 (II) ILR - CUT- 167

S.N. PRASAD, J.

W.P.(C) NO.11330 OF 2018

MANI TIRUMALA PROJECTS PVT. LTD. .....Petitioner

.Vs.

MRUTUNJAY PATTANAYAK & ANR. .....Opp. Parties

CONSUMER PROTECTION ACT, 1986 – Section 19 – Provision for Appeal against the order passed by State Consumer Dispute Redressal Commission – Writ petition filed Challenging the said order with the plea that the principles of natural justice not followed as notice has not been served before passing the order – Notice with same address in execution proceeding served – Held plea not acceptable – Writ petition not maintainable.

"Admittedly, there is a provision of appeal U/s.19 of the Act, 1986 and it is settled that when there is statutory appeal available, exercising extra-ordinary jurisdiction by the High Court under the power conferred under Article 226 of the constitution of India will not be proper since the same will amount to encroaching upon the power of the Forum which has been created by the Legislation." *(Paras 7,8 & 9)*

Case Laws Relied on and Referred to :-

1. (2011) 14 SCC 337 : Nibedita Sharma Vrs. Cellular Operators Association of India & Ors.
2. AIR 1964 SC 1419 : Thansingh Nathmal Vrs. Superintendent of Taxes.
3. (2000) 7 SCC 668 : Charan Singh Vrs. Healing Touch Hospital.
4. (1998) 8 SCC 1 : Whirlpool Corporation Vrs. Registrar of Trade Marks, Mumbai & Ors.

Counsel for Petitioner : M/s. Tanmay Mishra, S. S. Parida & Sr. Adv. Mr. Manoj Mishra.
Counsel for Opp.Parties : -

JUDGMENT Date of Hearing & Judgment: 11.07.2018

S. N. PRASAD, J.

This writ petition is under Article 226 and 227 of the Constitution of India wherein the order / judgment dtd.31.1.2018 as contained under Annexure-1, passed by the State Consumer Disputes Redressal Commission, has been assailed.

2. The fact of the case of the petitioner is that the complainant, opposite party no.1 has filed a complaint before the State Consumer Disputes Redressal Commission U/s.17(1)(a)(i) alleging therein that there is deficiency in service on the part of the petitioner in which an order has been passed by the Commission by making the proceeding as ex-parte, even though no notice has been served upon the petitioner, therefore the petitioner had got no knowledge about the aforesaid dispute case, hence the order passed by the Commission since is in gross violation of principle of natural justice, as such the same has been sought to be quashed by this court under its extra-ordinary jurisdiction conferred under Article 226 of the Constitution of India.

3. Learned Senior Counsel appearing for the petitioner has tried to impress upon the court by placing reliance upon the order-sheet as contained under Annexure-1 by showing that notices have been issued by registered post with A.D. on 03.3.2017 but without waiting for the service report, the notices issued against the petitioner, who was opposite party before the commission, has been held to be sufficient and thereby recording non-appearance, set the proceeding as ex-parte and proceeded with the matter and finally passed an order directing the petitioner to pay Rs.93,69,576/- to the complainant within a period of one month from the date of passing of the said order, failing which the said amount will carry interest @ 12% per annum till realization.

It is the further case of the petitioner that opposite party no.1, thereafter, has filed one execution case being Execution case No.3 of 2018 U/s.27 of the Consumer Protection Act, 1986 and then only the petitioner came to know about the order passed by the Commission and thereafter the instant writ petition has been filed.

4. This court, at this stage, has raised a question regarding maintainability of the writ petition on the ground of availability of alternative remedy available under the provision of Consumer Protection Act, 1986, learned Senior Counsel has argued

out the case both on the issue of maintainability as also on merit which has been heard by this court at length.

5. The contention of the learned Sr. Counsel representing the petitioner so far as maintainability of the writ petition is that since the order passed by the Commission is in gross violation of the principle of natural justice, as such the instant writ petition is maintainable under the provision of Article 226 of the constitution of India because there is no complete embargo upon the High Court not to entertain writ petition under Article 226 of the constitution of India, rather it is self-imposed restriction and when there is violation of principle of natural justice, as per the law already settled, writ will be said to be maintainable and since there is violation of principle of natural justice, hence the instant writ petition is maintainable.

6. This court has thought it proper that before going into the merit of the case, the maintainability of the writ petition is first to be decided.

This court has gone into the provisions of Consumer Protection Act, 1986. The main purpose to promulgate the Consumer Protection Act is to provide better protection of the interest of the consumers for speedy disposal of the grievance related to the consumers which is a benevolent piece of legislation, intended to protect a large body of consumers from exploitation. The act provides for an alternative system of consumer justice by summery trial. The authority under the Act exercises quasi-judicial powers for redressal of consumer disputes. The consumer within the meaning of the Act, 1986 has been given the statutory right to file their complaints either before the Consumer Disputes Redressal Forum at the district level or before State Consumer Disputes Redressal Commission or before the National Consumer Disputes Redressal Commission, subject to its pecuniary jurisdiction.

Section 17 of the Act, 1986 stipulates about the jurisdiction of the State Commission, under which, as per sub-section 1(a)(i) the State Commission is to entertain complaints where the value of goods or services and compensation, if any, claim exceeds rupees twenty lakhs but does not exceed rupees one crore, after the amendment made by virtue of Act 62 of 2002 implemented w.e.f. 15.3.2003, earlier to that, the pecuniary jurisdiction was in between five lakhs to twenty lakhs rupees.

The commission has also been conferred with the power to entertain an appeal against the orders passed by any District Forum within the State under the provision of Sub-section (1)(a)(ii), further the Commission has been conferred with the power under Sub-Section (1)(b) to call for records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised the jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity; for ready reference the aforesaid provision is being reproduced herein below:-

"17.Jurisdiction of the State Commission. – (1) Subject to the other provisions of this Act, the State Commission shall have jurisdiction-

(a) to entertain –

(i) complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees twenty lakhs but does not exceed rupees one crore; and

(ii) appeals against the orders of any District Forum within the State; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity."

The power of appeal has been provided under the provision of Section 19 of the Act, 1986 as per which any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of section 17 may prefer an appeal against such order to the national Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed; provided that the National Commission may entertain an appeal after expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period; provided further that no appeal shall be entertain by the National Commission unless the appellant has deposited in the prescribed manner fifty per cent of the amount or rupees thirty-five thousand, whichever is less.

It is evident from the provision of section 17 that the State Commission has been conferred with the power to adjudicate under its original jurisdiction, under appellate jurisdiction as also under revisional jurisdiction.

It is evident from the provision of Section 19 of the Act, 1986 wherein express provision has been made that any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of section 17 may prefer an appeal before the National Commission. It is further evident that under the provision of Section 19 there is no reference in the aforesaid provision regarding the appeal to be preferred if the order has been passed U/s.1(a)(ii) or (1)(b).

At present, this court is not concerned with the power conferred with the Commission U/s.(1)(a)(ii) or (1)(b), rather the present case is concerned with an order which has been passed by the Commission in exercise of power conferred under Section (1)(a)(i) for which, the express and explicit provision has been made U/s.19 to prefer an appeal, hence there is availability of statutory remedy of appeal available to the petitioner since the State Commission has passed an order U/s.(1)(a)(i) of Section 17 of the Act, 1986.

It is in this backdrop it is to be examined by this court as to whether on the ground of availability of alternative remedy of statutory appeal U/s.19 of the Act, 1986, the instant writ petition will be held to be maintainable?

7. Learned Senior Counsel for the petitioner has tried to impress upon this court that there cannot be any embargo upon the High Court not to entertain an application Under Article 226 of constitution of India even though there is availability of alternative remedy since it is self imposed restriction by the High Court and law is well settled that if the order is without jurisdiction or in violation of principle of natural justice, writ can be entertained by the high Court and to bring this case under the fold of violation of principle of natural justice, it has been submitted that the order passed by the State Commission is without following the principle of natural justice since even in spite of the fact that notices issued by the Commission has not been served, the proceeding was set ex-parte and thereafter the final order has been passed, thereby the opportunity to defend has not been provided, hence the aforesaid order passed by the Commission is without following the principle of natural justice, as such the said order is amenable under the judicial scrutiny by this court under Article 226 of the Constitution of India.

8. This court has gone through the order sheet annexed as Annexure-1 to the writ petition wherein it is evident from order no.2 dtd.3.3.2017 by which notices have been issued to the opposite party by registered post with A.D. on the point of admission with a direction to the opposite party no.1 to take steps for service of notice by submitting requisites by 6.3.2017, thereafter on 6.4.2017 and 17.4.2017 SR not back. It is evident from the order dtd.17.4.2017 that the Commission taking into consideration the provision of Section 28(A) has held the service to be sufficient and set the proceeding ex-parte, thereafter preceded for final hearing and accordingly final order has been passed.

The sole question is as to whether the order by which the Commission has set the proceeding ex-parte can be said to be under the fold of violation of principle of natural justice, the same is to be scrutinized in the light of the provision of section 28(A) which stipulates the provision of service of notice etc. wherein the following provisions have been made:-

> *"28A. Service of notice, etc.— (1) All notices, required by this Act to be served, shall be served in the manner hereinafter mentioned in sub-section (2).*
>
> *(2) The service of notices may be made by delivering or transmitting a copy thereof by registered post acknowledgment due addressed to opposite party against whom complaint is made or to the complainant by speed post or by such courier service as are approved by the District Forum, the State Commission or the National Commission, as the case may be, or by any other means of transmission of documents (including FAX message).*
>
> *(3) When an acknowledgment or any other receipt purporting to be signed by the opposite party or his agent or by the complainant is received by the District Forum, the State Commission or the National Commission, as the case may be, or postal article containing the notice is received back by such District Forum, State Commission or the National Commission, with an endorsement purporting to have been made by a postal employee or by any person authorized by the courier service to the effect that the opposite party or his agent or complainant had refused to take delivery of the postal article containing the notice or had refused to accept the notice by any other means specified in sub-section (2) when tendered or transmitted to him, the District Forum or the State Commission or the National Commission, as the case may be, shall declare that the notice had been duly served on the opposite party or to the complainant: Provided that where the notice was properly addressed, pre-paid and*

duly sent by registered post acknowledgment due, a declaration referred to in this sub-section shall be made notwithstanding the fact that the acknowledgment has been lost or mislaid, or for any other reason, has not been received by the District Forum, the State Commission or the National Commission, as the case may be, within thirty days from the date of issue of notice.

(4) All notices required to be served on an opposite party or to complainant shall be deemed to be sufficiently served, if addressed in the case of the opposite party to the place where business or profession is carried and in case of complainant, the place where such person actually and voluntarily resides."

It is evident from the aforesaid provision as quoted above that all the notices required by this Act to be served, shall be served in the manner hereinafter mentioned in sub-section (2).

Sub section (2) stipulates that the service of notices may be made by delivering or transmitting a copy thereof by registered post acknowledgment due addressed to opposite party against whom complaint is made or to the complainant by speed post or by such courier service as are approved by the District Forum, the State Commission or the National Commission, as the case may be, or by any other means of transmission of documents.

Subsection (3) stipulates that when an acknowledgement or any other receipt purporting to be signed by the opposite party or his agent or by the complainant is received by the District Forum, the State Commission or the National Commission, as the case may be, or postal article containing the notice is received back by such District Forum, State Commission or the National Commission, with an endorsement purporting to have been made by a postal employee or by any person authorized by the courier service to the effect that the opposite party or his agent or complainant refused to take delivery of the postal article containing the notice or refused to accept the notice by any other means specified in sub-section (2) when tendered or transmitted to him, the District Forum or the State Commission or the National Commission, as the case may be, shall declare that the notice had been duly served on the opposite party or to the complainant.

The aforesaid provision is in the case when the notice is served back with an endorsement given by the postal employee to the effect that the opposite party or the complainant had refused to take delivery of the postal article, provided that where the notices have properly addressed, pre-paid and duly sent by registered post acknowledgment due, a declaration referred to in this sub-section shall be made notwithstanding the fact that the acknowledgment has been lost or mislaid or for any other reason, has not been received by the District Forum, the State Commission or the National Commission, as the case may be, within thirty days from the date of issue of notice.

Sub-section (4) stipulates for the deemed service of notice as per which all notices required to be served on an opposite party or to complainant shall be deemed to be sufficiently served, if addressed in the case of the opposite party to the place where business or profession is carried and in case of complainant, the place where such person actually and voluntarily resides.

Thus sub-section (3) stipulates a case of refusal of the notice with an endorsement of the postal employee if the notice was properly addressed, a declaration referred in this sub-section shall be made notwithstanding the fact that the acknowledgment has been lost or mislaid and not been received by the District Forum or the State Commission or the National Commission within thirty days from the date of issue of notice and the same will be deemed to have been sufficiently served.

Here in the instant case the notices have been issued on 3.3.2017 under registered post with acknowledgment due but service report has not back, as such the Commission, taking aid of the provision of section 28(A) of the Act, 1986, more particularly sub-section (3) and (4), has given a declaration of deeming service and thereafter set the proceeding ex-parte.

The petitioner is claiming that he has not received the notice but it is evident from the material available on record, more particularly the address of the petitioner furnished by opposite party no.1 in the plaint of Execution Case No.3 of 2018 (Annexure-3) wherein the address has been furnished as "Authorized Officer / Chief Executive Officer, M/s. Mani Tirumala Projects, Private Ltd. (Mani Tribhuvan), At - 9th Floor, 164/1, Maniktala Main Road, Kolkata, 700054" and when the said address has been compared with the copy of agreement entered in between the petitioner with the opposite party no.1, as would be evident from Annexure-4 at page 29 wherein the address has been written as "Mani Tirumala Projects Private Limited having its registered office at Mani Square (IT), 9th Floor, 164/1, Maniktala Main Road, Kolkata, 700054, West Bengal, India", as such the address as stipulated in the aforesaid agreement is almost same to that of the address furnished by the opposite party no.1 in the plaint of the Execution Case No.3 of 2018 as under Annexure-3, the address upon which the notices have been issued by the State Commission and when in the Execution proceeding, notices have been issued on the aforesaid address furnished by the opposite party no.1, the petitioner has immediately in receipt of that notice as has been admitted by the petitioner at paragraph 4 of the writ petition which casts doubt upon the conduct of the petitioner to the effect that when the address furnished by the opposite party no.1 in the original complaint application ground has been taken that the notice has not been served but when on the same address the Commission issues notice in the Execution Proceeding, the same has been received by the petitioner. This prima facie shows that the petitioner, only in order to delay the original proceeding pending before the Commission, has, with ulterior motive, not accepted the said notice and now taking the ground of violation of principle of natural justice. Therefore, in my considered view, on the basis of the facts and circumstances discussed hereinabove this case will not come under the fold of violation of principle of natural justice, as such the principle laid down for entertaining a writ petition under Art.226 of the constitution of India in case of violation of principle of natural justice is not available to the petitioner.

9. Admittedly, there is a provision of appeal U/s.19 of the Act, 1986 and it is settled that when there is statutory appeal available, exercising extra-ordinary jurisdiction by the High Court under the power conferred under Article 226 of the constitution of India will not be proper since the same will amount to encroaching upon the power of the Forum which has been created by the Legislation.

In this connection Hon'ble Apex Court in the case of **Nibedita Sharma Vrs. Cellular Operators Association of India and Others** reported in (2011) 14 SCC 337, while dealing with situation of like nature, after discussing the principle to entertain a writ petition even in case of availability of statutory appeal and relying upon the judgment rendered in the case of **Thansingh Nathmal Vrs. Superintendent of Taxes** reported in AIR 1964 SC 1419, has been pleased to hold at paragraph 18 of the said judgment that the Act, 1986 was enacted for the better protection of the interests of consumers by making provision for the establishment of consumer councils and other authorities for the settlement of consumer disputes. The object and purpose of enacting the Act, 1986 is to provide for simple, inexpensive and speedy remedy to the consumers who have grievance against defective goods and deficient services. This benevolent piece of legislation intended to protect a large body of consumers from exploitation.

Further at paragraph 19 it has been observed that prior to the Act, 1986, the consumers were required to approach the Civil Court for securing justice for the wrong done to them and it is a known fact that the decision of the litigation instituted in the civil court could take several years. Under the Act, 1986, the consumers are provided with an alternative, efficacious and speedy remedy before the Consumer Forums at district, State and national level.

At paragraph 21 of the said judgment reference of a judgment rendered by Hon'ble Apex Court in the case of **Charan Singh Vrs. Healing Touch Hospital** reported in (2000) 7 SCC 668 has been made wherein the reference of paragraphs 11 and 12 of the said judgment is made, for ready reference both the paragraphs are being quoted herein below:-

> *"11. The Consumer Protection Act is one of the benevolent pieces of legislation intended to protect a large body of consumers from exploitation. The Act provides for an alternative system of consumer justice by summary trial. The authorities under the Act exercise quasi-judicial powers for redressal of consumer disputes and it is one of the postulates of such a body that it should arrive at a conclusion based on reason. The necessity to provide reasons, howsoever, brief in support of its conclusion by such a forum, is too obvious to be reiterated and needs no emphasizing. Obligation to give reasons not only introduces clarity but it also excludes, or at any rate minimizes, the chances of arbitrariness and the higher forum can test the correctness of those reasons. Unfortunately we have not been able to find from the impugned order any reasons in support of the conclusion that the claim of the appellant is 'unrealistic' or 'exaggerated' or 'excessive'. Loss of salary is not the sole factor which was required to be taken into consideration.*
>
> *12. While quantifying damages, consumer forums are required to make an attempt to serve ends of justice so that compensation is awarded, in an established case, which not only serves the purpose of recompensing the individual, but which also at the same time, aims to bring about a qualitative change in the attitude of the service provider. Indeed, calculation of damages depends on the facts and circumstances of each case. No hard-and-fast rule can be laid down for universal application. While awarding compensation, a Consumer Forum has to take into account all relevant factors and assess compensation on the basis of accepted legal principles, on moderation. It is for the Consumer Forum to grant compensation to the extent it finds it reasonable, fair and proper in the facts and circumstances of a given case according to the established judicial standards where the claimant is able to establish his charge."*

At paragraph 24 it has been observed that Section 19 of the Act, 1986 provides for remedy of appeal against an order made by the State Commission in exercise of its powers under sub-clause (i) of clause (a) of Section 17. If sections 11, 17 and 21 of the Act, 1986 which relate to the jurisdiction of the District Forum, the State Commission and the National Commission, there does not appear any plausible reason to interpret the same in a manner which would frustrate the object of legislation.

10. This court, after close scrutiny of the aforesaid judgment rendered by Hon'ble Supreme Court, is of the view that when statutory appeal is available, entertaining the instant writ petition will not be proper, rather the purpose and object of the Act, 1986 will be frustrated.

11. This court, before parting with the order, thinks it proper to deal with the judgments relied upon by the learned counsel for the petition.

This court after going across the issue involved in the judgment reported in 2015 SCC Online Cal 10423 of the High Court of Calcutta in the case of **HDFC Bank Limited and another Vrs. Shibendu Ghosh and another**, found that the petitioner of that case has preferred an appeal U/s.15 of the Consumer Protection Act, 1986 before the State Disputes Redressal Commission, West Bengal against an order passed by the District Forum wherein the ex-parte order was passed against which an application was filed before the District Forum for vacating the ex-parte order and restoration of the plaint case but the said application was rejected by the District Forum against which an appeal U/s.15 of the Consumer Protection Act, 1968 was filed before the State Commission of West Bengal who turned down to pass order to allow any opportunity of hearing on merit and challenging the said order the Hon'ble Calcutta High Court has came to conclusion that the Commission has also been vested with power of Revision U/s.17(1)(b), as such when the aforesaid point was raised before the Commission, the Commission ought to have gone into the merit of the claim of the parties exercising the aforesaid power, but instead of doing so the Commission has declined to interfere with the same, hence the order passed by the Commission has been quashed and the matter was remitted before the Commission for hearing the case afresh.

In the judgment rendered by this court in the case of **Manoj Kumar Jena Vrs. Secretary, State Transport Authority and Others** passed in W.P.(C) No.12341 of 2016 decided on 22.7.2016, this court, after taking into consideration the fact that there is violation of principle of natural justice, hence relying upon the judgment rendered by Hon'ble Supreme Court in the case of **Whirlpool Corporation Vrs. Registrar of Trade Marks, Mumbai and others** reported in (1998) 8 SCC 1, has entertained the writ petition.

While in the judgment rendered by Hon'ble High Court of Bombay at Aurangabad reported in 2017 SCC Online Bom 7459 where the factual aspect was that the first appeal which has been preferred by the appellant has been dismissed for default even before issuance of notice to the respondent, hence the Hon'ble Bombay High Court, by taking into consideration the fact that the appeal was dismissed in default has set aside the order.

But the fact of the case in hand is quite different since in the instant case an ex-parte order passed by the Commission has been assailed in this writ petition even though there is a specific provision of alternative remedy of appeal provided U/s.19 of the Act, 1986, as per the detail discussion made in the preceding paragraphs, since the petitioner has not been able to make out a case to entertain this writ petition even on the ground of availability of alternative remedy, hence on the fact of the case in hand, the judgment relied upon by the learned counsel for the petitioner is not applicable.

12. In view thereof, this court is not inclined to entertain this writ petition on the ground of availability of alternative remedy of appeal under the provision of the Act, 1986, as such this court is not going into the merit of the issue as raised by the petitioner in the instant writ petition. Accordingly the writ petition stands dismissed.

2018 (II) ILR - CUT- 176

S.N. PRASAD, J.

W.P.(C) No.969 OF 2010 & CONTC NO.2289 OF 2012

GANESWAR ROUT .....Petitioner
(In both W.P.(C)& CONTC)

.Vs.

COLLECTOR-CUM-CHAIRMAN, DIST. RED CROSS BRANCH, BALASORE & ORS. .....Opp. Parties
(in writ petition)

RANJIT KU. MOHANTY & ORS. .....Opp. parties
(in contempt petition)

CONSTITUTION OF INDIA,1950 – Articles 226 and 227 read with Article 12 – Writ Petition – Direction is sought for payment of petitioner's arrear dues and salary as per the terms and conditions of the appointment order and the agreement against Dist. Red Cross Branch – Question arose regarding maintainability of the writ petition by way of preliminary objection on the ground that the opposite party is not coming under the fold of within the meaning of State as stipulated, under Article 12 of the Constitution of India – Question was discussed and answered.

"Provision of Article 12 of the Constitution, as per the definition contained therein, the "State" includes the Government and Parliament of India and the Government and legislature of each State as well as "all local or other authorities within the territory of India or under the control of the Government of India". The word "other authority" in Article 226 of the Constitution of India needs to be appreciated by this Court and the tests/principles which are to be applied for ascertaining as to whether a particular body can be treated as "other authority" or not is to be assessed, if an authority violates the fundamental right or other legal rights of any person or citizen, which has already been dealt with in the judgment referred hereinabove. There is no confusion about the settled position of law that if such an authority violates the fundamental right or other legal rights of any person or citizen, as the case may be, a writ petition can be filed under Article 226 of the Constitution of India invoking

extraordinary jurisdiction of the High Court and seeking appropriate direction, order or writ. However, under Article 226 of the Constitution of India, the power of the High Court is not limited to the Government or authority which qualifies to be a "State" under Article 12. Power is extended to issue directions, orders or writs "to any person or authority". (Paras 7 & 8)

Case Laws Relied on and Referred to :-

1. 1981 (1) SCC 722 : Ajay Hasia vrs. Khalid Mujib Sehravardi
2. (1979) 3 SCC 489 : Ramana Dayaram Shetty vrs. International Airport Authority of India.
3. (2002) 5 SCC 111 : Pradeep Kumar Biswas vrs. Indian Institute of Chemical Biology.
4. (2005) 4 SCC 649 : Zee Telefilms Ltd. vrs. Union of India.
5. (1989) 2 SCC 691 : Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust vrs. V.R. Rudani.
6. (1997) 3 SCC 571 : K. Krishnamacharyuly vrs. Sri Venkateswara Hindu College of Engineering.
7. (2005) 6 SCC 657 : Binny Ltd. vrs. V. Sadasivan.
8. (2015) 4 SCC 670 : K.K. Saksena vrs. International Commission on Irrigation & Drainage.

For Petitioner : M/s. A.K. Nanda, A. Sahoo, G.N. Sahu, M/s. Dillip Ku. Mohapatra, N. Nayak.

For Opp. Parties : M/s. Saurjya Kanta Padhi, M/s. A.K., Choudhury, S.B. Dash. M. Padhi, M/s.Anand Das, K.K. Das, S.S. Mohanty, B.Panigrahi.

JUDGMENT Date of Hearing & Judgment : 13.07.2018

S. N. PRASAD, J.

The instant writ petition is under Article 226 and 227 of the Constitution of India seeking a direction from this Court upon the opposite parties to pay the petitioner's arrear dues and salary as per the terms and conditions of the appointment order and the agreement.

The contempt petition has been filed for non-compliance of the order dated 08.02.2010 passed in the instant writ petition by which this Court has directed the opposite parties to pay the current salary of the petitioner from the month of January 2010 till final disposal of the writ petition.

2. Case of the petitioner in brief is that he has been appointed in terms of an advertisement as Joint Secretary in the District Red Cross Branch, Balasore on 31.03.2005 with the specific condition that he will get apart from the salary, HRA, DA, increment and other criteria applicable to the similar rank of the State Govt. Gazetted Officers status. The petitioner in pursuance to the aforesaid appointment order has joined the service and started discharging his service but the salary has been paid without making payment of allowance i.e. HRA, DA, increments and other criteria applicable to the State Government employee as stipulated in the appointment order dated 31.03.2005, hence this writ petition.

Learned counsel for the petitioner submits by referring to the agreement dated 2.4.2005, more particularly clause 2.1 and 2.2 questioning the action of the authorities in not releasing allowances as stipulated therein.

It is the case of the petitioner that when the appointment order along with agreement is containing a specific condition regarding the financial benefit, the petitioner is entitled to get the aforesaid financial benefit but not extending the same is an arbitrary exercise of the authority.

3. Counter affidavit has been filed by the opposite party-Society, wherein it has been submitted that the petitioner has been appointed in terms of an advertisement dated 20.12.2004 which has been issued on the basis of a proceeding held on 25.11.2004, wherein it has been decided by the opposite party that in the District Red Cross Branches on the monthly honorarium (consolidated) to the tune of Rs.5000/-, from which Orissa State Branch through ODMP II will subsidize its share of Rs.3500/- and the District Branch Red Cross will contribute Rs. 1500/- till the project ends i.e. December, 2007.

It has been stated that since specific condition regarding the financial benefit to be given to one or the other appointees is on the basis of monthly honorarium (consolidated), as such there is no question of making payment of DA, HRA etc., hence the same is not applicable, as such it has been submitted that the petitioner's service is co-terminous with the Project and as per the proceeding dated 25th November 2004, the Project has ended in December 2007 and as such he will get remuneration until December 2007.

However, it has been stated that the remuneration has been paid and as such in view of the condition referred in the proceeding dated 25.11.2004, the petitioner is not entitled to get the benefit of D.A., HRA etc. Further ground has been taken regarding maintainability of the writ petition by saying that the Red Cross Society is not a State, as such not amenable under the writ jurisdiction of this Court since it is not coming under the fold of Article 12 of the Constitution of India.

It has further been stated that the agreement which has been annexed by the petitioner on 2.4.2005 is forged one, since the stamp paper has been purchased by him only on 6.4.2005, as such there cannot be any agreement prior to purchase of the aforesaid stamp paper which would be evident from the extract of the Register showing the purchase of stamp paper, hence the petitioner has committed forgery, further it has been stated that the petitioner was the custodian of all record, as such he has committed fraud by inserting the conditions of getting salary by committing forgery which would be evident from the date of purchase of the stamp paper as stated hereinabove.

4. Learned counsel for the petitioner while rebutting the aforesaid stand taken by the opposite parties and by putting reliance upon the rejoinder has submitted that no fraud has been committed rather the petitioner has entered with an agreement with the Collector who happens to be the Chairman of the Society dated 2.4.2005, as such the contention raised by the petitioner that there is intention of fraud is far from truth. The fact regarding custodian of the documents has also been denied.

5. This Court, after hearing the learned counsel for the parties thinks it proper to take up the issue of the maintainability of the writ petition under Article 226 of the Constitution of India as has been raised by the opposite parties by way of preliminary objection on the ground that the opposite party is not coming under the fold of within the meaning of State as stipulated, under Article 12 of the Constitution of India.

This Court has examined the pleading and the material available on record and before entering into this issue, thinks it proper to discuss about the scope of Article 226 vis-à-vis the definition of the State within the meaning of Article 12 of the Constitution of India and to discuss the principle laid down by the Hon'ble Supreme Court in catena of judgments to answer the issue as to whether the District Red Cross Society is a State within the meaning of Article 12 or not.

6. This Court has examined the judgment rendered by the constitution Bench of the Hon'ble Supreme Court rendered in the case of **Ajay Hasia vrs. Khalid Mujib Sehravardi** reported in 1981 (1) SCC 722, wherein this tests were culled out from its earlier judgment in the case of **Ramana Dayaram Shetty vrs. International Airport Authority of India**, (1979) 3 SCC 489, in the case of **Ajay Hasia** (supra) at para-9 it has been referred, which is being quoted herein below:-

> "(1) One thing is clear that if the entire share capital of the corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.
>
> (2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.
>
> (3) It may also be a relevant factor …whether the corporation enjoys monopoly status which is State conferred or State protected.
>
> (4)Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.
>
> (5) If the functions of the corporation are of public importance and closely related to governmental function, it would be a relevant factor in classifying the corporation as an instrumentality or agency of the Government.
>
> (6) Specifically, if a department of the Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of the Government."

The judgment rendered in the case of **Pradeep Kumar Biswas vrs. Indian Institute of Chemical Biology**, (2002) 5 SCC 111, wherein at para-40, it has been laid down that the picture that ultimately emerges is that the tests formulated in **Ajaya Hasia** (supra) are not rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be - whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found, then the body is a State within the meaning of Article 12, on the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

In the case of **Zee Telefilms Ltd. vrs. Union of India**,(2005) 4 SCC 649, the Hon'ble Supreme Court while dealing with the issue as to whether the Board of

Control for Cricket in India (BCCI) is "State" within the meaning of Article 12 of the Constitution. After detailed discussion on the functioning of BCCI, the Constitution Bench concluded that it was not a "State" under Article 12 and made following observations at para-30;

> "**30.** However, it is true that the Union of India has been exercising certain control over the activities of the Board in regard to organizing cricket matches and travel of the Indian team abroad as also granting of permission to allow the foreign teams to come to India. But this control over the activities of the Board cannot be construed as an administrative control. At best this is purely regulatory in nature and the same according to this Court in **Pradeep Kumar Biswas (supra)** case is not a factor indicating a pervasive State control of the Board."

7. It is evident from the aforesaid judgment as referred hereinabove that if the authority/body can be treated as "State" within the meaning of Article 12 of the Constitution of India, indubitably a writ petition under Article 226 would be maintainable against such an authority/body for enforcement of fundamental and other rights. Article 12 appears Part III of the Constitution or it pertains to fundamental rights. Therefore, the definition contained in Article 12 is for the purpose of application of the provisions contained in Part-III. Article 226 of the Constitution of India, which deals with powers of the High Courts to issue certain writs, inter alia, stipulates that every High Court has the power to issue directions, orders or writs to any person or authority, including, in appropriate cases, any Government, for the enforcement of any of the rights conferred by Part III and for any other purpose.

Provision of Article 12 of the Constitution, as per the definition contained therein, the "State" includes the Government and Parliament of India and the Government and legislature of each State as well as "all local or other authorities within the territory of India or under the control of the Government of India". The word "other authority" in Article 226 of the Constitution of India needs to be appreciated by this Court and the tests/principles which are to be applied for ascertaining as to whether a particular body can be treated as "other authority" or not is to be assessed, if an authority violates the fundamental right or other legal rights of any person or citizen, which has already been dealt with in the judgment referred hereinabove.

8. There is no confusion about the settled position of law that if such an authority violates the fundamental right or other legal rights of any person or citizen, as the case may be, a writ petition can be filed under Article 226 of the Constitution of India invoking extraordinary jurisdiction of the High Court and seeking appropriate direction, order or writ. However, under Article 226 of the Constitution of India, the power of the High Court is not limited to the Government or authority which qualifies to be a "State" under Article 12. Power is extended to issue directions, orders or writs "to any person or authority".

The expression "any person or authority" is to be taken in the wider meaning as has been held in the case of **Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust vrs. V.R. Rudani,** (1989) 2 SCC 691, wherein dispute arose between the Trust which was managing and running science college and teachers of the said college. It pertained to payment of certain employment related benefits like basic pay etc. The matter was referred for its decision before the Chancellor of Gujarat University, who passed an order which has been accepted by the University as well as the State Government and a direction was issued to all affiliated colleges to pay their teachers in terms of the said award. However, the aforesaid Trust running the science college did not implement the award. Teachers filed the writ petition seeking mandamus and direction to the Trust to pay them their dues of salary, allowances, provident fund and gratuity in accordance therewith. It is in this context an issue arose as to whether the writ petition under Article 226 of the Constitution was maintainable against the said Trust which is admittedly not a statutory body or authority under Article 12 of the Constitution as it was a private Trust running an educational institution. The High Court held that the writ petition was maintainable and the said view was upheld by this Court in the aforesaid judgment.

In the aforesaid judgment, observation made by the Hon'ble Supreme Court in the aforesaid judgment as contained in Paras 15 to 20, are relevant for the present, as such the same are being produced herein below:-

> "**15.** If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellant Trust was managing the affiliated college to which public money is paid as government aid. Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions, The aided institutions like government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. So are the service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty existence of this relationship, mandamus cannot be refused to the aggrieved party.
>
> **17.** There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The 'public authority' for them means everybody which is created by statute-and whose powers and duties are defined by statute. So government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities'. But there is no such limitation for our High Courts to issue the writ 'in the nature of mandamus'. Article 226 confers wide powers on the High Court to issue writs in the nature of prerogative writs. This a striking departure from the English law. Under Article 226, writs can be issued to 'any person or authority'. It can be issued 'for the enforcement of any of the fundamental rights and for any other purpose.'

> **20.** The term 'authority' used in Article 226, in the context, must receive a liberal meaning like the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words 'any person or authority' used in Article 226 are therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other persons or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the persons or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."

It is evident from the aforesaid judgment, the Hon'ble Supreme Court has spelled out two exceptions to the writ of mandamus; (i) if the rights are purely of a private character, no mandamus can issue; and (ii) if the management of the college is purely a private body "with no public duty", mandamus will not lie. The Hon'ble Supreme Court in the aforesaid case has clarified that since the Trust in the said case was an aiding institution, and due to that reason, it discharges public function, like government institution, by way of imparting education to students, more particularly when rules and regulations of the affiliating university are applicable to such an institution, being an aided institution. In such a situation, it has been held therein that the service conditions of academic staff were not purely of a private character as the staff had super-aided protection by university's decision creating a legal right and duty relationship between the staff and the management.

9. In the judgment referred in the case of **K. Krishnamacharyuly vrs. Sri Venkateswara Hindu College of Engineering,** (1997) 3 SCC 571, wherein at para-4, it has been held by the Hon'ble Supreme Court that when there is an interest created by the Government in an institution to impart education, which is a fundamental right of the citizens, the teachers who impart the education get an element of public interest in performance of their duties. In such a situation, remedy provided under Article 226 would be available to the teachers. The aforesaid two cases pertain to educational institutions and the function of imparting education.

In the case of **Binny Ltd. vrs. V. Sadasivan**, (2005) 6 SCC 657, the Hon'ble Supreme Court has clarified that though writ can be issued against any private body or person, the scope of mandamus is limited to enforcement of public duty. It is the nature of duty performed by such person/body which is the determinative factor as the Court is to enforce the said duty and the identity of authority against whom the right is sought is not relevant. Such duty can either be statutory or even otherwise, but, there has to be public law element in the action of that body.

In the case of **K.K. Saksena vrs. International Commission on Irrigation & Drainage**, (2015) 4 SCC 670, the International Commission on Irrigation & Drainage (in short ICID) since was not funded by the Government nor was discharging any public duties any function under any statute, as such the Hon'ble

Supreme Court has scrutinized the only question therein as to whether it is discharging public duty or positive application of public nature and the Hon'ble Supreme Court agreeing and biased that it has not discharged public duty which is not amenable under Article 226 of the Constitution of India.

10. It is, thus, evident that the element of public duty is to be seen vis-à-vis if the rights are purely of a private character as has been held in the case of **Anadi Mukta Sadguru** (supra) by the Hon'ble Supreme Court, hence this Court in order to examine this aspect of the matter as to whether the right which is being claimed by the petitioner is purely of a private character ?

If the answer will be that it is entirely private, mandamus will not be issued, but certainly if there will be public element, the petitioner is entitled for issuance of writ of mandamus upon the opposite parties for redressal of his grievance.

11. In order to assess this, the facts in hand is to be seen wherein, the relief sought for by the petitioner is regarding individual claim to give benefit of DA, HRA etc. which admittedly is a right purely of a private character and as such applying the ratio laid down in the case of **Anadi Mukta Sadguru (supra),** according to considered view of this Court, the present case is not fit to exercise the power conferred under Article 226 of the Constitution of India on the ground that the relief sought for by the petitioner is purely private in nature, otherwise also the writ petition is not maintainable for the reason that so many disputed question of fact has been raised; for example the petitioner has relied upon an appointment letter vis-à-vis the agreement as contained under Annexure-3, which documents are seriously being disputed by the opposite party by taking a specific stand that the agreement or the appointment letter is by way of forgery and also the stand has been taken that the appointment has been made in terms of the minutes of meeting dated 25.11.2004, wherein conditions stipulated under the heading of remuneration of Joint Secretary for the District Branch is only to pay monthly honorarium (consolidated) to be shared in between the IRCB, OSB and DRCB, Balasore, in the ratio of Rs.3500/- and Rs.1500/- respectively, but contrary to aforesaid stipulation made in the aforesaid minutes of meeting dated 25.11.2004, the appointment letter dated 31.03.2005, the reference of Rs. 5000/- although has been given but the same has been shown to be a salary along with DA, HRA and increment.

12. Now, question is that when the advertisement has been issued in terms of the proceeding of meeting dated 25.11.2004 containing therein the honorarium (consolidated) for the position of Rs. 5000/-, then how in the appointment letter, reference of HRA, DA has been referred. The question depends upon determination of factual aspect, hence on that ground also since disputed question of fact is involved in this writ petition, the writ petition cannot be entertained.

Basing upon the aforesaid reasons, according to my considered, the writ petition is not maintainable, as such the writ petition is dismissed.

13. It has been stated by the learned counsel for the petitioner and as has been evident from the order dated 08.02.2010 passed by this Court that there is direction to pay current salary from the month of January 2010 till disposal of the writ petition and due to non-compliance of the aforesaid order, contempt petition being CONTC No.2289 of 2012 has been filed, wherein a show cause has been filed in which stand has been taken that salary as per the admissibility has been paid but learned counsel for the petitioner has taken a stand that the DA, HRA etc. has not been paid.

Since this Court is not deciding the issue with respect to the DA, HRA etc. for the reasons stated above, however this Court has passed interim order to make payment of current salary, which has already been paid, hence there is no reason to proceed further with the contempt petition. Accordingly, the contempt petition is dismissed.

2018 (II) ILR - CUT- 184

J.P. DAS, J.

CRIMINAL REVISION. No. 1021 OF 2017

BHABESWAR RANA ……..Petitioner

.Vs.

STATE OF ODISHA (VIG.) ……..Opp-Party.

CODE OF CRIMINAL PROCEDURE, 1973 – Section 239 – Rejection of petition for discharge and framing of charge under section 12 of the Prevention of Corruption Act,1988 against the Informant as an abettor for not supporting the prosecution case – Whether rejection proper – Held, no, as the abetment always precedes the act of commission or omission whether implemented or not in order to create the liability.

"Thus, it was held that 'abetment' as per Indian Penal Code involves active complicity on the part of the abettor at a point of time prior to or at the time of the actual commission of the offence and it is the primary requirement that the abettor substantially assists the main accused towards the commission of the offence. In the instant case, as stated earlier, the petitioner did not support the prosecution case during the investigation while recording his statement under section 164 of the Cr.P.C.. In the cited case as aforesaid, the petitioner who was charged under Section 12 of the P.C. Act resiled from his earlier statement while deposing in the court during the trial and it has been held that the alleged acts did not make out an offence under section 12 of the P.C. Act against the accused."

(Paras 7 and 8)

Case Laws Relied on and Referred to :-

1. (2017) 67 OCR 81 : (Kamal Kumar Nanda -v- State of Orissa,Vigilance)

For Petitioner : M/s. J.Samantaray, R.L.Pradhan, G.Das,
For Opposite Party : Sri Sangram Das, Standing Counsel(Vigilance)

JUDGMENT Date of Hearing : 29.06.2018 Date of Judgment : 25.07.2018

J.P.DAS, J

This revision is directed against the order dated 13.09.2017 passed by the learned Special Judge, Vigilance, Phulbani in G.R. Case No.70 of 2013(V)/G.R. Case

No.29 of 2011(V) framing charges against the present petitioner under Section 12 of the Prevention of Corruption Act, 1988, rejecting an application filed on behalf of the petitioner under Section 239 of the Cr.P.C. to discharge him from the alleged offences.

2. Prosecution case is that the present petitioner as informant lodged an F.I.R. before the Deputy Superintendent of Police, Vigilance, Phulbani on 23.06.2011 alleging that he had been to the electric office at Manamunda and requested the Junior Engineer concerned, the principal accused, Brahmananda Sahu for giving electric connection to his shop. He alleged that the said Junior Engineer demanded an amount of Rs.20,000/- for giving such commercial connection and the request made by the informant-petitioner to waive such demand, was not paid heed to. Basing on his F.I.R, Vigilance P.S. Case no.29 of 2011 was registered under Section 7 of the Prevention of Corruption Act and a trap was laid on 26.06.2011. It is further alleged that the concerned Junior Engineer was caught red handed by the vigilance officials with tainted money of Rs.20,000/- and the investigation was taken up.

3. In course of investigation, the witnesses were examined. But, the informant-petitioner while giving his statement under Section 164 of the Cr.P.C. resiled from his earlier version denying any such demand by the concerned Junior Engineer or payment made by him. Since he resiled from his earlier version, he along with the concerned Junior Engineer was charge-sheeted under Section 13(2) read with Section 13(1)(d)/7 and 12 of the Prevention of Corruption Act,1988 with the allegation that the present petitioner by not supporting his earlier version, abetted the commission of the alleged offence by co-accused.

4. Both the accused persons filed separate petitions under Section 239 of the Cr.P.C. and by the impugned order, the learned trial court rejecting the applications framed charges as per the charge-sheet subsequently.

5. It is submitted in the present application that the learned trial court seriously erred in law by holding that the petitioner having resiled from his earlier statement became an abettor to commission of the offence by the co-accused. It was submitted on behalf of the petitioner that the alleged trap was laid on 24.06.2011 wherein the concerned Junior Engineer was allegedly caught red handed and the statement of the petitioner was recorded on 01.11.2011. Thus, it was submitted that the petitioner having given his statement five months after the alleged occurrence, could not have been an abettor by retrospective effect for the offence. It was further submitted that in this context the observation of the learned trial court that by resiling from his earlier statement, the petitioner relegated to the date of occurrence to be an abettor is unacceptable in law. It was also submitted by the learned counsel for the petitioner that simply because the petitioner did not support the prosecution case in his statement, he cannot be charged as an abettor in view of the settled proposition of law as has been held in a decision of this Hon'ble Court reported in (***2017) 67 OCR 81 (Kamal Kumar Nanda versus State of Orissa,Vigilance).***

6. Per contra, it was submitted by learned counsel for the State, Vigilance, that the petitioner submitted the F.I.R. and also participated in the operation and gave the

tainted money to the co-accused. Further the other witnesses who took part in the operation have also supported the prosecution case in their statements. Hence, by deviating from his earlier version while giving his statement under Section 164,Cr.P.C. the petitioner became a conspirator to protect the offender and thereby became liable under Section 12 of the Prevention of Corruption Act. It was further submitted that a conspiracy is a continuing offence which continues to subsist till its executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts, he would be held guilty under Section 120-B of the I.P.C.. Thus, it was submitted that the observation of the trial Court that the act of the petitioner on a subsequent date, can be relegated to the date of commission of offence was correct.

7. Firstly, the petitioner has been charge-sheeted for the offence under Section 12 of the Prevention of Corruption Act, not under 120-B of the I.P.C.. Section 12 of the P.C. Act provides that whoever abets any offence punishable under Section 7 or Section 11 of the Act whether or not that offence is committed in consequence of that abetment, shall be liable for punishment. Thus, the abetment always precedes the act of commission or omission whether implemented or not in order to create the liability.

8. It is profitable to note here that absolutely in a similar circumstance like the present case, on detailed discussion on the matter of abetment and liability of the accused, this Court in the case of Kamal Kumar Nanda (supra) has observed that if a witness in his deposition during trial deviates from his previous statement recorded either under Section 161,Cr.P.C. or Section 164, Cr.P.C., it cannot be said that he has abetted the accused who is facing trial for commission of an offence. Reference has been made to Section 107 of the I.P.C. wherein the explanation-2 provides:

> "whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act and thereby facilitates the commission thereof, is said to aid the doing of that Act."

Thus, it was held that 'abetment' as per Indian Penal Code involves active complicity on the part of the abettor at a point of time prior to or at the time of the actual commission of the offence and it is the primary requirement that the abettor substantially assists the main accused towards the commission of the offence. In the instant case, as stated earlier, the petitioner did not support the prosecution case during the investigation while recording his statement under section 164 of the Cr.P.C.. In the cited case as aforesaid, the petitioner who was charged under Section 12 of the P.C. Act resiled from his earlier statement while deposing in the court during the trial and it has been held that the alleged acts did not make out an offence under section 12 of the P.C. Act against the accused

9. Being in full agreement with the observation made in the cited decision in Kamal Kumar's case (supra), I find absolutely no reason to take a different view to hold that the alleged acts against the petitioner made out the offence under Section 12 of the Prevention of Corruption act against him.

10. In view of the aforesaid facts, circumstances and the position of law, the impugned order dated 13.09.2017 passed by the learned Special Judge, Vigilance, Phulbani in G.R. Case No.70 of 2013(V)/G.R. Case No.29 of 2011(V) is set-aside and the petitioner is discharged from the offence punishable under Section 12 of the Prevention of Corruption Act, as alleged.The CRLREV is disposed of accordingly.

2018 (II) ILR - CUT- 187

J.P. DAS, J.

TRPCRL NO.74 OF 2018

P.SRICHANDAN ……...Petitioner.

.Vs.

STATE OF ODISHA ……..Opp-Party.

CODE OF CRIMINAL PROCEDURE, 1973 – Section 407 – Application for transfer of the case – Petitioner, who is an accused and facing trial for the offences punishable under Section 376(2)(i) of the I.P.C. and Section 6 of the POCSO Act – Ground of transfer is that the Presiding Officer of the said court is vindictive towards the petitioner – Not found to be correct – Case cannot be transferred merely because favourable orders were not passed.

"Transfer of a case from the jurisdiction of one court to that of another, is not a routine matter. Such a prayer should not be allowed unless there exist sufficient grounds and reasons for such action. Peculiarly, in this case, the petitioner alleges personal vindictiveness against the Presiding Officer, that too two successive Presiding Officers, only because some adverse orders were passed against him. As submitted on behalf of the State, and as seen from the copies of the order-sheet placed on behalf of the petitioner, adjournments have been granted to the petitioner for production of the certified copy of the order of this Court and rejecting his application under Section 317 Cr.P.C. N.B.W.(A) has been issued. Placing a copy of one hazira, it was submitted by the learned counsel for the petitioner that the petitioner had signed on the said application and hence he was physically present in the court. But, if the petitioner was physically present in the court, there could not have been any necessity of filing of application under Section 317 of the Cr.P.C. Starting a Misc. Case against the bailer is the legal procedure when the accused remains absent in the court and the bail bonds become liable for forfeiture. Thus, I do not find any illegality or perversity in the orders so as to presume that the Presiding Officers of the court had any personal vendetta against the petitioner." (Para 6)

Case Laws Relied on and Referred to :-

1. (2018) 6 SCC 358 : (Harita Sunil Parab -V- State (NCT OF DELHI) and others) and (Harita Sunil Parab -V- Railway Protection Force, Ratlam and another)

For Petitioner : M/s. A.K.Hota
For Opp. Party : Standing Counsel

JUDGMENT Date of Hearing : 26.07.2018 Date of Judgment : 31.07.2018

J.P.DAS, J

This application has been filed by the petitioner with a prayer to transfer S.T. Case No.222/149 of 2015-17 corresponding to Rengali P.S.Case No.130 dated 15.09.2015 from the Court of learned Second Additional Sessions Judge-cum-Special Judge, Sambalpur, to any other court outside the undivided district of Sambalpur namely, Sambalpur, Jharsuguda, Deogarh, Kuchinda and Bargarh.

2. The petitioner is the accused in the case facing trial for the offences punishable under Section 376(2)(i) of the I.P.C. and Section 6 of the POCSO Act.

3. It has been submitted on behalf of the petitioner that he is a practicing advocate in the Sambalpur Bar Association. Due to some personal rivalry, he has been falsely implicated in this case with concocted allegations without any material evidence against him. He alleged that an application was filed by him before the learned trial court to discharge from the offences along with another application calling for certain documents from the Police Station. He alleged that both the applications were hurriedly disposed of by the then Presiding Officer of the court without giving opportunity of hearing to the learned counsel for the petitioner. The petitioner assailed the said order before this Court in Criminal Misc. Case No.1862 of 2018, which was disposed of by order dated 25.06.2018 with a direction to the learned trial court to re-consider and dispose of the application filed by the petitioner afresh by affording reasonable opportunity of hearing to the petitioner as well as to Special Public Prosecutor. It has been submitted that despite the intimation to the learned trial court that such an order has been passed by this court and some delay in obtaining the certified copy of the order of this Court, the learned trial court with a vindictive attitude did not grant time to the petitioner and on 02.07.2018 despite an application filed by the counsel for the petitioner under Section 317 of the Cr.P.C. seeking time to produce the certified copy of the order of this court, the learned trial court rejected the application and directed for issuance of N.B.W(A) against the accused. The counsel for the petitioner filed an application to recall the said order which was adjourned for consideration. In the meantime the Presiding Officer of the court was transferred being succeeded by another Officer. It is submitted that on 05.07.2018 the petitioner was physically present in the court along with his counsel and produced the certified copy of the order of this Court. It has been submitted that the succeeding Presiding Officer in the Court being influenced by his predecessor, kept the order reserved till 09.07.2018, and on that date, rejecting the application of the petitioner, simultaneously started a proceeding against the bailor who was none other than the wife of the petitioner-accused.

4. It was submitted by the learned counsel for the petitioner that the Presiding Officer of the said court being vindictive towards the petitioner for reasons unknown, has passed the aforesaid order to put the petitioner to harassment and

humiliation. It was also submitted that due to the circumstances, the petitioner along with his family has left Rengali and is staying at Kanas in the district of Puri. Submitting that all the orders passed by the learned trial court are products of inherent malafides and extraneous consideration causing serious prejudice to the petitioner, it has been prayed to transfer the proceeding to any court outside the jurisdiction of the undivided Sambalpur Judgeship.

5. Learned counsel on behalf of the State submitted that the allegations and the apprehensions as expressed on behalf of the petitioner, are absolutely baseless and imaginary. It cannot be believed that successive Senior Judicial Officers would carry any personal grudge against the petitioner. It was also submitted that there was absolutely no illegality in the orders passed by the learned trial court since time was granted to the petitioner to produce the certified copy of the order of this Court and despite direction for personal attendance of the accused, his petition seeking further time through the counsel was rightly rejected and N.B.W.(A) was issued.

6. Transfer of a case from the jurisdiction of one court to that of another, is not a routine matter. Such a prayer should not be allowed unless there exist sufficient grounds and reasons for such action. Peculiarly, in this case, the petitioner alleges personal vindictiveness against the Presiding Officer, that too two successive Presiding Officers, only because some adverse orders were passed against him. As submitted on behalf of the State, and as seen from the copies of the order-sheet placed on behalf of the petitioner, adjournments have been granted to the petitioner for production of the certified copy of the order of this Court and rejecting his application under Section 317 Cr.P.C. N.B.W.(A) has been issued. Placing a copy of one hazira, it was submitted by the learned counsel for the petitioner that the petitioner had signed on the said application and hence he was physically present in the court. But, if the petitioner was physically present in the court, there could not have been any necessity of filing of application under Section 317 of the Cr.P.C. Starting a Misc. Case against the bailor is the legal procedure when the accused remains absent in the court and the bail bonds become liable for forfeiture. Thus, I do not find any illegality or perversity in the orders so as to presume that the Presiding Officers of the court had any personal vendetta against the petitioner. In this context, I feel it profitable to quote the observation of the Hon'ble Apex Court as reported in **(2018) 6 SCC 358 (** ***Harita Sunil Parab versus State (NCT OF DELHI) and others) and (Harita Sunil Parab Versus Railway Protection Force, Ratlam and another*****)**

> "The apprehension of not getting a fair and impartial enquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. No universal or hard-and fast rule can be prescribed for deciding a transfer petition, which will always have to be decided on the facts of each case. Convenience of a party may be one of the relevant considerations but cannot override all other considerations such as the availability of witnesses exclusively at the original place, making it virtually impossible to continue with the trial at the place of transfer, and progress of which would naturally be impeded for that reason at the transferred place of trial. The convenience of the parties does not mean the convenience of the petitioner alone who approaches the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society".

In the instant case, the victim is a child and the other witnesses are local persons. In such circumstances taken together with the positions of law, I do not find any merit in the present application to transfer the case from the court wherein it is pending now. Accordingly, this application stands rejected.

7. However, it is directed that the petitioner is given liberty to surrender before the learned trial court within a fortnight hence and on such event, the learned trial court shall do well to recall the N.B.W.(A) and to allow the petitioner to continue on his previous bail, and proceed with the trial of the case according to law. The N.B.W.(A) issued against the petitioner shall not be executed till a fortnight hence. The application is disposed of accordingly.

2018 (II) ILR - CUT- 190

J.P. DAS, J.

CRIMINAL REVISION NO.390 OF 2018

BHABAGRAHI PATRA .....Petitioner

.Vs.

STATE OF ORISSA .....Opp. party

CODE OF CRIMINAL PROCEDURE 1973 – Section 167(2) read with Section 36(A)(4) of the N.D.P.S. Act – Accused in custody for the offence punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act – Application for bail for not filing the charge sheet within time – No application by prosecution seeking extension of time or indicating the progress of investigation – Accused is entitled for bail.

"In this case, as detailed above, the prosecution report was not submitted even on 183rd day. When the accused persons moved the application for bail, there was no application filed by the Public Prosecutor seeking further detention of the accused persons. Lastly, there is absolutely no mention as to the progress of investigation or the compelling reasons to keep the accused in custody. Mere in-capacity of the Investigating Officer due to his personal illness to submit the prosecution report in time can never be said to be the compelling reasons to keep the accused behind the bars." *(Para 6)*

For the Petitioner : M/s. Mohendra Kumar
Mohapatro, S. Khan & B. Parida.

For the Opp. Party : Additional Standing Counsel.

JUDGMENT Date of Hearing : 18.07.2018 Date of Judgment : 31.07.2018

J.P. DAS, J.

This application has been filed assailing the order dated 09.04.2018 passed by the learned Sessions Judge-cum-Special Judge, Bolangir in 2(a) C.C. Case No.10 of 2017 rejecting the application filed by the petitioner to be released on bail under Section 167(2) of the Criminal Procedure Code (in short 'the Cr.P.C.') read with Section 36(A)(4) of the N.D.P.S. Act.

2. The petitioner is an accused in the aforesaid case for the offence punishable under Section 20(b)(ii)(C) of the N.D.P.S. Act with the allegation of unauthorized possession of 46 Kgs. of contraband Ganja. Since the charge-sheet was not submitted despite completion of 180 days from the date of arrest of the petitioner, he moved an application before the learned trial court to be released on bail as per provisions under Section 167(2) of the Cr.P.C. read with Section 36(A)(4) of the N.D.P.S. Act. Learned trial court rejected his application by the impugned order by observing that one application was filed by the concerned Public Prosecutor seeking extension of time for submission of charge-sheet.

3. It was submitted by learned counsel on behalf of the petitioner in the present application that the petitioner was arrested on 8.10.2017 and 180 days were completed on 06.04.2018. He moved the application on 09.04.2018. It was submitted that the observation made by the learned trial court that the concerned Public Prosecutor has moved an application for extension of time was not correct. It was submitted that after filing of the application by the present petitioner on 09.04.2018, in order to save the face of the prosecution, the Public Prosecutor filed an application on the same day mentioning that the concerned Investigating Officer had met with an accident while on duty and was bed-ridden for two and half of months for which the investigation could not be progressed so as to submit the prosecution report within the stipulated time of 180 days. It was further mentioned in the petition that the concerned Investigating Officer joined his duty on 07.04.2018 and hence, one month time was prayed for to complete the investigation. On the submissions made on behalf of the petitioner, learned trial court was asked to submit the copy of the application made by the Public Prosecutor, which has been submitted and is on record.

4. It was submitted on behalf of the petitioner that by the time the petitioner filed his application, there was no application or petition filed by the Public Prosecutor for extension of time. It was further submitted that as per mandates of law, the Public Prosecutor, after application of his mind to the submission made by the Investigating Officer, must indicate the progress of the investigation, and the compelling reasons for seeking the detention of the accused beyond the period of 180 days. But in this case, the application filed by the Public Prosecutor did not mention about the progress of the investigation, nor did it mention the compelling reasons to keep the accused in detention beyond the period of 180 days except mentioning that the prosecution report could not be submitted since the Investigating Officer met with an accident and was bed-ridden. Thus, it was submitted that no reason was assigned by the Public Prosecutor justifying the further detention of the accused in custody.

5. The position of law as submitted on behalf of the petitioner is well recognized. The petitioner has filed the certified copy of the order-sheet of the learned trial court of the date 09.04.2018. It is seen there from that the learned counsel for the accused persons filed a petition to enlarge the petitioner-accused on bail on

the ground stated therein. Copies of the said petitions were served on the Public Prosecutor and thereafter, it was directed to put up the file later for hearing of the bail application. There was no mention about any application filed by the Public Prosecutor by then. On the same day at a later stage, the application was filed by the Public Prosecutor wherein in the very 1st paragraph it has been mentioned that the accused persons have filed a petition praying to enlarge them on bail on the grounds stated therein. This goes to show that the application was filed by the Public Prosecutor subsequent to the application filed on behalf of the petitioner. It is the mandate of law that if the prosecution report is not submitted within 180 days, a statutory right accrues in favour of the accused to be released on bail, unless extension of time for submission of charge-sheet, mentioning the compelling reasons to keep the accused persons in custody, is prayed for by the Public Prosecutor before the learned trial court.

6. In this case, as detailed above, the prosecution report was not submitted even on 183rd day. When the accused persons moved the application for bail, there was no application filed by the Public Prosecutor seeking further detention of the accused persons. Lastly, there is absolutely no mention as to the progress of investigation or the compelling reasons to keep the accused in custody. Mere in-capacity of the Investigating Officer due to his personal illness to submit the prosecution report in time can never be said to be the compelling reasons to keep the accused behind the bars.

7. As per the settled positions of law, (**Hitendra Vishnu's case)** reported in **A.I.R.1994 (S.C.) 2623**, the use of expression of submission of the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the specific period is important and indicative of the legislative intent not to keep the accused in custody unreasonably and to grant extension of time only on the report of the Public Prosecutor. It was further observed by the Hon'ble Apex Court that the report of the Public Prosecutor, therefore, is not merely a formality but a very vital report because, the consequence of its acceptance affects the liberty of an accused.

As found out in the case at hand, there was not even any report submitted by the Public Prosecutor seeking extension of time by the time, the application for bail was filed by the accused persons. Hence, a valuable right had already accrued in favour of the accused persons to be released on bail and it could not have been denied by taking into consideration an application subsequently filed by the Public Prosecutor according to the requirements of the law.

8. Accordingly, it is directed that the impugned order dated 09.04.2018 passed by the learned Sessions Judge-cum-Special Judge, Bolangir in 2(a) C.C. Case No.10 of 2017 is set aside and it is further directed that in this case, the petitioner be released on bail on such terms and conditions as deemed just and proper by the said court. The Criminal Revision is disposed of accordingly.

———