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2018 (II) ILR - CUT- 593 (S.C.)

ABHAY MANOHAR SAPRE, J & INDU MALHOTRA, J.

CRIMINAL APPEAL NO. 1276 OF 2010

DASHRATH SINGH CHAUHAN ……Appellant(s)

.Vs.

CENTRAL BUREAU OF INVESTIGATION ……....Respondent(s)

PREVENTION OF CORRUPTION ACT, 1988 – Sections 7, 13(2) read with 13 (1) (d) and Section 120-B of IPC – Both the accused persons acquitted of the charge under section 120-B and only the appellant was convicted for the charge under the PC Act – Plea that the basic requirements i.e proving of demand of bribe and its acceptance was absent – Whether the conviction can be maintained? – Held, No.

"Since in order to attract the rigors of Sections 7, 13(2) read 13(1)(d) of PC Act, the prosecution was under a legal obligation to prove the twin requirements of "demand and acceptance of bribe money by the accused", the proving of one alone but not the other was not sufficient. The appellant is, therefore, entitled for acquittal from the charges framed against him under the PC Act too." *(Para 32)*

Case Laws Relied on and Referred to :-

1. (1972) 2 SCC 466) Para 15 : Bhagat Ram Vs. State of Rajasthan.
2. (1996) 11 SCC 720) : M.K. Harshan Vs. State of Kerala.

For Petitioner : Mr. Rishi Malhotra [P-1]
Respondent : Mr. Mukesh Kumar Maroria [R-1]

JUDGMENT Date of Judgment : 09 10 2018

ABHAY MANOHAR SAPRE, J.

1) This appeal is directed against the final judgment and order dated 20.07.2009 passed by the High Court of Delhi at New Delhi in Criminal Appeal No.447 of 2001 whereby the High Court dismissed the appeal filed by the appellant herein and upheld his conviction and sentence awarded by order dated 31.05.2001 passed by the Special Judge, Delhi in C.C. No.53 of 1995 acquitting him of the charge under Section 120B of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and convicting him for the charges under Sections 7, 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the PC Act") and sentenced him to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.40,000/under Sections 7 and 13(2) read with Section 13(1)(d) of the PC Act cumulatively, in default of payment of fine, he shall further undergo simple imprisonment for six months.

2) In order to appreciate the issues involved in this appeal, few facts need mention herein below.

3) In short, the case of the prosecution is that the appellant was an employee of Delhi Electric Supply Undertaking (DESU). At the relevant time, he was working on the post of Inspector.

4) On 28.03.1995, the complainant Arun Kumar (PW1) lodged an FIR under Section 7 read with Section 13(2) of the PC Act against the appellant and another employee of DESU namely, Rajinder Kumar complaining *inter alia* that in January 1995, he applied for installation of an electric connection for his factory and for that purpose he met the appellant in his office where he demanded from him Rs.4000/for doing the above said work and told him that unless he pays a sum of Rs.4000/as bribe to him, it is not possible to install the electric connection.

5) On the basis of the said FIR, the CBI through its Inspector Mr. Kaul (PW6) formed a raiding party on 29.03.1995 to implicate the appellant and then reached to his office with one shadow witness Mahinder (PW2).

6) On reaching the office, the Complainant told the appellant that he has brought Rs.4000/- as demanded by him. The appellant, however, told the Complainant to give the said money to Rajinder Kumar, who accepted the money from him. No sooner Rajinder Kumar accepted the money, than PW2 and PW6 entered in the room and caught Rajinder Kumar with the bribe money.

7) This led to initiation of the prosecution of the appellant and coaccused Rajinder Kumar for commission of the offences punishable under Sections 7, 13(2) and 13(1)(d) of the PC Act read with Section 120B of IPC in the Court of Special Judge Delhi. The prosecution examined their witnesses to prove the three charges framed against both the accused. The appellant also adduced defense evidence.

8) By judgment dated 31.05.2001, the Trial Court (Special Judge) held that the prosecution failed to prove the case of any conspiracy between the appellant (A1) and coaccused Rajinder Kumar (A2) in relation to the offences in question and, therefore, the charge of conspiracy against them under Section 120B IPC was held as not made out. Both the accused were, therefore, acquitted of the charge of conspiracy under Section 120B IPC.

9) The finding on this issue recorded by the Trial Court in Paras 14 and 16 reads as under:

> "**14. In the case before us, there is not even slightest evidence about the existence of a criminal conspiracy between A1 and A2. Once this had been established, only then we could have read the statement of both the accused, not only against each one of them, but against the other of them and also for proving the existence of criminal conspiracy as such.**
>
> **16. There is no such situation before us. There are certain statements only. In any case, once conspiracy is not established, even the statement, made by A1 against A2 are viceversa, cannot be read in evidence."**

10) The Trial Court then disbelieved the evidence of the Investigating OfficerMr. Kaul (PW6) on the ground that he himself was of a doubtful integrity because the High Court, in one case, had directed registration of a bribe case against him and, therefore, his evidence in this case cannot be relied on (See Para 17 of the judgment of the Trial Court) but the Trial Court believed the evidence of shadow witness (PW2 Mahinder Lal) for holding the appellant guilty of the offences punishable under the PC Act.

11) The Trial Court accordingly acquitted Rajinder Kumar (A2) from all the charges but convicted the appellant(A1) for the offences punishable under Sections 7 and 13 (2) read with 13(1)(d) of the PC Act.

12) The State, however, accepted the judgment of the Trial Court and did not file any appeal against the acquittal of Rajinder Kumar nor even file any appeal against the acquittal of the appellant from the offence under Section 120B IPC.

13) The appellant (A1), felt aggrieved by his conviction and sentence under the PC Act, filed criminal appeal in the High Court at Delhi. By impugned order, the High Court dismissed the appeal and affirmed the judgment of the Trial Court which has given rise to filing of the present appeal by way of special leave by the appellant(A1) in this Court.

14) Heard learned counsel for the parties.

15) Mr. Rishi Malhotra, learned counsel appearing for the appellant (A1) while assailing the legality and correctness of the impugned order mainly argued two points.

16) In the first place, learned counsel contended that the Trial Court as well as the High Court having rightly acquitted both the accused (A1 and A2) insofar as the offence of conspiracy under Section 120B is concerned and further having rightly acquitted Rajinder Kumar (A2) from all the charges under the PC Act but erred in not acquitting the appellant(A1) from the offences under Sections 7, 13(2) read with Section 13(1)(d) of the PC Act.

17) It was his submission that once the charge of conspiracy under Section 120B IPC was held as "not proved" against the appellant(A1) and the coaccused Rajinder Kumar(A2) and further its benefit was rightly extended to Rajinder Kumar (A2) for his clean acquittal from the charges under the PC Act, the same benefit should have been extended to the appellant(A1) as well.

18) In the second place, the learned counsel contended that the appellant's conviction is based only on the evidence of a shadow witness (PW2) whereas the evidence of the Investigation Officer, Mr. Kaul (PW6) was not believed due to his doubtful integrity.

19) It was his submission that the basic requirements in such a case, namely, proving of "demand of bribe and its acceptance by the appellant" was not proved much less beyond reasonable doubt. It was urged that at best what the prosecution was able to prove was the "demand" of bribe made by the appellant to the Complainant but not "its acceptance" because the evidence, in clear terms, established coupled with the findings of the Courts below that the appellant did not accept the money but it was accepted and recovered from the possession of Rajinder Kumar(A1).

20) It was, therefore, urged that since the acceptance of bribe money was not proved *qua* the appellant and nor it was proved that Rajinder Kumar accepted it for and on behalf of the appellant, the appellant's conviction under any of the provisions of the PC Act much less under Sections 7, 13(2) read with Section 13(1)(d) was not legally sustainable and hence it deserves to be set aside.

21) In reply, learned counsel for the respondent (CBI) supported the reasoning and the conclusion arrived at by the two Courts below and contended that no case for any interference in the impugned judgment is made out and hence the appeal be dismissed.

22) Having heard the learned counsel for the parties and on perusal of the record of the case, we find force in the submissions of the learned counsel for the appellant.

23) It is not in dispute that the prosecution had framed three charges against the appellant and coaccused Rajinder Kumar and two out of the three charges, namely, Charge Nos. 1 and 2 were based on the conspiracy. It is also not in dispute that the Trial Court, on appreciation of the evidence, held that the prosecution failed to prove the charge of conspiracy under Section 120B IPC against the appellant and Rajinder Kumar (A1) and accordingly acquitted

both of them from the said charge. It is also not in dispute that so far as coaccused Rajinder Kumar (A1) is concerned, he was acquitted from all the charges framed under the PC Act. It is also not in dispute that the State neither challenged the clean acquittal of Rajinder Kumar and nor challenged the part acquittal of the appellant in the High Court by filing any appeal. This, therefore, attained finality.

24) In substance, the charges against both the accused were that the appellant entered into a criminal conspiracy with Rajinder Kumar to demand and accept illegal bribe money of Rs. 4000/- from the complainant Arun Kumar as a motive or reward for showing him official favour in the matter of installation of electricity power connection and, in furtherance thereof, the appellant on 28.03.1995 as also on 29.03.1995 around 11.30 AM to 11.55 AM in the DESU office demanded Rs.4000/- from the complainant and directed him to pay the said money to Rajinder Kumarco accused, who accepted the said money on his behalf.

25) In our considered opinion, when the charge against both the accused in relation to conspiracy was not held proved and both the accused were acquitted from the said charge which, in turn, resulted in clean acquittal of Rajinder Kumar from all the charges under the PC Act, a *fortiori*, the appellant too was entitled for his clean acquittal from the charges under the PC Act.

26) It is not the case of the prosecution that the appellant had conspired with another person and even though the identity of the other person was not established, yet the appellant held guilty for the offence under Section 120B IPC. On the contrary, we find that the case of the prosecution was that the appellant conspired with one Rajinder Kumar to accept the sum of Rs.4000/as illegal gratification from Arun Kumar the complainant.

27) Once Rajinder Kumar so also the appellant stood acquitted in respect of the charge of conspiracy and further Rajinder Kumar coaccused was also acquitted from the charges under the PC Act, the charges against the appellant must also necessarily fall on the ground. (**See Para 15 Bhagat Ram vs. State of Rajasthan,** (1972) 2 SCC 466).

28) Even assuming that despite the appellant being acquitted of the charge relating to conspiracy and notwithstanding the clean acquittal of Rajinder Kumar from all the charges, the prosecution failed to prove the charge against the appellant under Sections 7, 13(2) read with Section 13(1)(d) of the PC Act.

29) It is for the reason that in order to prove a case against the appellant, it was necessary for the prosecution to prove the twin requirement of "demand and the acceptance of the bribe amount by the appellant". As mentioned above, it was the case of the prosecution in the charge that the appellant did not accept the bribe money but the money was accepted and recovered from the possession of Rajinder Kumar–coaccused (A1).

30) In such circumstances, there is no evidence to prove that the appellant directly accepted the money from the Complainant. Since the plea of conspiracy against the appellant and Rajinder Kumar failed, it cannot be held that money (Rs.4000/-) recovered from the possession of Rajinder Kumar was as a fact the bribe money meant for the appellant for holding him guilty for the offences punishable under Sections 7, 13(2) read with 13(1)(d) of the PC Act. It is more so when the benefit of such acquittal from the charge of conspiracy was given to Rajinder Kumar but was not given to the appellant.

31) In our view, the prosecution, therefore, failed to prove the factum of acceptance of bribe money of Rs.4000/- by the appellant from the Complainant on 29.03.1995 as per the charges framed against him.

32) Since in order to attract the rigors of Sections 7, 13(2) read 13(1)(d) of PC Act, the prosecution was under a legal obligation to prove the twin requirements of "demand and acceptance of bribe money by the accused", the proving of one alone but not the other was not sufficient. The appellant is, therefore, entitled for acquittal from the charges framed against him under the PC Act too. (**See para 8 of M.K. Harshan** vs. **State of Kerala,** (1996) 11 SCC 720)

33) In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. The impugned judgment is set aside. The conviction and the sentence awarded to the appellant under Sections 7, 13(2) read with Section 13(1)(d) of the PC Act by the Courts below are set aside and the appellant is set free from the said charges.

34) If the appellant is already on bail, it is not necessary for him to surrender.

2018 (II) ILR - CUT- 599 (S.C.)

R.F. NARIMAN, J & NAVIN SINHA, J.

CIVIL APPEAL NO. 10873 OF 2018
[ARISING OUT OF SLP(CIVIL) NO.5895 OF 2018]

M/S HINDON FORGE PVT. LTD. & ANR. .....Appellants

Vs.

THE STATE OF UTTAR PRADESH THROUGH DISTRICT MAGISTRATE GHAZIABAD & ANR. .....Respondents

WITH

CIVIL APPEAL NO. 10874 OF 2018
[ARISING OUT OF SLP(CIVIL) NO.12841 OF 2018]

SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITIES INTEREST ACT, 2002 – Section 17(1) read with rule 8 of the Security Interest (Enforcement) Rules, 2002 – The question whether an application under section 17(1) at the instance of a borrower, is maintainable even before physical or actual possession of secured assets is taken by banks/financial institutions in exercise of their powers under section 13(4) of the Act read with rule 8 of the Security Interest (Enforcement) Rules, 2002 – After discussing the various provisions of the Act, the 2002 Rules and judgments of the Supreme Court, the law was laid down with a positive note – It is hereby declared that the borrower/debtor can approach the Debts Recovery Tribunal under section 17 of the Act at the stage of the possession notice referred to in rule 8(1) and 8(2) of the 2002 Rules – The appeals are to be sent back to the Court/Tribunal dealing with the facts of each case to apply this judgment and thereafter decide each case in accordance with the law laid down by this judgment.

Case Laws Relied on and Referred to :-

1. (2004) 4 SCC 311 : Mardia Chemicals Ltd. .Vs. Union of India.
2. (2013) 9 SCC 620 : Standard Chartered Bank .Vs. V. Noble Kumar & Ors.
3. (2008) 1 SCC 125 : Transcore .Vs. Union of India & Anr.
4. (2017) 4 SCC 735 : Canara Bank .Vs. M. Amarender Reddy & Anr.
5. (2014) 5 SCC 610 : Mathew Varghese .Vs. M. Amritha Kumar and Ors.
6. AIR 2018 SC 3063 : ITC Limited .Vs. Blue Coast Hotels Ltd. And Ors.

For Petitioner : M/s. Pahlad Singh Sharma
Respondent : M/s. O.P.Gaggar [R-2]

JUDGMENT Date of Judgment 01.11. 2018

R.F. NARIMAN, J.

1. Leave granted.

2. These matters come to us from a Full Bench judgment of the Allahabad High Court dated 06.02.2018. By an order of reference dated 19.09.2017, a learned Single Judge noticed divergent opinions expressed by two different Benches of the Allahabad High Court on the question whether an application under section 17(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as the "**SARFAESI Act**" or the "**Act**"), at the instance of a borrower, is maintainable even before physical or actual possession of secured assets is taken by banks/financial institutions in exercise of their powers under section 13(4) of the Act read with rule 8 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the "**2002 Rules**"). After discussing the various provisions of the Act, the 2002 Rules and judgments of the Supreme Court, the Full Bench summarised the true legal position according to it as follows:

> "**29.** The upshot of legal position that emerges from the judgments of the Supreme Court, insofar as the question referred to for our consideration is concerned, briefly stated, is as under:
>
> (a) The remedy of an application under Section 17(1) is available only after the measures under Section 13(4) have been taken by the Bank/FIs against the borrower.
>
> (b) The issue of notice under Section 13(2) to the borrower and communication contemplated by Section 13(3-A) stating that his representation/objection is not acceptable or tenable, does not attract the application of principles of natural justice. In other words, no recourse to an application under Section 17(1), at that stage, is available/maintainable.
>
> (c) The borrower/person against whom measures under Section 13(4) of the Act are likely to be taken, cannot be denied to know the reason why his application or objections have not been accepted, as a fulfilment of the requirement of reasonableness and fairness in dealing with the same.
>
> (d) One of the reasons for providing procedure under Section 13(4) read with Rule 8 for taking possession is that the borrower should have a clear notice before the date and time of sale/transfer of the secured assets, in order to enable him to tender the dues of the secured creditor with all other charges or to take a remedy under Section 17, at appropriate stage.
>
> (e) The time of 60 days is provided after the "measures" under Section 13(4) have been taken so as to enable the borrower to approach DRT and in such an eventuality, the DRT shall have a jurisdiction to pass any order/interim order, may be subject to conditions, on the application under Section 17(1) of the Act.
>
> (f) The scheme of relevant provisions of the Act and the Rules shows that the Bank/FIs have been conferred with powers to take physical (actual) possession of

the secured assets without interference of the Court and the only remedy open to the borrower is to approach DRT challenging such an action/measure and seeking appropriate relief, including restoration of possession, even after transfer of the secured assets by way of sale/lease, on the ground that the procedure for taking possession or dispossessing the borrower was not in accordance with the provisions of the Act/Rules.

(g) If the dues of the secured creditor together with all costs, charges and expenses incurred by them are tendered to them (secured creditors) before the
date fixed for sale or transfer, the assets shall not be sold or transferred and in such an eventuality, possession can also be restored to the borrower.

(h) If the possession is taken before confirmation of sale, it cannot be stated that the right of the borrower to get the dispute adjudicated upon is defeated. The borrower's right to get back possession even after the sale remains intact or stands recognised under the scheme of the provisions of the Act.

(i) The borrower is not entitled to challenge the reasons communicated or likely measure, to be taken by the secured creditor under Section 13(4) of the Act, unless his right to approach DRT, as provided for under Section 17(1), matures. The borrower gets all the opportunities, at different stages, either to clear the dues or to challenge the measures under Section 13(4) or even to challenge the reasons rejecting his objections/not accepting the objections, after the measures under Section 13(4) have been taken.

(j) While the banks have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting DRT with authority, after conducting an adjudication into the matters, to declare any such action invalid and also to restore even though the possession may have been made over to the transferee.

(k) The safeguards provided under the scheme make it further clear that if the Bank/FIs proceeds to take actual possession of the assets that cannot be stalled by the interference of a Court.

(l) If DRT after examining the facts and circumstances of the case and on the basis of evidence produced by the parties, comes to the conclusion that any of the measures referred to in Section 13(4), taken by the secured creditor is not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid and restore possession to the borrower.

(m) Any transfer of secured asset after taking possession thereof by the secured creditor shall vest in the transferee all rights in, or in relation to the secured asset as if the transfer had been made by the owner of such secured assets.

(n) No remedy under Section 17(1) can be taken by the borrower unless he loses actual (physical) possession of the secured assets. In other words, before losing actual possession or unless the secured creditor obtains physical possession of the secured asset under Section 13(4), it is not open to the borrower to take a remedy under Section 17(1) of the Act."

The court then went on to hold:

> "**31.** Section 13(4) of the Act provides that if the borrower fails to discharge his liability within the period prescribed under Section 13(2), the secured creditor can take recourse to one of the measures, such as taking possession of the secured assets, including the right to transfer by way of lease, assignment or sale for realising the secured asset. From the language of this provision, it is further clear that taking measure under Section 13(4)(a) would mean taking actual (physical) possession, and if we do not read it in the said provision to say so, the right and power of the secured creditor to transfer the assets by way of lease, assignment or sale for realizing the secured assets, as provided for therein, would render redundant. In other words, putting such an interpretation on the language of Section 13(4) of the Act would be atrocious and would defeat the very objective of bringing the legislation. It is, therefore, not possible to hold that taking "measures" under Section 13(4)(a) also means taking only "symbolic possession" and not "physical possession". We record further reasons to say so in following paragraph. From the scheme of Section 13(4) and Sections 14 and 17 of the Act and the relevant Rules 8 and 9 of the Rules, it appears to us that unless physical possession is taken, the measure, contemplated under Section 13(4), cannot be stated to have been taken.
>
> **31.1.** One of the rights conferred on a secured creditor is to transfer by way of lease, the secured asset, possession or management whereof has been taken under clauses (a) or (b) of sub-section (4) of Section 13. We have already held that sale or assignment of the secured assets could only be undertaken if actual physical possession has been taken over by the bank/FI's. If we pose a question whether right to transfer the secured assets by way of lease could be exercised without taking actual physical possession of the secured asset or management of the business of the borrower, our answer would be obviously in the negative.
>
> **31.2.** The word 'lease' has not been defined under the Act, but it has been used in the Act in the same sense as under the Transfer of Property Act, 1882. Thereunder, Section 105 defines lease as "transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Lease is a contract between the lessor and the lessee for the possession and profits of land, etc. on one side and the recompense by rent or other consideration on the other. The estate transferred to the lessee is called the leasehold. The estate remaining in the lessor is called the reversion.
>
> **31.3.** The absolute owner, who is under no personal incapacity can grant lease for any term he pleases. However, the limited owner like a tenant for life can grant lease but it would not endure beyond his death. The Supreme Court in *Associated Hotels of India Ltd.* v. *R.N. Kapoor*, AIR 1959 SC 1262, while making a distinction between lease and license observed thus:—
>
> "A lease is a transfer of an interest in land. The interested transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor.

Under S. 52 if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the permissive for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts."

31.4. One of the essential indicia of lease is parting of exclusive possession by the lessor to the lessee with conferment of reciprocal right in the lessee to protect his possession during subsistence of the lease to the exclusion of the lessor. Although in some cases, a licensee may also be given exclusive possession of a property, but as observed above, parting of exclusive possession to the lessee is a *sine qua non* for creating a valid lease. Thus, where a person is not in physical possession of a property nor in a position to deliver physical possession in future, he is incompetent to create a valid lease. The reason being that he is not in a position to confer upon the lessee the right to enjoy the property to the exclusion of the lessor and everyone else.

31.5. It thus necessarily follow that the ultimate object of taking possession of the secured asset or management of the business of the borrower would not be achieved unless the secured creditor is in a position to further exercise his right to transfer the same, inter alia, by way of lease or sale, which could be possible only if physical (actual) possession has been taken over and not constructive or symbolic possession. The language of Section 13(6) also supports our view. Thus, while there is no bar in first taking symbolic possession of the secured assets, but it is implicit in sub-section (4) of Section 13 that the secured creditor has to thereafter proceed to take physical (actual) possession in order to exercise its right to transfer by way of lease, assignment or sale."

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"**34.** Thus, the scheme of the provisions of Sections 13 and 17 of the Act, read with Rules 8 and 9 of the Rules, would show that the "measure" taken under Section 13(4)(a) read with Rule 8 would not be complete unless actual (physical) possession of the secured assets is taken by the Bank/Financial Institutions. In our opinion, taking measure under Section 13(4) means either taking actual/physical possession under clause (a) of sub-section (4) of Section 13 or any other measure under other clauses of this Section and not taking steps to take possession or making unsuccessful attempt to take measure under Section 13(4) of the Act. Similarly, following the procedure laid down under Section 14 and/or Rules 8 and 9, where the Bank meets with resistance, would only mean taking steps to seek possession under Section 13(4)(a) and the "measure" under sub-section (4)(a) of Section 13 would stand concluded only when actual/physical possession is taken or the borrower loses actual/physical possession. It is at this stage alone or thereafter, the borrower can take recourse to the provisions of Section 17(1) of the Act. The transfer of possession is an action. Mere declaration of possession by a notice, in itself, cannot amount to transfer of possession, more particularly where such a notice meets with

resistance. When the possession is taken by one party, other party also loses it. In the present case, adversial possession in being claimed by the secured creditor against the borrower. It is not possible that both will have possession over the secured assets. The possession of the secured creditor would only come into place with the dispossession of the borrower. We may also observe that in a securitization application under Section 17(1), the borrower will have to make a categoric statement that he lost possession or he has been dispossessed and pray for possession.

35. Issuance of possession notice, as observed earlier, gives borrower and the public in general an intimation that the secured creditor has taken possession of the property and at that stage, it is quite possible, may be in view of resistance or if the Banks chooses to take only symbolic possession, to state that the secured creditor has taken symbolic/constructive possession and not physical possession, but that by itself would not entitle the borrower to raise challenge under Section 17(1) of the Act, as held by the Supreme Court in *Noble Kumar* (supra). Unless the borrower loses actual (physical) possession, he cannot take recourse to provisions of Section 17(1). Even while taking steps under Section 13(4) of the Act read with Rule 8 of the Rules, in a given case, the bank may not physically dispossess the borrower and wait till it takes steps to conduct actual sale/auction of the secured assets i.e. till he issues notice under Rule 8(6) of the Rules. Even that by itself, from the scheme of the Act and the Rules, in the backdrop of the objective of the Act, in our opinion, does not confer any right to take recourse to Section 17(1). The borrower can file securitisation application under Section 17(1) only when he physically loses possession."

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"**40.** We are, therefore, of the firm and considered opinion that taking "symbolic possession" or issuance of possession notice under Appendix IV of the Rules, meeting with any resistance, cannot be treated as "measure"/s taken under Section 13(4) of the Act and, therefore, the borrower at that stage cannot file an application under Section 17(1) before DRT. In other words, a securitisation application under Section 17(1) of the Act is maintainable only when actual/physical possession is taken by the secured creditor or the borrower loses actual/physical possession of the secured assets. Once the right to approach DRT matures and securitisation application under Section 17(1) is filed by the borrower, it is open to DRT to deal with the same on merits and pass appropriate orders in accordance with law. Thus, the question referred to for our consideration stands answered in terms of this judgment. The judgment of this Court in *Aum Jewels* (supra), in our opinion, does not enunciate the correct law."

3. Shri Neeraj Kishan Kaul, learned Senior Advocate, appearing on behalf of the appellants, has placed before us all the relevant sections under the SARFAESI Act as well as the relevant rules under the 2002 Rules. He has referred to the Statement of Objects and Reasons of both the original Act as well as the Amendment Act made in 2004 pursuant to a judgment of this Court in **Mardia Chemicals Ltd. v. Union of India**, (2004) 4 SCC 311

("**Mardia Chemicals**"). According to Shri Kaul, the scheme of section 13 is that a notice of default once served under section 13(2) of the Act may call upon the borrower to discharge in full his liability to the secured creditor within 60 days from the date of notice, failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4) of section 13. He relied upon section 13(3-A) which made it clear that even though reasons are communicated under the said sub-section, since no measures were actually taken under section 13(4), there is no right at that stage for the borrower to prefer an application to the Debts Recovery Tribunal under section 17 of the Act. According to the learned Senior Advocate, section 13(4)(a) makes it clear that "possession" of the secured assets of the borrower may be taken under this provision. Obviously, such possession is to be taken under the rules framed under the Act. Rule 8(1) makes it clear that possession is taken under the 2002 Rules by delivering a possession notice prepared in the form contained in Appendix IV to the rules, and by affixing the notice on the outer door or at such conspicuous place of the property. Once this is done, and the possession notice is published in two leading newspapers under sub-rule (2), the form contained in Appendix IV makes it clear that notice is given to the public in general that possession has been taken in exercise of powers contained under section 13(4) of the Act read with rule 8 of the 2002 Rules. As soon as this takes place, according to Shri Kaul, since "symbolic possession" has been so taken, the right of the borrower to approach the Debts Recovery Tribunal for relief under section 17 gets crystallized. He also relied upon sub-rule (3) to argue that possession may be taken under this sub-rule which is "actual" as opposed to "symbolic" possession under sub-rule (1). According to the learned Senior Advocate, the moment possession is taken either under rule 8(1) or under rule 8(3), section 13(6) gets attracted thereby making it clear that a transfer of secured asset, after taking such possession, shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset. According to Shri Kaul, after symbolic possession is taken under rule 8(1), rules 8(5) to 8(8) and rule 9 can then be followed in order to effect sale of property of which symbolic possession has been taken. Shri Kaul attacked the judgment of the Full Bench, stating that the conclusion of the Full Bench that the borrower would have to wait until actual physical possession of the secured asset is taken would create great hardship in that a running business of the borrower would be taken over without the borrower being able to approach the Debts Recovery Tribunal, and would have to wait until after the sale takes place to recover possession

under section 17(3), even if he is able to show that the steps taken by the secured creditor are in violation of the provisions of the Act. Thus, if symbolic possession is taken contrary to section 13(2) prior to 60 days from the date of the notice mentioned therein, all borrowers would have to wait until physical possession is taken and/or a sale notice is issued to get back their running business after the business is brought to a grinding halt. This could not possibly have been the intention of the legislature.

4. Shri C.U. Singh, learned Senior Advocate, appearing on behalf of respondent no. 2, took us through the statutory provisions and the 2002 Rules and argued that the High Court may have gone beyond what was argued by his predecessor before the High Court. Shri Singh emphasised that his limited argument before this Court is that the stage of symbolic possession is not a stage at which any prejudice is caused to the borrower as he may continue to run his business. Section 13(6) does not come in at this stage at all, and section 13(13), which interdicts a borrower after receipt of a notice under section 13(2) to transfer by way of sale, lease or otherwise, other than in the ordinary course of business, any of his secured assets without prior written consent of the secured creditor, is the only restraint that continues to attach after symbolic possession is taken. According to him, as no prejudice is caused to the borrower at this stage, it is clear that "possession" spoken of in section 13(4) can only mean actual physical possession. This becomes clear on a reading of section 13(4)(c) which makes it clear that a manager can only manage the secured assets the possession of which has been taken over by the secured creditor, if actual physical possession has been parted with. According to the learned Senior Advocate, therefore, the object of the Act will be defeated if a debtor can approach the Debts Recovery Tribunal at such stage when no prejudice is caused to him, thereby rendering what is statutorily granted to a creditor futile. He relied upon observations in various Supreme Court judgments to buttress his stand that it is only at the stage of actual physical possession that an application can be filed under section 17 and not before.

5. Shri Ranjit Kumar, learned Senior Advocate, appearing on behalf of the respondents in Civil Appeal arising out of SLP(C) No.12841 of 2018, went on to argue that all the sub-clauses in section 13(4) must be construed together. If that is done, it is clear that under sub-clauses (b) and (c), management and possession must physically be taken over. Therefore, under sub-clause (a), the expression "possession" must also mean actual physical possession. According to the learned Senior Advocate, the measures taken

under section 13 must also be read with sections 14 and 15. It is clear that under section 14, actual physical possession is to be handed over by the Chief Metropolitan Magistrate or the District Magistrate to the secured creditor, and under section 15, management of the business has actually to be taken over as two managements cannot possibly continue at the same time. Read in this light, the scheme of the Act, therefore, is clear and it becomes equally clear that only actual physical possession is referred to in section 13(4)(a) before a section 17 application can be filed. He also referred to section 17(3) to further argue that restoration of possession of secured assets could only refer to restoration of actual physical possession thereby strengthening his interpretation of sections 13 and 17 of the Act. According to him, under section 19, compensation is also payable where possession taken is not in accordance with the provisions of the Act and 2002 Rules, again making it clear that when the Court or Tribunal directs the secured creditor to return such secured asset to the borrowers, compensation may be paid. Returning secured assets obviously would mean assets of which physical possession has been taken. When it came to reading rules 8(1) and 8(3) of the 2002 Rules, according to Shri Ranjit Kumar, rule 8(3) is the next step after symbolic possession is taken over under rule 8(1), and without taking of actual physical possession under rule 8(3), no sale can be made of any secured assets. Like Shri C.U. Singh before him, he agreed that the High Court had perhaps gone a little too far in its conclusion, and that the moment any real prejudice is caused to the borrower, the borrower can certainly approach the Tribunal. This would also include the stage at which a sale notice is issued under rule 8.

6. Shri Ashish Dholakia, learned Advocate, appearing for the intervenor, State Bank of India, referred to the objects of the 2002 Act and relied upon the judgment of this Court in **Standard Chartered Bank v. V. Noble Kumar & Ors.**, (2013) 9 SCC 620 ("**Noble Kumar**"). He argued that if we were to grant an opportunity to a debtor to approach the Tribunal at the stage of symbolic possession, there would be little difference between the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the "**Recovery of Debts Act**") and the SARFAESI Act, and thus, we would destroy the very object for which the SARFAESI Act was enacted, namely, so that banks could recover their debts by selling properties outside the court process, something that the Recovery of Debts Act did not envisage. He also referred to and relied upon section 3 of the Transfer of Property Act for the definition of "a person is said to have notice" and Explanation II in particular, which referred to actual possession.

According to him therefore, the correct stage would be the stage at which actual physical possession has been taken, upon which a debtor may then approach the Debts Recovery Tribunal under section 17.

7. Having heard learned counsel for the parties, we may first set out the Statement of Objects and Reasons for the 2002 Act. The Statement of Objects and Reasons for the 2002 Act read as follows:

> "**Statement of Objects and Reasons**.—The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realize long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.
>
> 2. It is now proposed to replace the Ordinance by a Bill, which, inter alia, contains provisions of the Ordinance to provide for—
>
> (*a*) registration and regulation of securitisation companies or reconstruction companies by the Reserve Bank of India;
>
> (*b*) facilitating securitisation of financial assets of banks and financial institutions with or without the benefit of underlying securities;
>
> (*c*) facilitating easy transferability of financial assets by the securitization company or reconstruction company to acquire financial assets of banks and financial institutions by issue of debentures or bonds or any other security in the nature of a debenture;

(*d*) empowering securitisation companies or reconstruction companies to raise funds by issue of security receipts to qualified institutional buyers;

(*e*) facilitating reconstruction of financial assets acquired by exercising powers of enforcement of securities or change of management or other powers which are proposed to be conferred on the banks and financial institutions;

(*f*) declaration of any securitization company or reconstruction company registered with the Reserve Bank of India as a public financial institution for the purpose of Section 4-A of the Companies Act, 1956;

(*g*) defining "security interest" as any type of security including mortgage and charge on immovable properties given for due repayment of any financial assistance given by any bank or financial institution;

(*h*) empowering banks and financial institutions to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default, i.e. classification of the borrower's account as non-performing asset in accordance with the directions given or guidelines issued by the Reserve Bank of India from time to time;

(*i*) the rights of a secured creditor to be exercised by one or more of its officers authorised in this behalf in accordance with the rules made by the Central Government;

(*j*) an appeal against the action of any bank or financial institution to the concerned Debts Recovery Tribunal and a second appeal to the Appellate Debts Recovery Tribunal;

(*k*) setting-up or causing to be set-up a Central Registry by the Central Government for the purpose of registration of transactions relating to securitisation, asset reconstruction and creation of security interest;

(*l*) application of the proposed legislation initially to banks and financial institutions and empowerment of the Central Government to extend the application of the proposed legislation to non-banking financial companies and other entities;

(*m*) non-application of the proposed legislation to security interests in agricultural lands, loans not exceeding Rupees One lakh and cases where eighty per cent of the loans are repaid by the borrower.

3. The Bill seeks to achieve the above objects."

Section 13 with which we are concerned reads as follows:

"**13. Enforcement of security interest**.—(1) Notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4):

[1][Provided that—

(*i*) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(*ii*) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;]

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

[2][(3-A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate [3][within fifteen days] of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower :

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A.]

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:—

(*a*) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

[4][(*b*) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

[1] *Ins*. by Act 44 of 2016, S. 11(*i*) (w.e.f. 1-9-2016).
[2] *Ins*. by Act 30 of 2004, S. 8 (w.r.e.f. 11-11-2004).
[3] *Subs*. for "within one week" by Act 1 of 2013, S. 5(*a*) (w.e.f. 15-1-2013).
[4] *Subs*. by Act 30 of 2004, S. 8 (w.r.e.f. 11-11-2004). Prior to substitution it read as:
"(*b*) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;"

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;]

(*c*) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(*d*) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (*d*) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

[5][(5-A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

(5-B) Where the secured creditor, referred to in subsection (5-A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of Section 13.

(5-C) The provisions of Section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5-A).]

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

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(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor."

[5] *Ins*. by Act 1 of 2013, S. 5(*b*) (w.e.f. 15-1-2013)

Section 14(1) of the Act reads as follows:

"**14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset**.—(1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him—

(*a*) take possession of such asset and documents relating thereto; and

(*b*) forward such asset and documents to the secured creditor:

xxx xxx xxx"

Section 15(1) of the Act reads as follows:

"**15. Manner and effect of takeover of management**.—(1) [6][When the management of business of a borrower is taken over by a [7][asset reconstruction company] under clause (*a*) of Section 9 or, as the case may be, by a secured creditor under clause (*b*) of sub-section (4) of Section 13], the secured creditor may, by publishing a notice in a newspaper published in English language and in a newspaper published in an Indian language in circulation in the place where the principal office of the borrower is situated, appoint as many persons as it thinks fit—

(*a*) in a case in which the borrower is a company as defined in the Companies Act, 1956 (1 of 1956), to be the directors of that borrower in accordance with the provisions of that Act; or

(*b*) in any other case, to be the administrator of the business of the borrower.

xxx xxx xxx"

Section 17 of the Act reads as follows:

"[8]**[17. Application against measures to recover secured debts]**.—(1) Any person (including borrower,) aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this chapter, [9][may make an application along with such fee, as may be prescribed,] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

[6] *Subs*. for "When the management of business of a borrower is taken over by a secured creditor" by Act 30 of 2004, S. 9 (w.r.e.f. 11-11-2004).

[7] *Subs*. for "securitisation company or a reconstruction company" by Act 44 of 2016, S. 3(*i*) (w.e.f. 1- 9-2016).

[8] *Subs*. for "Right to appeal" by Act 44 of 2016, S. 14(*i*) (w.e.f. 1-9-2016).

[9] *Subs*. for "may prefer an appeal" by Act 30 of 2004, S. 10 (w.r.e.f. 21-6-2002).

[10][Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

[11][*Explanation*.—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.]

[12][(1-A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

(*a*) the cause of action, wholly or in part, arises;

(*b*) where the secured asset is located; or

(*c*) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

[13][(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in subsection (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

[14][(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any

[10] *Ins*. by Act 30 of 2004, S. 10 (w.r.e.f. 21-6-2002).
[11] *Ins*. by Act 30 of 2004, S. 10 (w.r.e.f. 11-11-2004).
[12] *Ins*. by Act 44 of 2016, S. 14(*ii*) (w.e.f. 1-9-2016).

[13] *Subs*. for sub-sections (2) and (3) by Act 30 of 2004, S. 10 (w.r.e.f. 11-11-2004). Prior to substitution sub-sections (2) and (3) read as:

"(2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent of the amount claimed in the notice referred to in sub-section (2) of Section 13:

Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

(3) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."

[14] *Subs*. by Act 44 of 2016, S. 14(*iii*) (w.e.f. 1-9-2016). Prior to substitution it read as:

"(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of Section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of Section 13.".

of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

(*a*) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and

(*b*) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(*c*) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.]

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under subsection (4) of Section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of Section 13 to recover his secured debt.

[15][(4-A) Where—

(*i*) any person, in an application under subsection (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,—

(*a*) has expired or stood determined;

or

(*b*) is contrary to Section 65-A of the Transfer of Property Act, 1882 (4 of 1882); or

(*c*) is contrary to terms of mortgage; or

(*d*) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act; and

(*ii*) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (*a*) or sub-clause (*b*) or subclause (*c*) or sub-clause (*d*) of clause (*i*), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.]

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

[15] *Ins*. by Act 44 of 2016, S. 14(*iv*) (w.e.f. 1-9-2016).

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.]"

Rule 8 of the 2002 Rules reads as follows:

"**8. Sale of immovable secured assets**.—(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) [16][The possession notice as referred to in subrule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers], one in vernacular language having sufficient circulation in that locality, by the authorised officer.

[17][(2-A) All notices under these rules may also be served upon the borrower through electronic mode of service, in addition to the modes prescribed under sub-rule (1) and sub-rule (2) of rule 8.]

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:—

[16] *Subs.* for "The possession notice as referred to in sub-rule (1) shall also be published in two leading newspaper" by S.O. 1837(E), dated 26-10-2007 (w.e.f. 26-10-2007).
[17] *Ins.* by G.S.R. 1046(E), dt. 3-11-2016 (w.e.f. 4-11-2016).

(*a*) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(*b*) by inviting tenders from the public;

[18][(*c*) by holding public auction including through e-auction mode; or]

(*d*) by private treaty.

(6) the authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,—

(*a*) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(*b*) the secured debt for recovery of which the property is to be sold;

(*c*) reserve price, below which the property may not be sold;

(*d*) time and place of public auction or the time after which sale by any other mode shall be completed;

(*e*) depositing earnest money as may be stipulated by the secured creditor;

(*f*) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the website of the secured creditor on the Internet.

(8) Sale by any methods other than public auction or public tender, shall be on such terms as may be settled [19][between the secured creditor and the proposed purchaser in writing]."

Appendix IV to the 2002 Rules reads as follows:

[19] *Subs.* for "between the parties in writing" by G.S.R. 1046(E), dt. 3-11-2016 (w.e.f. 4-11-2016).

[18] *Subs.* by G.S.R. 1046(E), dt. 3-11-2016 (w.e.f. 4-11-2016). Prior to substitution it read as:
"(*c*) by holding public auction; or"

"APPENDIX IV

[*See* rule 8(1)]

POSSESSION NOTICE

(*for immovable property*)

Whereas

The undersigned being the authorised officer of the ……..……. (name of the Institution) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest 20[Act, 2002 (54 of 2002)] and in exercise of powers conferred under Section 13(12) read with 21[Rule 3] of the Security Interest (Enforcement) Rules, 2002 issued a demand notice dated ……. calling upon the borrower Shri ……..……. /M/s …… to repay the amount mentioned in the notice being Rs …… (in words ……) within 60 days from the date of receipt of the said notice.

[22][The borrower having failed to repay the amount, notice is hereby given to the borrower and the public in general that the undersigned has taken possession of the property described herein below in exercise of powers conferred on him under subsection (4) of Section 13 of Act read with Rule 8 of the Security Interest Enforcement) Rules, 2002 on this the …….day of ….. of the year……]

The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the …….. ……. (name of the Institution) for an amount Rs. …….. and interest thereon.

[23][The borrower's attention is invited to provisions of sub-section (8) of Section 13 of the Act, in respect of time available, to redeem the secured assets.]

Description of the Immovable Property
All that part and parcel of the property consisting of Flat No. …… /Plot No. …… In Survey No. ……/City or Town Survey No. …… /Khasara No. ……. …… within the registration sub-district ……. And District ……..
Bounded:
On the North by
On the South by
On the East by
On the West by

Sd/-
Authorised Officer

(Name of Institution)
Date:
Place:"

[20] *Subs.* for "Ordinance" by S.O. 103(E), dated 2-2-2007 (w.e.f. 2-2-2007), [21] *Subs.* for "Rule 9" by G.S.R. 1046(E), dt. 3-11-2016 (w.e.f. 4-11-2016), [22] *Subs.* by G.S.R. 1046(E), dt. 3-11-2016 (w.e.f. 4-11-2016). [23] *Ins.* by G.S.R. 1046(E), dt. 3-11-2016 (w.e.f. 4-11-2016).

8. This Court in **Mardia Chemicals** (supra) after referring in detail to the provisions of the Act held:

> "**48.** The next safeguard available to a secured borrower within the framework of the Act is to approach the Debts Recovery Tribunal under Section 17 of the Act. Such a right accrues only after measures are taken under sub-section (4) of Section 13 of the Act.
>
> xxx xxx xxx
>
> **59.** We may like to observe that proceedings under Section 17 of the Act, in fact, are not appellate proceedings. It seems to be a misnomer. In fact it is the initial action which is brought before a forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in civil court. As a matter of fact proceedings under Section 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar under Section 34 of the Act in the present case. We may refer to a decision of this Court in *Ganga Bai* v. *Vijay Kumar*[(1974) 2 SCC 393] where in respect of original and appellate proceedings a distinction has been drawn as follows: (SCC p. 397, para 15)
>
> "There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute."
>
> xxx xxx xxx
>
> **62.** As indicated earlier, the position of the appeal under Section 17 of the Act is like that of a suit in the court of the first instance under the Code of Civil Procedure. No doubt, in suits also it is permissible, in given facts and circumstances and under the provisions of the law to attach the property before a decree is passed or to appoint a receiver and to make a provision by way of interim measure in respect of the property in suit. But for obtaining such orders a case for the same is to be made out in accordance with the relevant provisions under the law. There is no such provision under the Act.
>
> xxx xxx xxx
>
> **80.** Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debts Recovery Tribunal. The abovenoted provisions are for the purpose of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days' notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal under Section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under subsection (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debts Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.

4. In view of the discussion already held in this behalf, we find that the requirement of deposit of 75% of the amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court."

Close on the heels of this judgment, the 2002 Act was amended on 30.12.2004 with effect from 11.11.2004. The Statement of Objects and Reasons for the Amended Act reads as under:

"***Statement of Objects and Reasons.***—The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected thereto. The Act enables the banks and financial institutions to realise long-term assets, manage problems of liquidity, asset liability mis-match and improve recovery by exercising powers to take possession of securities, sell them and reduce nonperforming assets by adopting measures for recovery or reconstruction. The Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured assets and take over the management of the business of the borrower.

2. The Hon'ble Supreme Court, in the case of *Mardia Chemicals Ltd. v. Union of India,* A.I.R. 2004 S.C. 2371 : (2004) 4 S.C.C 311, *inter alia*,—

(a) upheld the validity of the provisions of the said Act except that of sub-section (2) of Section 17 which was declared *ultra vires* Article 14 of the Constitution. The said sub-section provides for deposit of seventy-five per cent. of the amount claimed before entertaining an appeal (petition) by the Debts Recovery Tribunal (DRT) under Section 17;

(b) observed that in cases where a secured creditor has taken action under sub-section (4) of Section 13 of the said Act, it would be open to borrowers to file appeals under Section 17 of the Act within the limitation as prescribed therefor. It also observed that if the borrower, after service of notice under sub-section (2) of Section 13 of the said Act, raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief that may be, must be communicated to the borrower. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal under Section 17 of the Act, at that stage.

3. In view of the above judgment of the Hon'ble Supreme Court and also to discourage the borrowers to postpone the repayment of their dues and also enable the secured creditor to speedily recover their debts, if required, by enforcement of security or other measures specified in sub-section (4) of Section 13 of the said Act, it had become necessary to amend the provisions of the said Act.

4. Since the Parliament was not in session and it was necessary to take immediate action to amend the said Act for the above reasons, the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Ordinance, 2004 was promulgated on the 11th November, 2004.

5. The said Ordinance amends the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Companies Act, 1956. Chapter II of the Ordinance which amends the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002,—

(a) require the secured creditor to consider, in response to the notice issued by the secured creditor under sub-section (2) of Section 13 of the said Act, any representation made or objection raised by the borrower and cast an obligation upon the secured creditor to communicate within one week of receipt of such representation or objection the reasons for no acceptance of the representation or objection to the borrower and take possession of the secured asset only after reasons for not accepting the objections of the borrower have been communicated to him in writing;

(b) enable the borrower to make an application before the Debts Recovery Tribunal without making any deposit (instead of filing an appeal before the Debts Recovery

> Tribunal after depositing seventy-five per cent. of the amount claimed with the notice by the secured creditor);
>
> (c) provides that the Debts Recovery Tribunal shall dispose of the application as expeditiously as possible and dispose of such application within sixty days from the date of such applications so that the total period of pendency of the application with such Tribunal shall not exceed four months;
>
> (d) make provision for transfer of pending applications to any one of the Debts Recovery Tribunal in certain cases;
>
> (e) enables any person aggrieved by any order made by the Debts Recovery Tribunal to file an appeal to the Debts Recovery Appellate Tribunal after depositing with the Appellate Tribunal fifty per cent. of amount of debt due from him, as claimed by the secured creditor or determined by the Debts Recovery Tribunal, whichever is less;
>
> (f) enables the borrower residing in the State of Jammu and Kashmir to make an application to the Court of District Judge in that State having jurisdiction over the borrower and make provision for filing an appeal to the High Court from the order of the Court of District Judge;
>
> (g) makes provision for validation of the fees levied under the said Act before the commencement of this Ordinance.
>
> xxx xxx xxx"
>
> The Act was accordingly amended in accordance with the aforesaid judgment.

9. The judgment in **Mardia Chemicals** (supra) had made it clear in paragraph 80 that all measures having been taken under section 13(4), and before the date of sale auction, it would be open for the borrower to file a petition under section 17 of the Act. This paragraph appears to have been missed by the Full Bench in the impugned judgment.

10. A reading of section 13 would make it clear that where a default in repayment of a secured debt or any instalment thereof is made by a borrower, the secured creditor may require the borrower, by notice in writing, to discharge in full his liabilities to the secured creditor within 60 days from the date of notice. It is only when the borrower fails to do so that the secured creditor may have recourse to the provisions contained in section 13(4) of the Act. Section 13(3-A) was inserted by the 2004 Amendment Act, pursuant to **Mardia Chemicals** (supra), making it clear that if on receipt of the notice under section 13(2), the borrower makes a representation or raises an objection, the secured creditor is to consider such representation or objection and give reasons for nonacceptance. The proviso to section 13(3-A) makes it clear that this would not confer upon the borrower any right to prefer an

application to the Debts Recovery Tribunal under section 17 as at this stage no action has yet been taken under section 13(4).

11. When we come to section 13(4)(a), what is clear is that the mode of taking possession of the secured assets of the borrower is specified by rule 8. Under section 38 of the Act, the Central Government may make rules to carry out the provisions of the Act. One such rule is rule 8. Rule 8(1) makes it clear that "the authorised officer shall take or cause to be taken possession". The expression "cause to be taken" only means that the authorised officer need not himself take possession, but may, for example, appoint an agent to do so. What is important is that such taking of possession is effected under sub-rule (1) of rule 8 by delivering a possession notice prepared in accordance with Appendix IV of the 2002 Rules, and by affixing such notice on the outer door or other conspicuous place of the property concerned. Under sub-rule (2), such notice shall also be published within 7 days from the date of such taking of possession in two leading newspapers, one in the vernacular language having sufficient circulation in the locality. This is for the reason that when we come to Appendix IV, the borrower in particular, and the public in general is cautioned by the said possession notice not to deal with the property as possession of the said property has been taken. This is for the reason that, from this stage on, the secured asset is liable to be sold to realise the debt owed, and title in the asset divested from the borrower and complete title given to the purchaser, as is mentioned in section 13(6) of the Act. There is, thus, a radical change in the borrower dealing with the secured asset from this stage. At the stage of a section 13(2) notice, section 13(13) interdicts the borrower from transferring the secured asset (otherwise than in the ordinary course of his business) without prior written consent of the secured creditor. But once a possession notice is given under rule 8(1) and 8(2) by the secured creditor to the borrower, the borrower cannot deal with the secured asset at all as all further steps to realise the same are to be taken by the secured creditor under the 2002 Rules.

12. Section 19, which is strongly relied upon by Shri Ranjit Kumar, also makes it clear that compensation is receivable under section 19 only when possession of secured assets is not in accordance with the provision of this Act and rules made thereunder. [24] The scheme of section 13(4) read with rule 8(1) therefore makes it clear that the delivery of a possession notice together with affixation on the property and publication is one mode of taking "possession" under section 13(4). This being the case, it is clear that section 13(6) kicks in as soon as this is done as the expression used in section 13(6)

is "after taking possession". Also, it is clear that rule 8(5) to 8(8) also kick in as soon as "possession" is taken under rule 8(1) and 8(2). The statutory scheme, therefore, in the present case is that once possession is taken under rule 8(1) and 8(2) read with section 13(4)(a), section 17 gets attracted, as this is one of the measures referred to in section 13(4) that has been taken by the secured creditor under Chapter III.

13. Rule 8(3) begins with the expression "in the event of". These words make it clear that possession may be taken alternatively under sub-rule (3). The further expression used in sub-rule (3) is "actually taken" making it clear that physical possession is referred to by rule 8(3). Thus, whether possession is taken under either rule 8(1) and 8(2), or under rule 8(3), measures are taken by the secured creditor under section 13(4) for the purpose of attracting section 17(1).

14. The argument made by the learned counsel for the respondents that section 13(4)(a) has to be read in the light of sub-clauses (b) and (c) is therefore incorrect and must be rejected. Under sub-clause (c), a person is appointed as manager to manage the secured assets the possession of which has been taken over by the secured creditor only under rule 8(3). Further, the rule of *noscitur a sociis* cannot apply. Sub-clause (b) speaks of taking over management of the business of the borrower which is completely different from taking over possession of a secured asset of the borrower. Equally, sub-clause (d) does not speak of taking over either management or possession, but only speaks of paying the secured creditor so much of the money as is sufficient to pay off the secured debt. These arguments must therefore be rejected.

15. Equally fallacious is the argument that section 13(4) must be read in the light of sections 14 and 15. There is no doubt whatsoever that under section 14(1), the Magistrate takes possession of the asset and "forwards" such asset to the secured creditor. Equally, under section 15 there is no doubt that the management of the business of a borrower must actually be taken over. These are separate and distinct modes of exercise of powers by a secured creditor under the Act. Whereas sections 14 and 15 have to be read by themselves, section 13(4)(a), as has been held by us, has to be read with rule 8, and this being the case, this argument must also be rejected.

[24] That this is the general scheme of the Act is also clear from section 17(2) which states that the Debts Recovery Tribunal, when an application is filed before it, shall consider whether any of the measures referred to in section 13(4) taken by the secured creditor are in accordance with the provisions of the Act and rules made thereunder.

16. Yet another argument was made by the learned counsel for the respondents that section 17(3) would require restoration of possession of secured assets to the borrower, which can only happen if actual physical possession is taken over. Section 17(3) is a provision which arms the Debts Recovery Tribunal to give certain reliefs when applications are made before it by the borrower. One of the reliefs that can be given is restoration of possession. Other reliefs can also be given under the omnibus section 17(3)(c). Merely because one of the reliefs given is that of restoration of possession does not lead to the sequitur that only actual physical possession is therefore contemplated by section 13(4), since other directions that may be considered appropriate and necessary may also be given for wrongful recourse taken by the secured creditor to section 13(4). This argument again has no legs to stand on.

17. Another argument made by learned senior counsel for the respondents is that if we were to accept the construction of section 13(4) argued by the appellants, the object of the Act would be defeated. As has been pointed out hereinabove in the Statement of Objects and Reasons of the original enactment, paragraphs 2(i) and 2(j) make it clear that the rights of the secured creditor are to be exercised by officers authorised in this behalf in accordance with the rules made by the Central Government. Further, an appeal against the action of any bank or financial institution is provided to the concerned Debts Recovery Tribunal. It can thus be seen that though the rights of a secured creditor may be exercised by such creditor outside the court process, yet such rights must be in conformity with the Act. If not in conformity with the Act, such action is liable to be interfered with by the Debts Recovery Tribunal in an application made by the debtor/borrower. Thus, it can be seen that the object of the original enactment also includes secured creditors acting in conformity with the provisions of the Act to realise the secured debt which, if not done, gives recourse to the borrower to get relief from the Debts Recovery Tribunal. Equally, as has been seen hereinabove, the Statement of Objects and Reasons of the Amendment Act of 2004 also make it clear that not only do reasons have to be given for not accepting objections of the borrower under section 13(3-A), but that applications may be made before the Debts Recovery Tribunal without making the onerous pre-deposit of 75% which was struck down by this Court in **Mardia Chemicals** (supra). The object of the Act, therefore, is also to enable the borrower to approach a quasijudicial forum in case the secured creditor, while taking any of the measures under section 13(4), does not

follow the provisions of the Act in so doing. Take for example a case in which a secured creditor takes possession under rule 8(1) and 8(2) before the 60 days' period prescribed under section 13(2) is over. The borrower does not have to wait until actual physical possession is taken (this may never happen as after possession is taken under rule 8(1) and 8(2), the secured creditor may go ahead and sell the asset). The object of providing a remedy against the wrongful action of a secured creditor to a borrower will be stultified if the borrower has to wait until a sale notice is issued, or worse still, until a sale actually takes place. It is clear, therefore, that one of the objects of the Act, as carried out by rule 8(1) and 8(2) must also be subserved, namely, to provide the borrower with instant recourse to a quasi-judicial body in case of wrongful action taken by the secured creditor.

18. Another argument that was raised by learned senior counsel for the respondents is that the taking of possession under section 13(4)(a) must mean actual physical possession or otherwise, no transfer by way of lease can be made as possession of the secured asset would continue to be with the borrower when only symbolic possession is taken. This argument also must be rejected for the reason that what is referred to in section 13(4)(a) is the right to transfer by way of lease for realising the secured asset. One way of realising the secured asset is when physical possession is taken over and a lease of the same is made to a third party. When possession is taken under rule 8(1) and 8(2), the asset can be realised by way of assignment or sale, as has been held by us hereinabove. This being the case, it is clear that the right to transfer could be by way of lease, assignment or sale, depending upon which mode of transfer the secured creditor chooses for realising the secured asset. Also, the right to transfer by way of assignment or sale can only be exercised in accordance with rules 8 and 9 of the 2002 Rules which require various pre-conditions to be met before sale or assignment can be effected. Equally, transfer by way of lease can be done in future in cases where actual physical possession is taken of the secured asset after possession is taken under rule 8(1) and 8(2) at a future point in time. If no such actual physical possession is taken, the right to transfer by way of assignment or sale for realising the secured asset continues. This argument must also, therefore, be rejected.

19. Shri Ashish Dholakia, learned Advocate, appearing for the intervenor, State Bank of India, argued that if we were to upset the Full Bench judgment, there would be little difference between the Recovery of Debts Act and the SARFAESI Act as banks would not be able to recover their debts by selling

properties outside the court process without constant interference by the Debts Recovery Tribunal. We are of the view that this argument has no legs to stand on for the reason that banks and financial institutions can recover their debts by selling properties outside the court process under the SARFAESI Act by adhering to the statutory conditions laid down by the said Act. It is only when such statutory conditions are not adhered to that the Debts Recovery Tribunal comes in at the behest of the borrower. It is needless to add that under the Recovery of Debts Act, banks/financial institutions could not recover their debts without intervention of the Debts Recovery Tribunal, which the SARFAESI Act has greatly improved upon, the only caveat being that this must be done by the secured creditor following the drill of the SARFAESI Act and rules made thereunder. Shri Dholakia then referred to and relied upon section 3 of the Transfer of Property Act, 1882. Under the said section, "a person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. Shri Dholakia referred to and relied upon Explanation II to this definition, which reads as under:

> "*Explanation II*.—Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof."

We fail to understand what relevance Explanation II could possibly have for a completely different statutory setting, namely, that of the SARFAESI Act and the 2002 Rules thereunder. For the purpose of the Transfer of Property Act, a person acquiring immovable property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof. For the purpose of the SARFAESI Act read with the 2002 Rules, the taking of possession by a secured creditor of the secured asset of the borrower would include taking of possession in any of the modes prescribed under rule 8, as has been held by us hereinabove. This argument must also, therefore, be rejected.

20. We now come to some of the decisions of this Court. In **Transcore v. Union of India & Anr.**, (2008) 1 SCC 125, this Court formulated the question which arose before it as follows:

> "**1.** A short question of public importance arises for determination, namely, whether withdrawal of OA in terms of the first proviso to Section 19(1) of the DRT Act, 1993 (inserted by amending Act 30 of 2004) is a condition precedent to taking recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the NPA Act", for short)."

To this, the answer given is in paragraph 69, which is as follows:

"**69.** For the above reasons, we hold that withdrawal of the OA pending before DRT under the DRT Act is not a precondition for taking recourse to the NPA Act. It is for the bank/FI to exercise its discretion as to cases in which it may apply for leave and in cases where they may not apply for leave to withdraw. We do not wish to spell out those circumstances because the said first proviso to Section 19(1) is an enabling provision, which provision may deal with myriad circumstances which we do not wish to spell out herein."

Thereafter, the Court went on to discuss whether recourse to take possession of secured assets of the borrower in terms of section 13(4) of the Act would comprehend the power to take actual possession of immovable property. In the discussion on this point in paragraph 71 of the judgment, learned counsel on behalf of the borrowers made an extreme submission which was that the borrower who is in possession of immovable property cannot be physically dispossessed at the time of issuing the notice under section 13(4) of the Act so as to defeat adjudication of his claim by the Debts Recovery Tribunal under section 17 of the Act and that therefore, physical possession can only be taken after the sale is confirmed in terms of rule 9(9) of the 2002 Rules. This submission was rejected by stating that the word "possession" is a relative concept and that the dichotomy between symbolic and physical possession does not find place under the Act. Having said this, the Court went on to examine the 2002 Rules and held:

"**74.** …… Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a Court Receiver under Order 40 Rule 1 CPC. The Court Receiver can take symbolic possession and in appropriate cases where the Court Receiver finds that a third-party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorised officer under Rule 8 has greater powers than even a Court Receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorised officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third-party interests are created overnight and in very many cases those third parties take up the defence of being a *bona fide* purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules."

If the whole of paragraph 74 is read together with the extracted passage, it becomes clear that what is referred to in the extracted passage is the procedure provided by rule 8(3). It is clear that the authorised officer's

powers, once possession is taken under rule 8(3), include taking of steps for preservation and protection of the secured assets which is referred to in the extracted portion. Thus, the final conclusion by the Bench, though general in nature, is really referable to possession that is taken under rule 8(3) of the 2002 Rules. Whether possession taken under rule 8(1) and 8(2) is called symbolic possession or statutory possession, the fact remains that rule 8(1) and rule 8(2) specifically provide for a particular mode of possession taken under section 13(4)(a) of the Act. This cannot be wished away by an observation made by this Court in a completely different context in order to repel an extreme argument. This Court was only of the opinion that the extreme argument made, as reflected in paragraph 71 of the judgment, would have to be rejected. This judgment therefore does not deal with the problem before us: namely, whether a section 17(1) application is maintainable once possession has been taken in the manner specified under rule 8(1) of the 2002 Rules.

21. Another case strongly relied upon by learned counsel for the respondents is **Noble Kumar** (supra). This judgment decided that it is not necessary to first resort to the procedure under section 13(4) and, on facing resistance, then approach the Magistrate under section 14. The secured creditor need not avail of any of the remedies under section 13(4), and can approach the Magistrate straightaway after the 60-day period of the notice under section 13(2) is over, under section 14 of the Act. This Court therefore held:

> "**35.** Therefore, there is no justification for the conclusion that the Receiver appointed by the Magistrate is also required to follow Rule 8 of the Security Interest (Enforcement) Rules, 2002. The procedure to be followed by the Receiver is otherwise regulated by law. Rule 8 provides for the procedure to be followed by a secured creditor taking possession of the secured asset without the intervention of the court. Such a process was unknown prior to the SARFAESI Act. So, specific provision is made under Rule 8 to ensure transparency in taking such possession. We do not see any conflict between different procedures prescribed by law for taking possession of the secured asset. The finding of the High Court in our view is unsustainable.
>
> **36.** Thus, there will be three methods for the secured creditor to take possession of the secured assets:
>
> **36.1.** (*i*) The first method would be where the secured creditor gives the requisite notice under Rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under Rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

> **36.2.** (*ii*) The second situation will arise where the msecured creditor meets with resistance from the borrower after the notice under Rule 8(1) is given. In that case he will take recourse to the mechanism provided under Section 14 of the Act viz. making application to the Magistrate. The Magistrate will scrutinise the application as provided in Section 14, and then if satisfied, appoint an officer subordinate to him as provided under Section 14(1-A) to take possession of the assets and documents. For that purpose the Magistrate may authorise the officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.
>
> **36.3.** (*iii*) The third situation will be one where the secured creditor approaches the Magistrate concerned directly under Section 14 of the Act. The Magistrate will thereafter scrutinise the application as provided in Section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents and forward them to the secured creditor as under clause 36.2.(*ii*) above.
>
> **36.4.** In any of the three situations above, after the possession is handed over to the secured creditor, the subsequent specified provisions of Rule 8 concerning the preservation, valuation and sale of the secured assets, and other subsequent rules from the Security Interest (Enforcement) Rules, 2002, shall apply."

When this Court referred to the first method of taking possession of secured assets in paragraph 36.1.(i), this Court spoke of a case in which, once possession notice is given under rule 8(1), no resistance is met with. That is why, this Court states that steps as stipulated under rule 8(2) onwards to take possession, and thereafter, for sale of the secured assets to realise the amounts that are claimed by the secured creditor would have to be taken, meaning thereby that advertisement must necessarily be given in the newspaper as mentioned in rule 8(2), after which steps for sale may take place. This case again does not deal with the precise problem that is before the Court in this case. The observation made in paragraph 36.1.(i), which is strongly relied upon by the Full Bench of the High Court, to arrive at the conclusion that actual physical possession must first be taken before the remedy under section 17(1) can be availed of by the borrower, does not flow from this decision at all.

22. In **Canara Bank v. M. Amarender Reddy & Anr.**, (2017) 4 SCC 735, this Court after referring to **Mathew Varghese v. M. Amritha Kumar and Ors.**, (2014) 5 SCC 610, which held that the 30-day period mentioned under rule 8(6) is mandatory, then held:

> "**14.** The secured creditor, after it decides to proceed with the sale of secured asset consequent to taking over possession (symbolic or physical as the case may be), is no doubt required to give a notice of 30 days for sale of the immovable asset as per sub-rule (6) of Rule 8. However, there is nothing in the Rules, either express or

> implied, to take the view that a public notice under sub-rule (6) of Rule 8 must be issued only after the expiry of 30 days from issuance of individual notice by the authorised officer to the borrower about the intention to sell the immovable secured asset. In other words, it is permissible to simultaneously issue notice to the borrower about the intention to sell the secured assets and also to issue a public notice for sale of such secured asset by inviting tenders from the public or by holding public auction. The only restriction is to give thirty days' time gap between such notice and the date of sale of the immovable secured asset."

Though there was no focused argument on the controversy before us, this Court did recognise that possession may be taken over under rule 8 either symbolically or physically, making it clear that two separate modes for taking possession are provided for under rule 8.

23. Similarly, in **ITC Limited v. Blue Coast Hotels Ltd. And Ors.**, AIR 2018 SC 3063, this Court held:

> "**45.** As noticed earlier, the creditor took over symbolic possession of the property on 20.06.2013. Thereupon, it transferred the property to the sole bidder ITC and issued a sale certificate for Rs. 515,44,01,000/- on 25.02.2015. On the same day, i.e., 25.02.2015, the creditor applied for taking physical possession of the secured assets under Section 14 of the Act.
>
> **46.** According to the debtor, since Section 14 provides that an application for taking possession may be made by a secured creditor, and the creditor having ceased to be a secured creditor after the confirmation of sale in favour of the auction purchaser, was not entitled to maintain the application. Consequently, therefore, the order of the District Magistrate directing delivery of possession is a void order. This submission found favour with the High Court that held that the creditor having transferred the secured assets to the auction purchaser ceased to be a secured creditor and could not apply for possession. The High Court held that the Act does not contemplate taking over of symbolic possession and therefore the creditor could not have transferred the secured assets to the auction purchaser. In any case, since ITC Ltd. Was the purchaser of such property, it could only take recourse to the ordinary law for recovering physical possession.
>
> **47.** We find nothing in the provisions of the Act that renders taking over of symbolic possession illegal. This is a well-known device in law. In fact, this court has, although in a different context, held in *M.V.S. Manikayala Rao* v. *M. Narasimhaswami* [AIR 1966 SC 470] that the delivery of symbolic possession amounted to an interruption of adverse possession of a party and the period of limitation for the application of Article 144 of the Limitation Act would start from such date of the delivery."

24. This judgment also speaks of the taking over of symbolic possession under the SARFAESI Act. The judgment then goes on to discuss whether a creditor could maintain an application for possession under section 14 of the

Act once it takes over symbolic possession before the sale of the property to the auction purchaser. The Court referred to various authorities and arrived at the conclusion that a secured creditor remains a secured creditor when only constructive or symbolic possession is given, as the entire interest in the property not having been passed on to the secured creditor in the first place, the secured creditor in turn could not pass on the entire interest in the property to the auction purchaser. In this behalf, it is important to refer to section 8 of the Transfer of Property Act, 1882 which states as follows:

> "**8. Operation of transfer**.— Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof.
>
> xxx xxx xxx"

Section 13(6) of the SARFAESI Act makes it clear that a different intention is so expressed by the Act, as any transfer of a secured asset after taking possession thereof, shall vest in the transferee all rights in the secured asset so transferred as if the transfer had been made by the owner of such secured asset. It is clear, therefore, that statutorily, under section 13(6), though only the lesser right of taking possession, constructive or physical, has taken place, yet the secured creditor may, by lease, sale or assignment, vest in the lessee or purchaser all rights in the secured asset as if the transfer had been made by the original owner of such secured asset. This aspect of the matter does not appear to have been noticed in the aforesaid judgment. The ultimate conclusion in the said judgment is, however, correct as a secured creditor remains a secured creditor even after possession is taken over as the fiction contained in section 13(6) does not convert the secured creditor into the owner of the asset, but merely vests complete title in the transferee of the asset once transfer takes place in accordance with rules 8 and 9 of the 2002 Rules.

25. We may also add that by a notification dated 17.10.2018, rule 8 has since been amended adding two sub-rules as follows:

> "3. In the said rules, in rule 8—
>
> (i) in sub-rule (6), for the proviso, the following proviso shall be substituted, namely:-
>
> "Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in the Form given in Appendix IV-A to be published in two

leading newspapers including one in vernacular language having wide circulation in the locality.";

(ii) for sub-rule (7), the following sub-rule shall be substituted, namely:–

"(7) every notice of sale shall be affixed on the conspicuous part of the immovable property and the authorised officer shall upload the detailed terms and conditions of the sale, on the web- site of the secured creditor, which shall include;

(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price of the immovable secured assets below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) deposit of earnest money as may be stipulated by the secured creditor;

(f) any other terms and conditions, which the authorized officer considers it necessary for a purchaser to know the nature and value of the property.";

Appendix IV-A which is now inserted by the said notification reads as follows:

"APPENDIX - IV-A

[*See* proviso to rule 8 (6)]

Sale notice for sale of immovable properties

E-Auction Sale Notice for Sale of Immovable Assets under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 read with proviso to Rule 8 (6) of the Security Interest (Enforcement) Rules, 2002.

Notice is hereby given to the public in general and in particular to the Borrower (s) and Guarantor (s) that the below described immovable property mortgaged/charged to the Secured Creditor, the constructive/physical _____ (whichever is applicable) possession of which has been taken by the Authorised Officer of _____ Secured Creditor, will be sold on "As is where is", "As is what is", and "Whatever there is" on_____ (mention date of the sale), for recovery of Rs. due to the _____Secured Creditor from (mention name of the Borrower (s)) and _____ (mention name of the Guarantor (s)). The reserve price will be Rs. _____ and the earnest money deposit will be Rs. _____ (Give short description of the immovable property with known encumbrances, if any) For detailed terms and conditions of the sale, please refer to the link provided in _____ Secured Creditor's website i.e. www. (give details of website)

Date:
Place:" Authorised Officer

This appendix makes it clear that statutorily, constructive or physical possession may have been taken, pursuant to which a sale notice may then be issued under rule 8(6) of the 2002 Rules. Appendix IV-A, therefore, throws considerable light on the controversy before us and recognises the fact that rule 8(1) and 8(2) refer to constructive possession whereas rule 8(3) refers to physical possession. We are therefore of the view that the Full Bench judgment is erroneous and is set aside. The appeals are accordingly allowed, and it is hereby declared that the borrower/debtor can approach the Debts Recovery Tribunal under section 17 of the Act at the stage of the possession notice referred to in rule 8(1) and 8(2) of the 2002 Rules. The appeals are to be sent back to the Court/Tribunal dealing with the facts of each case to apply this judgment and thereafter decide each case in accordance with the law laid down by this judgment.

2018 (II) ILR - CUT- 633 (S.C.)

S.A. BOBDE, J & L. NAGESWARA RAO, J.

CIVIL APPEAL NO. 10920 OF 2018
(ARISING OUT OF S.L.P. (CIVIL) NO.2194 OF 2018)

TAMILNADU DR. MGR MEDICAL UNIVERSITY .....Appellant

.Vs.

SVS EDUCATIONAL & SOCIAL TRUST ……..Respondent

EDUCATION – Admissions – Whether the courts should pass interim order directing provisional admissions of the students during pendency of the writ petition – Held, No. – Exercise of jurisdiction in favour of provisional admissions during the pendency of a Writ Petition exposes the students to the risk of losing precious years in case of dismissal of the Writ Petition – Courts should desist from passing interim order directing provisional admissions of students.

(Para 10)

Case Laws Relied on and Referred to :-

1 (1984) 1 SCC 307: Krishna Priya Ganguly & Ors. .Vs. University of Lucknow & Ors.

2 (2000) 5 SCC 57 : Union of India .Vs. Era Educational Trust & Anr.

For Petitioner : Mr. T.R.B Siva Kumar [P-1]
For Opp. Parties : M/s. Naresh Kumar [R-1] & Shekhar Kumar [R-3]

JUDGMENT Date of Judgment : 12.11.2018

L. NAGESWARA RAO, J.

Leave granted.

1. The request of the First Respondent for continuance of provisional affiliation for admission of students in Bachelor of Homeopathy Medicine and Surgery (BHMS) degree course for the academic year 2016-2017 was rejected by the Appellant. In a Writ Petition filed by the First Respondent assailing the said order, the High Court of Madras directed the Appellant to permit the First Respondent to participate in the counselling for admission to Homeopathic Colleges for the academic year 2017-2018. The Division Bench of the High Court of Madras upheld the said interim order. Hence this Appeal.

2. The Central Council for Homeopathy, the Third Respondent herein, conducted an inspection on 06.08.2013 and recommended for grant of permission to the First Respondent for starting a Homeopathic college with an intake of 50 students. The Government of India, Ministry of Ayurvedic, Yoga and Naturopathy, Unani, Siddha and Homeopathy (AYUSH), the Second Respondent herein, refused to grant the permission on the basis of its own assessment. In view of the deficiencies of the requisite facilities found in an inspection conducted later, the application of the First Respondent for admission to the first batch of students to BHMS course was rejected by the Third Respondent. However, the Second Respondent decided to grant permission to the First Respondent to start a new homeopathic medical college under Section 12 A of the Homeopathy Central Council Act, 1973 (hereinafter referred to as the 'Act'). On 28.09.2015, the First Respondent was informed that it can admit 50 students for the academic year 2015-2016 subject to the condition that sufficient infrastructure, hospital facilities and qualified teachers in each department as per the relevant regulations were provided before the admission of students. It was mentioned in the letter dated 28.09.2015 that the First Respondent should comply with the requirements of the Act and the relevant regulations made thereunder for obtaining permission to admit students in the academic year 2016-2017.

3. In view of the unfortunate death of three students of BNYS course in the First Respondent institute on 23.01.2016, the Government of Tamil Nadu directed relocation of BHMS students also. The First Respondent-College was closed down by the District Collector,Villupuram and students were adjusted in Government Homeopathy Medical College, Thirumangalam. Thereafter, the First Respondent filed an application for grant of provisional

affiliation which was rejected by the Appellant on 08.04.2016. The reason for rejection was the failure on the part of the First Respondent in not rectifying the deficiencies notified to the College in the inspection. Writ Petition No.18510 of 2016 filed by the First Respondent challenging denial of provisional affiliation was dismissed by the High Court. However, a Division Bench of the High Court directed the Appellant to reconsider the grant of affiliation after conducting another inspection in the Writ appeal filed by the First Respondent against the judgment in Writ Petition 18510 of 2016.

4. On a reconsideration of the matter the Appellant rejected the request of the First Respondent for continuance of provisional affiliation for admission of students to BHMS course for the year 2016-2017 by an order dated 08.02.2017. The First Respondent questioned the rejection of his request for grant of provisional affiliation by filing a Writ Petition in the High Court of Madras. Pending disposal of the Writ Petition filed by the First Respondent, the High Court directed the Appellant to include the First Respondent in the counselling for admission to the first year BHMS course for the year 2017- 2018. In the Writ appeal filed against the said order, the First Respondent was directed to proceed with the counselling and admit students for the year 2017-2018. By an order dated 29.01.2018 we issued notice in the SLP and stayed the operation of the impugned order of the High Court.

5. The Ministry of AYUSH was formed on 9th November 2014 to ensure the optimal development and propagation of AYUSH systems of health care. The main objective of the Ministry of AYUSH is to upgrade the educational standards of Indian systems of medicines and Homoeopathy Colleges in the country. Section 12 A of the Act postulates that a Homeopathic Medical College shall be started only with the previous permission of the Central Government. Permission was granted in favour of First Respondent to start a Homeopathic Medical College on 28.09.2015. First Respondent could make admissions to 50 seats for the academic year 2015-2016 in the first year BHMS course subject to the condition that the requisite infrastructure, hospital facilities and qualified teachers in each department as per the Central Council for Homeopathic Regulations are complied with before the admission of the students. It was made clear that the College should fulfil all the requirements of the Act before obtaining permission for admission to the academic year 2016-2017. There is no doubt that the approval that was granted by the Second Respondent was valid only for a period of one year. The High Court committed a serious error in

proceeding on the basis that the approval granted for the year 2015-2016 was neither rescinded nor cancelled and there was no necessity for the First Respondent to seek for a fresh approval.

6. There is a further requirement of affiliation from the Appellant University for starting a Homeopathic College in the State of Tamil Nadu. The Tamil Nadu Dr. MGR Medical University (Affiliation of Homeopathic Medical College) Statute, BHMS, MD (Homeopathy) prescribes for the procedure relating to affiliation of Homeopathy Colleges according to which an application has to be made for issuance of a "letter of consent of affiliation" for starting a Homeopathy College. According to the said Statute a letter of consent of affiliation is granted only on fulfilment of the conditions mentioned therein. Para 12 of the Statute makes it clear that the application for provisional affiliation can be made only after obtaining letter of permission from the department of AYUSH, Health and Family Welfare to start a Homeopathy Medical College.

7. On 07.06.2013, the Appellant issued a letter of consent of affiliation in the prescribed format. It was mentioned in the said letter that the consent of affiliation was valid for a period of one year from the date of issuance. The First Respondent was also directed not to admit any student till the provisional affiliation is granted by the University to start the first BHMS degree course. A perusal of the consent of affiliation in Form 5 which has been filed by the First Respondent would make it clear that the University agreed in principle to grant affiliation to the proposed Homeopathy College and that the consent was subject to grant of permission by the Government of India under Section 12 A of the Act.

8. The request for grant of provisional affiliation made by the First Respondent was rejected by an order dated 08.04.2016 by the Appellant. There is a reference to an inspection that was conducted pursuant to a letter written by the Government of India on 28.09.2015. It was stated in the letter dated 08.04.2016 that a scrutiny of the inspection report showed that the deficiencies pointed out have not been rectified by the First Respondent. The matter pertaining to grant of provisional affiliation was reconsidered by the Appellant after a direction was issued by the High Court. By a letter dated 08.02.2017, the Appellant informed the First Respondent that the question of continuance of provisional affiliation for the academic year 2016-2017 does not arise as there was no order of provisional affiliation issued to the institute. The request made by the First Respondent for continuance of provisional

affiliation for admission of students for the academic year 2016-2017 to BHMS degree course was rightly rejected.

9. The High Court held that the Appellant committed an error in not passing any order on the application made by the First Respondent for continuance of affiliation on 03.08.2017. As stated earlier, the application for continuance of provisional affiliation was reconsidered by the Appellant University and a decision was taken on 08.02.2017. During the pendency of the Writ Petition wherein the said decision was challenged, the Appellant could not have considered yet another application which was made on 03.08.2017. The High Court erred in holding that the non-consideration of the application dated 03.08.2017 for continuance of affiliation is a default on the part of the University. The High Court committed a further mistake in finding that the deficiencies pertained only to land.

10. It is clear from the record that the First Respondent- University does not have the requisite approval from the Central Government as provided in Section 12 A of the Act. As the consent to affiliation was granted subject to the approval from the Central Government for the period of one year, the request made by the First Respondent for continuance of provisional affiliation was rightly rejected by the Appellant. We are in agreement with the submission made by the learned Advocate General for the State of Tamil Nadu that as the First Respondent did not have provisional affiliation, there was no question of continuance of the provisional affiliation to the First Respondent. The First Respondent is not entitled for the relief that was granted by the High Court for admission of students to the first BHMS degree course for the academic year 2017-2018 as it has neither approval from the Central Government nor affiliation from the Appellant. Exercise of jurisdiction in favour of provisional admissions during the pendency of a Writ Petition exposes the students to the risk of losing precious years in case of dismissal of the Writ Petition. Courts should desist from passing interim orders directing provisional admissions of students. ***[See: Krishna Priya Ganguly & Ors.*** *v.* ***University of Lucknow & Ors.***[1] *and* ***Union of India*** *v.* ***Era Educational Trust & Anr.***[2]*].*

11. While affirming the order passed in the Writ Petition, the Division Bench referred to the submissions made by the parties but did not express its views. It is imminent that points raised have to be adjudicated upon and reasons to be recorded in support of the decision. The Division Bench failed to consider the submissions of the Appellant relating to the lack of approval

by the Central Government in favour of the First Respondent without which the First Respondent is not entitled to the relief sought for. The Division Bench ought not to have granted the relief without deciding whether the First Respondent had the requisite approval from the Central Government to start a College.

12. For the aforementioned reasons, the order of the High Court is set aside and the appeal is allowed.

2018 (II) ILR - CUT- 638

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

W.P.(C) No. 18655 of 2017

M/S. MAA SANTOSHI CONSTRUCTION .....Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Tender – Claim of incentives for early completion of the work – Petitioner completed the work 72 days prior to the scheduled date of completion and meaning thereby he had completed 21.56% earlier than the scheduled time – Petitioner executed the agreement on 11.11.2013 and the amendment in OPWD Code was w.e.f 08.11.2013 – Objection raised that since the amendment was on 08.11.2013 and the agreement had been executed on 11.11.2013, and that the amended provision was not included in the agreement, the old provision as provided in the DTCN would be applicable – Question arose as to whether the incentive for early completion of contract work was to be given to the petitioner-contractor as per the conditions in the contract, or as per the latest amendment brought in the Odisha Public Works Department Code – Held, the latest amendment dated 08.11.2013 was to be taken into account as the provisions of the DTCN clearly state that the latest amendment would be applicable – Direction to pay the amount with interest. (Paras 15 to 17)

Case Laws Relied on and Referred to :-

1. (2007) 11 SCC 756 : Ghaziabad Zila Sahkari Bank Ltd. .Vs. Labour Commissioner.
2. (2014) 4 SCC 186 : S.V.A. Steel Re-Rolling Mills Limited s. State of Kerala.

For Petitioner : Mr. Milan Kanungo, Sr. Advocate,
M/s. S. Mishra, S.N. Das, S.R. Mohanty and S. Rout

For Opp. Parties : Mr. B.P. Pradhan, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 12.07.2018

VINEET SARAN, CJ.

The Chief Engineer (DPI and Roads), Odisha-opposite party no.2 issued Invitation for Bids (IFB), vide Bid Identification No.CE-DPI & R-19/2013-14 dated 15.07.2013, at Annexure-1, inviting percentage rate bid in double cover system for execution of the work "***Widening and strengthening to Kuakhia-Bari-Kalamatia Road (MDR-14) from 9/250 to 17/500 Km for the year 2013-14***" from special class/super class contractors registered with the State Governments and contractors of equivalent Grade/Class registered with Central Government/ MES/Railways. As per Detailed Tender Call Notice (DTCN), the bid documents were to be available in the website from 10.00 AM of 30.07.2003 till 5.00 PM of 14.08.2013 for online bidding. The last date and time of submission of bid, as per the DTCN, was fixed to 14.08.2013 on or before 5.00 PM, and the bids received on online were to be opened at 11.30 hours on 20.08.2013 in the office of the Engineer-in Chief (Civil)-opposite party no.2.

2. The petitioner, being a proprietorship firm and having satisfied the requirements, participated in the tender process by abiding all the conditions stipulated in the IFB as well as DTCN. During pendency of the tender process, the Works Department of Government of Odisha brought an amendment to the contractual and codal provisions of Para-3.5.5(V) Note-III of OPWD Code Volume-I, vide Office Memorandum no. 12366 dated 08.11.2013, changing the rates of percentage of contract value to be paid as incentive for early completion of the contract work.

3. After completion of tender process, the petitioner qualified as successful bidder and the work in question was settled in its favour by executing Agreement No. 271 P1 of 2013-14 dated 11.11.2013. As per the agreement, the date of commencement of work was 11.11.2013 and due date of completion was 10.10.2014. The petitioner, after getting the contract, started the work immediately and completed the same in all respect, before the schedule date of completion, on 30.07.2014, that is to say prior to 72 days of date fixed for completion, which was 10.10.2014.

4. For early completion of the work, the petitioner is entitled to incentive/bonus as per the provisions contained in the DTCN read with the Office Memorandum issued by the Government. Though a sum of Rs.11,16,754/- was paid as incentive, after long lapse of two years, on 21.07.2016, but the same was not in consonance with the provisions contained in the Office Memorandum read with the conditions stipulated in the DTCN. Hence, this writ application.

5. Mr. S.R. Mohanty, learned counsel appearing for the petitioner contended that there is no dispute on the part of the opposite parties that the petitioner is entitled to get incentive/bonus, rather they have admitted by making payment of Rs.11,16,754/- after two years of completion of the work. It is contended that the incentive bill of the petitioner dated 06.08.2014 was forwarded by the Executive Engineer concerned to the Superintending Engineer recommending for an amount of Rs.41,87,829/-, as per the DTCN Clause No.34(III)(b) and Clause No.45, read with Office Memorandum issued by the Works Department dated 08.11.2013. The Superintending Engineer-opposite party no.3, in its turn, recommended the same to the Chief Engineer, vide letter dated 09.09.2014 for award of suitable incentive due to completion of the project before time. The Chief Engineer-opposite party no.2 on 11.11.2014 forwarded the claims of the petitioner to the Engineer-in-Chief-cum-Secretary to Government-opposite party no.1 to pay incentive found due for Rs.41,87,829/-.

Receiving all the recommendations, the Financial Advisor-cum-Addl. Secretary, working under opposite party no.1, made a query with regard to drawal of agreement and to justify the proposal for payment of incentive in the revised scale. In response to the same, on 09.06.2015 opposite party no.2 replied that the entitlement of the petitioner is to be considered on the basis of the Office Memorandum dated 08.11.2013 issued by the Government. Consequentially, the opposite party no.2, vide its letter dated 02.07.2015, justified the reasons for recommending incentive. But unfortunately, the opposite party no.1 on 23.06.2016 approved incentive only for Rs.11,16,754/-, which is at 2% of the actual value of the work done, though the petitioner is entitled to get incentive as per the conditions stipulated in the DTCN read with Office Memorandum issued by the Government in Works Department, referred to above. Since incentive/bonus has not been calculated in terms of the conditions stipulated in the DTCN and the Office Memorandum, it is thus contended that the same is arbitrary, unreasonable and contrary to the provisions of law.

6. Mr. B.P. Pradhan, learned Addl. Government Advocate appearing for the State-opposite parties argued with vehemence justifying the action taken by the opposite parties in awarding Rs.11,16,754/- as incentive by calculating the same at the rate of 2% of the actual value of the work done, and contended that the petitioner is not entitled to get any further amount as claimed in this writ application and seeks for dismissal of the same.

7. We have heard Shri S.R. Mohanty, learned counsel for the petitioner as well as Shri B.P. Pradhan, learned Addl. Government Advocate for the State-opposite parties and perused the record.

Pleadings between the parties have been exchanged. With consent of learned counsel for the parties, this writ petition is being disposed of at the stage of admission.

8. The facts, as narrated above, are not disputed by learned counsel for the parties. In view of the undisputed facts, the short question involved in this writ petition is as to whether the incentive for early completion of contract work is to be given to the petitioner (contractor) as per the conditions in the contract, or as per the latest amendment brought in the Odisha Public Works Department Code (for short "OPWD Code"). As per the Detailed Tender Call Notice (DTCN), which was issued on 15.07.2013, the incentive for early completion of work was @ 1% per annum up to maximum of 2%, whereas by the amendment which was brought in the OPWD Code by Office Memorandum dated 08.11.2013, the incentive provided was changed to be between 1% and 10%, depending on the percentage of days of early completion.

9. For just and proper adjudication of the case, some of the relevant provisions of the DTCN are quoted below:-

> ***Clause-34(iii)****: The agreement will incorporate all correspondence between the officer inviting the bid/Engineer-in-Charge and the successful bidder. Within 15 days following the notification of award along with Letter of Acceptance, the successful bidder will sign the agreement and deliver it to be Engineer-in-Charge. Following documents shall form part of the agreement:*
>
> ***(a)*** *The notice inviting bid, all the documents including additional conditions, specifications and drawings, if any, forming the bid as issued at the time of invitation of bid and acceptance thereof together with any correspondence leading thereto & required amount of performance security including additional performance security.*
>
> ***(b)*** *Standard P.W.D. Form P-1 with latest amendments."*
>
> *(Emphasis supplied)*

*"**Clause-45.** Bidders are required to go through each clause of P.W.D. Form P-1 carefully in addition to the clause mentioned herein before tendering. In case of ambiguity, the clauses of P.W.D. Form P-1 with latest amendments shall supersede the condition of the D.T.C.N."*

(Emphasis supplied)

***"Clause-120. ADDENDUM TO THE CONDITION OF P1 CONTRACT**.*

XX XX XX

Clause-2.4. Bonus for early completion.

***Clause-2.4.1.** In case, the contractor completes the work ahead of scheduled completion time, a bonus @ 1% (one percent) of the tendered value/Agreement cost/actual value of work executed whichever is less per month computed on per day basis, shall be payable to the contractor, subject to maximum limit of 2% (two percent). The amount of bonus, if payable shall be paid along with final bill after completion of work."*

10. Clause 4(B) of the Office Memorandum dated 08.11.2013 is quoted below:-

"4(B)-Amendment to Para-3.5.5(V) Note-III of OPWD Code, Vol-I by inclusion-

Note-III- For availing incentive clause in any project which is completed before the stipulated date of completion, subject to other stipulations it is mandatory on the part of the concerned Executive Engineer to report the actual date of completion of the project as soon as possible through fax or e-mail so that the report is received within 7 days of such completion by the concerned SE, CE & the Administrative Department. The Incentive for timely completion should be on a graduated scale of one percent to 10 percent of the contract value. Assessment of incentives may be worked out for earlier completion of work in all respect in the following scale.

"Before 30% of contract period = 10% of Contract Value

Before 20 to 30% of contract period = 7.5% of Contract Value

Before 10 to 20% of contract period = 5% of Contract Value

Before 5 to 10% of contract period = 2.5% of Contract Value

Before 5% of contract period = 1% of Contract Value".

11. As per Sub-clause-2.4.1 of Clause 120, the meaning of '**bonus**' reads thus:-

*"**Bonus**. A gratuity; a premium or advantage; a definite sum to be paid at one time, for a loan of money for a specified period, distinct from, and independently of, the interest; a premium for loan; a sum paid for services or upon a consideration in addition to or in excess of that which would ordinarily be given.*

In ***Webster Dictionary***, "bonus" has been defined to mean:

"*something given in addition to what is ordinarily received by, or strictly due to, the recipient; specifically: (a) A premium given for a loan, or for a charter or other privilege granted to a company. (b) An extra dividend to the shareholders of a company, out of accumulated profits. (c) Money, or other valuable, given in addition to an agreed compensation (d) Life insurance. An addition or credit allotted to policy holders out of accumulated profits.*"

In ***Business Encyclopaedia Caxton***, "bonus" has been construed to mean:

"as a gift, reward, or premium, granted voluntarily although theoretically only in many cases, as a matter of grace and without consideration or obligation. Thus, a payment to an employee in addition to his wages is called a bonus."

As per ***Great Encyclopaedia of Universal Knowledge***, "bonus" means:

"something over and above what is the usual or regular payment. In the case of joint-stock companies it is a payment to shareholders, when profits are exceptionally high or have accumulated in the form of an extra dividend or new free shares. It may also be a payment for special services rendered or as an inducement to work."

The apex Court in ***Ghaziabad Zila Sahkari Bank Ltd. V. Labour Commissioner,*** (2007) 11 SCC 756, has held that-

"bonus" is a boon or gift, over and above, what is normally due as remuneration to be received.

12. As per Office Memorandum, referred to above, the petitioner is entitled to get incentive for early completion of the work.

As per ***Oxford Dictionary***, "*incentive"* means:

"*1. A thing that motivates or encourages someone to do something.*
2. A payment or concession to stimulate greater output or investment."

According to ***The Concise Oxford Dictionary,*** the meaning of "*incentive*" is:

"*1.a Tending to incite, 2.n. Incitement (to action, to do, to doing), provocation, motive, payment or concession to stimulate greater output by workers."*

As per ***Chambers Dictionary,*** the meaning of "*incentive" is*:

"In-sent'iv, adj inciting, encouraging; igniting(Milton). –n that which incites to action, a stimulus, esp to work more efficiently, productively, etc.

As per ***Collins Dictionary,*** "*incentive"* means :

"an additional payment made to employees as a means of increasing production, an incentive scheme.

Wage incentive:- additional wage payments intended to stimulate improved work performance"

According to ***Dictionary.com*** "*incentive*" means:

"1. something that incites or tends to incite to action or greater effort, as a reward offered for increased productivity.

2. inciting, as to action; stimulating; provocative.*"*

As per ***Cambridge Advanced Learner's Dictionary & Thesaurus,*** "incentive" means:

"something that encourages a person to do something."

According to ***Merriam-Webster Dictionary"*** *incentive*" means:

"Something that incites or has a tendency to incite to determination or action.

Incentive synonyms

Boost, encouragement, goad, impetus, impulse, incitation, incitement, instigation, momentum, motivation, provocation, spur, stimulant, stimulus, yeast."

In **P. Ramanatha Aiyar's Advanced Law Lexicon, 4th Edition,** "*incentive"* has been defined to mean:

"*something that aroused feeling or incites to action. Positive motive (something artificially generated) for performing some task. It is not appropriate to limit the word 'incentive' to the provision of incentives for employees only. An incentive scheme is a scheme which has the purpose of giving rewards in order to encourage performance of some description."*

One of such example is ***Export incentive***-

"Government incentives to promote exports. They include direct-tax incentives, subsidies, favourable terms for insurance and the provision of cheap credit."

13. Applying the meaning of '*incentive"* discussed above, to Para 3.5.5(v) Note-III of OPWD Code Vol-I, the incentive is provided by the authority for early completion of work so that the authorities may be benefited by the efficient and proper action of the contractor.

14. The apex Court in the case of ***S.V.A. Steel Re-Rolling Mills Limited v. State of Kerala,*** (2014) 4 SCC 186, in paragraph-30 of the judgment held as under:-

"Before laying down any policy which would give benefits to its subjects, the State must think about pros and cons of the policy and its capacity to give the benefits.

> *Without proper appreciation of all the relevant factors, the State should not give any assurance, not only because that would be in violation of the principles of promissory estoppel but it would be unfair and immoral on the part of the State not to act as per its promise."*

15. In response to the DTCN, which was issued on 15.07.2013, the petitioner was selected for carrying out the contract, for which the agreement was executed on 11.11.2013. The work was to be completed in 11 months i.e. by 10.10.2014. Admittedly, the petitioner completed the work on 30.07.2014, which was 72 days prior to the scheduled date of completion of work, meaning thereby the petitioner had completed the work 21.56% earlier than the scheduled time. As per the amendment in the OPWD Code vide Office Memorandum dated 08.11.2013, the petitioner would be entitled to 7.5% of the contract value for having completed the work between 20% and 30% before the scheduled date. The petitioner thereafter claimed such incentive, which was Rs.41,87,829/- for such early completion of work @7.5% of the contract value. The same was duly recommended by the Executive Engineer vide communication dated 02.09.2014 by giving all the details of the work done and its completion. The same was further forwarded with his recommendation by the Superintending Engineer on 09.09.2014. Even the Chief Engineer, on 11.11.2014, recommended the same to the State Government, on which the Financial Advisor-cum-Addl. Secretary of the State Government made an observation that-

> *"there is no provision in the Agreement for payment of incentive in the new scale as per this Department O.M. No.12366 dated 08.11.2013. Further Clause 45 of DTCN is applicable only in case when any amendment is effected after drawal of Agreement. So CE may be requested to justify the proposal for payment of incentive in the revised scale. It was further opined that the rate, as per the DTCN, which forms part of the agreement, would be payable, which comes to only 2% and not 7.5%."*

With the said observation, the matter was referred to the Chief Engineer who, in turn, again recommended that the payment should be made at the revised rate in terms of the Office Memorandum dated 08.11.2013, but instead, the State Government, on 23.06.2016, made payment of Rs.11,16,754/, which was 2% of the contract value, instead of 7.5% as per the amendment dated 08.11.2013, which comes to Rs.41,87,829/-. The petitioner has thus filed this writ petition with the prayer for a direction to the opposite parties to pay the balance incentive/bonus amount of Rs.30,71,075/- along with interest.

16. A conjoint reading of the aforesaid provisions of the DTCN as well as the Office Memorandum dated 08.11.2013 would make it clear that the latest

amendment, as incorporated by the Office Memorandum dated 08.11.2013, was to be taken into account as the provisions of the DTCN clearly state that the latest amendment would be applicable, and the same has rightly been recommended by all the authorities, which includes the Executive Engineer, Superintending Engineer and Chief Engineer.

17. The objection raised by the State-opposite parties that since the amendment had been incorporated on 08.11.2013 and the agreement had been executed on 11.11.2013, and that the amended provision was not included in the agreement, as such the old provision as provided in the DTCN would be applicable, is not worthy of acceptance.

18. Such ground for rejecting the payment of incentive as per the amended provision cannot be justified as the DTCN, which was issued on 15.07.2013, was prior to issuance of the Office Memorandum dated 08.11.2013, which clearly provides that the latest amendment will be applicable and since the latest amendment was issued on 08.11.2013, the benefit of the same should have been granted to the petitioner.

19. The incentive for early completion of work is granted so that the contractors may be encouraged to complete the work early, which would benefit the State Government. The State Government, in its wisdom, had earlier provided for maximum 2% of incentive, but subsequently modified the same to be up to 10%, after giving various scales. Since the petitioner, having completed the work 21.56% prior to the contract period, falls in the category of having completed the work 20% to 30% prior to the schedule date, thus, as per the Office Memorandum dated 08.11.2013, the petitioner would be entitled to the incentive @ 7.5% of the contract value, which comes to Rs.41,87,829/-. A provision incorporated or amended for the benefit of the contractor giving higher incentive for early completion of work should be liberally interpreted so as it give its benefit to all such contractors who are found eligible to such benefit.

20. Thus, in our view, the petitioner has wrongly been denied such benefit and awarded incentive of only Rs.11,16,754/-, whereas he would be entitled to Rs.41,87,829/-. Accordingly, the petitioner shall be entitled to payment of the balance amount of Rs.30,71,075/-, along with six per cent interest from the date of completion of the work (i.e. 30.07.2014), till the date of payment of such additional amount.

21. We are directing payment of interest because the incentive was to be paid to the petitioner along with the final bill, which should have been in 2014. Even the payment of 2% inventive amount was delayed by the opposite parties by about two years, as even Rs.11,16,754/- was paid to the petitioner on 21.07.2016, without any interest. The petitioner was entitled to the entire amount of incentive along with the final bill. There has admittedly been delay in payment of even 2% incentive and thus we are now directing for payment of the balance amount to be paid with nominal interest @ 6% per annum only, from the date of completion of work, till actual payment of balance amount. Such amount shall be paid to the petitioner within two months from today.

22. Accordingly, with the aforesaid direction, the writ petition stands allowed.

2018 (II) ILR - CUT- 647

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

W.P.(C) NO. 15220 OF 2005

NARENDRANATH DASH .....Petitioner

.Vs.

L.I.C. OF INDIA, CENTRAL OFFICE, MUMBAI & ORS. .....Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the order directing recovery of excess amount – No reason or opportunity of hearing was provided before directing recovery – Held , the order cannot sustain in the eye of law.

(B) WORDS AND PHRASES – Reason – Meaning of – Franz Schubert said – "Reason is nothing but analysis of belief" – In Black's Law Dictionary, reason has been defined as a "faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions" – No reason given in the order – Effect of – Held, in view of the meaning of 'reasons' and requirement for compliance of the principle of natural justice, as discussed above, and also the law laid

down by the apex Court, we are of the considered view that the order having been passed without assigning any reasons, suffers from non-application of mind and thereby violates principle of natural justice – Impugned order liable to be quashed. (Paras 12 & 17)

Case Laws Relied on and Referred to :-

1. (1968) 1 All E.R. 694 : Padfield .Vs. Minister of Agriculture, Fisheries and Food.
2. AIR 1974 SC 87 : Union of India .Vs. Mohan Lal Capoor.
3. AIR 1981 SC 1915 : Uma Charan .Vs. State of Madhya Pradesh.
4. AIR 1971 SC 862 : Travancore Rayons Ltd. .Vs. The Union of India.
5. AIR 1978 SC 597 : Maneka Gandhi .Vs. Union of India.

For Petitioner : M/s. G.P. Dutta, K.C. Nayak & M.K. Swain.
For Opp. Parties : Mr. S.P. Mishra, Sr. Adv. M/s. R.K. Patnaik, S. Nanda, A.K. Dash, P.Sahu & A.K. Dash.

JUDGMENT Date of Judgment : 17.07.2018

DR. B.R.SARANGI,J.

The petitioner, who was working as Development Officer in Life Insurance Corporation of India, has filed this application to quash letter dated 26.10.2005 in Annexure-6, whereby direction has been given for recovery of excess amount paid under IB/ACA/Reimbursement due to illegal allotment of agency of Sri D.K. Mandal, vide Agency Code No. 00268/59C.

2. The factual matrix of the case, in hand, is that the petitioner was initially recruited as an Apprentice Development Officer under the Senior Divisional Manager, Life Insurance Corporation of India Limited, Sambalpur Division-opposite party no.3. He was confirmed in the month of November, 1994 and posted as Development Officer under the Senior Branch Manager, Life Insurance Corporation of India, Panposh Branch, Rourkela-opposite party no.4. As per practice, for procurement of business, the Development Officers are authorized to recruit agents and accordingly code numbers are allotted by the Divisional Office in favour of those agents. Following the said process, one Sri D.K. Mandal was recruited by one Sri Pandey, Development Officer and agency code was allotted by the Divisional Office-opposite party no.3, accordingly he was working under Sri Pandey who was working as Development Officer in Panposh Branch.

3. After confirmation of the petitioner as Development Officer in Panposh Branch, the opposite party no.3, vide letter dated 24.10.1996, allotted agent Sri D.K. Mandal to work under him. While the agent Sri D.K. Mandal was working, the petitioner all on a sudden received letter dated

06.08.2002 from opposite party no.3 detaching Sri Mandal from the petitioner wherein it was mentioned that all the benefits including IB/ACA/Reimbursement paid in excess will be recovered from the petitioner and the details of the recovery will be informed to the petitioner shortly. On receipt of such letter, the petitioner submitted his representation on 07.10.2002 to opposite party no.3 through opposite party no.4 to consider the matter and take a decision, as he is no way responsible for any deed done by Sri D.K. Mandal, and neither he is a recruiting authority nor he had directed Sri Mandal to work under him for procurement of the benefits to the Corporation.

4. On receipt of such representation dated 07.10.2002, the opposite party no.4, vide letter dated 25.11.2002, forwarded the same to opposite party no.3 recommending that agent Sri D.K. Mandal should be retained under the organization of the petitioner, as while working under the petitioner the concerned agent had been continuing as number one agent of opposite party no.4, but no action was taken by the authority. Consequentially, a reminder was issued on 30.06.2005 by the petitioner requesting opposite party no.4 to restore the agency of Sri Mandal under his organization. But on 26.10.2005, it was informed to the petitioner that an excess amount of Rs.3,10,864/- would be recovered from the petitioner towards payment of excess amount by the agent Sri D.K. Mandal. On receipt of such letter dated 26.10.2005, the petitioner again filed a representation on 03.11.2005 to opposite party no.4 to consider his case, but no action was taken. Consequentially, the petitioner has been put to heavy financial loss. Hence this application.

5. Mr. G.P. Dutta, learned counsel appearing for the petitioner contended that the petitioner had never opted Sri D.K. Mandal as an agent to work under his organization. Rather, it is opposite party no.3, who vide his letter dated 24.10.1996 allotted Sri D.K. Mandal to the organization of the petitioner and as such, while he was working under the petitioner, due to sincere efforts of the petitioner Mr. D.K. Mandal, agent became number one agent under the opposite party no.4 and procured the business for the opposite parties, for which the opposite parties have enjoyed financial benefits. But reason best known to opposite parties no.3 and 4, the excess amount has been directed to be recovered from the petitioner, which is arbitrary, unreasonable, and more particularly no opportunity of hearing has been given to the petitioner for recovery of such amount nor the order itself indicates the reasons for such recovery, therefore, seeks for quashing of the same.

6. Mr. S.P. Mishra, learned Senior Counsel appearing for the opposite parties strenuously urged justifying the order of recovery of excess amount from the petitioner, vide letter dated 26.10.2005, and stated that as the agent Sri D.K. Mandal was working under the petitioner, if any loss has been caused to the Corporation, the same has to be recovered from him, and thereby no illegality or irregularity has been committed by the authority in issuing such letter, which does not warrant any inference by this Court at this stage.

7. We have heard Mr. G.P. Dutta, learned counsel for the petitioner and Mr. S.P. Mishra, learned Senior Counsel appearing for the opposite parties, and perused the records. With the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

8. The facts delineated above are undisputed. On perusal of the order-sheets of the case, it appears that this Court issued notice to the opposite parties on 22.12.2005 and also passed an interim order to the extent that as an interim measure operation of the direction contained in letter dated 26.10.2005 (Annexure-6) shall remain stayed till the next date. Pursuant to the notice issued to opposite parties no.1 to 4, Mr. S.P. Mishra, learned Senior Counsel and associates appeared in the case on 20.07.2015, but till date no counter affidavit has been filed by the opposite parties. When the matter was listed on 24.04.2018, request was made on behalf of the opposite parties seeking three weeks time to file counter affidavit and accordingly the matter was adjourned granting three weeks time to the opposite parties to file counter affidavit and further two weeks time was granted to the petitioner to file rejoinder affidavit and it was directed that the matter shall be listed in the week commencing 16.07.2018. Although the matter was listed today (17.07.2018), the opposite parties have not filed any counter affidavit, therefore filing of rejoinder affidavit at this stage does not arise. In any case, since the opposite parties have not filed their counter affidavit and the matter is pending since 2005 and in the meantime more than 12 years have elapsed, this Court is not inclined to grant any further time and proceeds with the matter on the basis of the pleadings available on record itself. Though initially it was decided to dispose of the matter applying the doctrine of non-traverse, since Mr. S.P. Mishra, learned Senior Counsel appearing for the opposite parties argued the case, without filing any counter affidavit, the same was taken into consideration and this case proceeded with the hearing on merits.

9. On perusal of the impugned order dated 26.10.2005, it appears that referring to the Divisional Office's letters dated 27.05.2005, 22.06.2005, 24.06.2005 and 18.10.2005, the appraisal of the petitioner was reopened. But it is contended that due to wrong allotment of agency of Sri D.K. Mandal, an excess payment has been made for each appraisal period as per the calculation and the same relates to different appraisal periods, as mentioned in the letter itself. Consequentially, total amount of excess payment came to Rs.3,10,864/- is to be recovered from the petitioner. Though in response to the same, the petitioner filed his representation on 03.11.2005, but the same was not taken into consideration. In addition to the same, while determining the liability, no opportunity of hearing has been given to the petitioner and as such, no reasons have been assigned for determining such amount. Furthermore, due to wrong allotment of agency of Sri D.K. Mandal, if the Corporation has sustained loss, in that case the opposite party no.4 could not have recommended that Sri D.K. Mandal is number one agent in his Division and he should be retained instead of discharging him from agency.

10. On the basis of the record available, continuance of the agency of Sri D.K. Mandal under the petitioner is by virtue of the order passed by the opposite party no.3 and as such, the petitioner has never opted to allow Sri D.K. Mandal to work under him. After Sri D.K. Mandal was thrust upon the petitioner to work under him and after working under him he became number one, as per the recommendation made by opposite party no.4, in that case the authority should have given an opportunity to Sri D.K. Mandal, instead of calculating for excess payment for each appraisal period, which has been directed to be recovered from the petitioner, vide impugned order dated 26.10.2005.

11. If the liability has been determined, in that case the petitioner should have been given opportunity of hearing in compliance of the principles of natural justice. Non-compliance thereof and without assigning any reasons, if any direction has been given for recovery from the petitioner; the same cannot sustain in the eye of law and more particularly the order impugned does not indicate any reasons for recovery of the same.

12. ***Franz Schubert*** said-

"*Reason is nothing but analysis of belief.*"

In ***Black's Law Dictionary***, reason has been defined as a-

"faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions."

It means the faculty of rational thought rather than some abstract relationship between propositions and by this faculty, it is meant the capacity to make correct inferences from propositions, to size up facts for what they are and what they imply, and to identify the best means to some end, and, in general, to distinguish what we should believe from what we merely do believe.

Therefore, reasons being a necessary concomitant to passing an order allowing the authority to discharge its duty in a meaningful manner either furnishing the same expressly or by necessary reference.

13. "***Nihil quod est contra rationem est licitum***" means as follows:

"nothing is permitted which is contrary to reason. It is the life of the law. Law is nothing but experience developed by reason and applied continually to further experience. What is inconsistent with and contrary to reason is not permitted in law and reason alone can make the laws obligatory and lasting."

Therefore, recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is pertinent to note that a decision is apt to be better if the reasons for it are set out in writing because the reasons are then more likely to have been properly thought out. It is vital for the purpose of showing a person that he is receiving justice.

In *Re*: ***Racal Communications Ltd. (1980)2 All ER 634 (HL)***, it has been held that the giving of reasons facilitates the detection of errors of law by the court.

In ***Padfield v. Minister of Agriculture, Fisheries and Food*** (1968) 1 All E.R. 694, it has been held that a failure to give reasons may permit the Court to infer that the decision was reached by the reasons of an error in law.

14. In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87 it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken in ***Uma Charan v. State of Madhya Pradesh***, AIR 1981 SC 1915.

15. In ***Travancore Rayons Ltd. v. The Union of India,*** AIR 1971 SC 862 it is observed by the apex Court that the necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental process by which the conclusion is reached in cases where a non-judicial authority exercises judicial functions is obvious. When judicial power is exercised by an authority normally performing executive or administrative functions, the Supreme Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency. The court insists upon disclosure of reasons in support of the order on two grounds: one, that the party aggrieved in a proceeding before the court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.

16. In ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597, the apex Court held that the reasons, if disclosed, being open to judicial scrutiny for ascertaining their nexus with the order, the refusal to disclose the reasons would equally be open to the scrutiny of the Court; or else, the wholesome power of a dispassionate judicial examination of executive orders could with impunity be set at naught by an obdurate determination to suppress the reasons.

17. In view of the meaning of 'reasons' and requirement for compliance of the principle of natural justice, as discussed above, and also the law laid down by the apex Court, we are of the considered view that the order of the appellate authority, having been passed without assigning any reasons, suffers from non-application of mind and thereby violates principle of natural justice. Therefore, the impugned order passed by the appellate authority is liable to be quashed and is hereby is quashed. Further, this Court is of the considered view that direction for recovery of the amount, pursuant to letter dated 26.10.2005 vide Annexire-6, being made without compliance of principle of natural justice and without assigning reasons, cannot sustain in the eye of law and accordingly the same is also hereby quashed.

18. The writ petition is accordingly allowed. No order to costs.

2018 (II) ILR - CUT- 654

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

W.P.(C) NO. 294 OF 2017

CHANDRA SEKHAR SWAIN .....Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Tender – Cancellation – Petitioner, a bidder along with others – Technically qualified – Complaints received before opening of Financial bid against the petitioner and another technically qualified bidder – Upon evaluation both bidders found to be disqualified – Tender cancelled and fresh bid called for – Whether correct – Held, Yes.

"If the technical evaluation committee qualified the petitioner pursuant to meeting held on 01.10.2016 and placed the matter for opening of the financial bid on 07.10.2016, but before 07.10.2016 complaints having been received, though the date for opening of the financial bid was fixed to 07.10.2017, the technical evaluation committee reconsidered the technical bids in its meeting dated 28.11.2016 and found that the petitioner as well as the other qualified bidder Sanjaya Kumar Samantary, both are disqualified. Thereby, all the three bidders having been disqualified in the technical bid, the authorities did not allow opening of the financial bids and, by cancelling the tender on 30.11.2016, issued fresh IFB on 01.12.2016, which cannot be faulted." *(Para 16)*

Case Laws Relied on and Referred to :-

1. 2016 (II) ILR- CUT-937 : Kailash Chandra Lenka .Vs. MD, IDCO.
2. 2017 (II) ILR - CUT-1035 : M/s. Sical Logistics Ltd. .Vs. Mahanadi Coalfields Ltd. & Ors.
3. 2017 (I) OLR 666 : Chandra Sekhar Swain .Vs. State of Odisha.

For Petitioner : M/s. Umesh Chandra Mohanty, T. Sahoo & B.K. Swain
For Opp. Parties : Mr. B.P. Pradhan, Addl. Gov. Adv.

JUDGMENT Date of Hearing: 11.07.2018 Date of Judgment : 20.07.2018

DR. B.R.SARANGI, J.

The petitioner, who is a Super Class Contractor having Registration No. 477 of 2016 issued by the Chairman of the Committee of Chief Engineer and Engineer-in-Chief (Civil), Bhubaneswar, has filed this writ application seeking following reliefs:-

> *"i) Issue appropriate Writ/Writs thereby quashing the cancellation of Bid vide no. C-IIM-IFB- 07/2015 No. 53035 dated 30.11.2016 under Annexure-3 and fresh Tender Call notice Bid Identification No. CE-DPI & R-43/2016-17 dtd. 1.12.2016 under Annexure-4;*

ii) And this Hon'ble Court be further pleased to hold that the actions of the Opp.Parties in using Annexure-3 and 4 in cancelling the Tender and issuing fresh tender are absolutely illegal, arbitrary, unreasonable and accordingly be further pleased to direct the Opp. Parties to open the Price bid of the petitioner so as to adjudge his suitability to find out the lowest successful bidder in accordance with the provisions of DTCN dated 29.07.2016 under Annexure-1 Series for award of contract."

2. The factual matrix of the case, in hand, is that the Chief Engineer (DPI & Roads), Odisha, Bhubaneswaropposite party no.3 issued Invitation for Bids (IFB) vide Bid Identification No. CE-DPI & R-19/2016-17 dated 29.07.2016 for different works including the work at serial no. 4, viz., "***Improvement of Junagadi-Junusnagar-Khola road from 7/500 Km to 17/040 Km under State Plan***". The value of the work was Rs.9,74,17,550.00 and the period of completion was within 11 calendar months. As per the aforesaid tender call notice, the bids were to be received only online on or before 5.00 PM of 29.08.2016, with the stipulation for opening of the Technical Bid on 02.09.2016 at 11.30 hours in the office of the E.I.C. (Civil), Nirman Soudh, Unit-V, Bhubaneswar, Odisha in presence of the bidders.

3. As per Clause-5(i) of the Detailed Tender Call Notice (DTCN), the bid was to be submitted in two covers, Cover-1 was to contain scanned EMD, Cost and VAT of bid document, scanned copy of registration certificate for execution of civil works, PAN card, Valid VAT clearance certificate required under Section 99 of the Odisha VAT Act, undertaking/certificates duly filled, affidavit, work experience certificate and documents required as per the relevant clauses of this DTCN. Similarly, as per Clause-5(ii), Cover-II was to contain the price bid and scanned copy of Additional Performance Security duly filled in and signed by the bidder. Clause-7 provides for production of documents. Similarly, Clause-8 provides that the work will be completed in all respect within the time period, as specified in the contract data, and the contractor should satisfy Clause-10 of the DTCN.

4. The petitioner, having satisfied all the eligibility criteria as required under the DTCN, submitted his tender and also furnished the affidavit of authentication and agreement for hiring machineries with one Subal Behera, aged about 40 years, resident of Jamadeipur, Patna, P.O.- Mandhatpur, Dist-Nayagarh with a validity for a period of 12 months commencing from 25.08.2016 and also submitted affidavits as required under DTCN showing no relationship certificate and no litigation certificate etc. The tender was submitted by the petitioner on online basis within the time stipulated.

5. On receipt of the bids, including the bid of the petitioner, within the time specified, the tendering authority opened the technical bids and assessed the same on 02.09.2016. So far as package no.7 is concerned, three bidders, including the petitioner, participated in the proceeding of the tender evaluation committee meeting held on 01.10.2016. As per clause 8.7.3, at the time of opening of financial bid the names of the bidders, whose technical bids were found responsive, would be announced and the bids of only those bidders would be opened and the remaining bids would be rejected. But opposite party no.3 floated an order of cancellation of bid in the website, vide Annexure-3, without assigning any reason and without affording opportunity of hearing to the petitioner, and issued fresh Invitation For Bids on 01.12.2016 in Annexure- 4, hence this application.

6. Mr. U.C. Mohanty, learned counsel for the petitioner states that the order of cancellation of bid in Annexure-3 dated 30.11.2016 has been passed without affording opportunity of hearing and without assigning any reasons. Therefore, such order of cancellation itself vitiates, being violative of Article 14 and 19(1)(g) of the Constitution of India. To substantiate his contention he has relied upon the judgments of this Court in ***Kailash Chandra Lenka v. MD, IDCO,*** 2016 (II) ILR- CUT-937 and ***M/s. Sical Logistics Ltd. v. Mahanadi Coalfields Ltd. & Ors.,*** 2017 (II) ILR – CUT-1035.

7. Mr. B.P. Pradhan, learned Addl. Government Advocate contended that due to "Bharat Bandh" on 02.09.2016 which was the scheduled date as per the IFB, the technical bid was opened on 03.09.2016. For the work at serial no. 4, namely, "*Improvement of Junagadi- Junusnagar-Khola road from 7/500 km to 17/040 km. under State Plan*", 3 numbers of bids were received, including the bid of the petitioner. A series of technical criteria was evaluated, which was as per the conditions stipulated in the DTCN. The tender evaluation committee, relying on the affidavits and documents submitted by the bidders/ contractors, in its meeting held on 01.10.2016, unanimously qualified two bidders in technical bid and decided to open the financial bids of the qualified bidders on 07.10.2016. The committee disqualified the bidder-Bibhu Ranjan Parida, Special Class Contractor. But in the meantime, complaints were received in the office from one Prakash Kumar Das and Susanta Kumar Kar against the petitioner regarding suppression of 8 nos. of ongoing works. Complaint was also received from one Sanjay Kumar Samantray against the petitioner regarding hiring of machineries for 11 months and 12 months, although the completion period of work was 14 months. After evaluation/verification of allegations, as all the

bidders were disqualified, it was decided not to open the financial bids. Therefore, the order of cancellation was communicated and steps were taken for issuance of fresh IFB. Accordingly, fresh IFB was issued in Annexure-4 on 01.12.2016. Therefore, no illegality or irregularity has been committed by the authority concerned in cancelling the bid submitted by the petitioner, so as to warrant interference of this Court. To substantiate his contention, he has relied upon the judgment of this Court in ***Chandra Sekhar Swain v. State of Odisha*** 2017 (I) OLR 666.

8. We have heard Shri U.C. Mohanty, learned counsel for the petitioner as well as Shri B.P. Pradhan, learned Addl. Government Advocate for the State-opposite parties and perused the record. Pleadings between the parties have been exchanged. With consent of learned counsel for the parties, this writ petition is being disposed of at the stage of admission.

9. The facts delineated above are not in dispute. As per the IFB issued on 29.07.2016, procedure to participate in online bidding has been elaborately mentioned. Clause-3 deals with format and signing of bids, whereas clauses 3.3 to 3.17 deal with compliance of different conditions for submission of bids. Clause-4 deals with security of bid submission, whereas clause-8 deals with opening of bid. The procedure for evaluation of bids has been provided in Clause 8.5.2(A) to 8.7.9. Thereafter, clause-9 deals with clarification and negotiation of bids. The DTCN for road and project works attached to the IFB also provides different conditions and clauses 5, 6, 8 and 10, being relevant for the purpose of the case are reproduced hereunder:-

> "*5. The bid is to be submitted in two covers.*
>
> *(i) Cover-I is to contain scanned EMD, Cost and VAT of bid document, scanned copy of registration certificate, PAN card, valid VAT clearance certificate, undertaking/ certificates duly filled, affidavit, work experience certificate and documents required as per the relevant clauses of this DTCN.*
>
> *(ii) Cover-II is to contain the price bid and Scanned copy of Additional Performance Security duly filled in and signed by the bidder.*
>
> *6. The on line bid must be accompanied with scanned copies of financial instruments towards bid security of the amount as specified in the* ***Contract Data*** *along with the Bid in the form of Fixed deposit receipt of Scheduled Bank/ Kissan Vikash Patra/ Post Office Saving Bank Account/ National Saving Certificate/ Postal Office Time Deposit Account duly pledged in favour of the* ***Executive Engineer and payable at*** *the place as specified in the* ***Contract Data*** *as per the terms and conditions laid down in OGFR and in no other form. Bidders desirous to hire machineries or equipments from out side the State or owned but deployed outside*

*the State are required to furnish the bid security as specified in the **Contract Data** in form of above shape and as per the above terms and conditions. Bid not accompanied with EMD as specified above shall be liable for rejection.*

xx xx xx

*8. The work is to be completed in all respects within the **time period** as specified in the **Contract Data**. Bidders whose bid is accepted must submit a work programme at the time of execution of Agreement.*

xx xx xx

*10. (i) The Contractors are required to furnish evidence of ownership of principal machineries/equipments in **Schedule-C** as per **Annexure-I for which contractor shall have to secure minimum 80% of marks failing which the tender shall be liable for rejection.***

*(ii) In case the contractor executing several works he is required to furnish a time schedule for movement of equipment/machinery from one site to work site of the tendered work in **Annexure-IV of Schedule-C**.*

*(iii) The contractor shall furnish ownership documents for those machineries which he is planning to deploy for the tendered work if these are not engaged and produce certificate from the Executive Engineer as per **Annexure-III of Schedule-C** under whom these are deployed at the time of tendering as to the period by which these machines are likely to be released from the present contract. Certificate from the Executive Engineer of Government of Odisha or Engineer-in-Charge of the project (in case of non-Government projects) under whose jurisdiction the work is going on, shall not be more than 90 days old on the last date of receipt of tender.*

(iv) In case the contractor proposes to engage machineries and equipments as asked for in the tender documents, owned or hired but deployed out side the State, he/she is required to furnish additional 1 % EMD/Bid Security. The entire bid security including the additional bid security shall stand forfeited in case the contactor fails to mobilize the machineries within a period as to be able to execute an item of work as per original programme which will be part of the agreement.

*(v) The contractor intending to hire/lease equipments/machineries are required to furnish proof of ownership from the company/person providing equipments/ machineries on hire/ lease along with contracts/ greements/lease deed and duration of such contract. The contracts/agreements/lease deed should be on long term basis for a minimum period **as mentioned in contract data** from the last date of receipt of Bid documents."*

(emphasis supplied)

10. The petitioner satisfied the eligibility criteria and submitted his bid. Consequentially, the tender evaluation committee, in its meeting held on 01.10.2016, after scrutiny of the bid documents furnished by the bidders, found that the petitioner fulfilled the minimum eligibility criteria as per the DTCN and found responsive, accordingly qualified him. Out of three bidders,

the petitioner and another bidder Sanjaya Kumar Samantary, having fulfilled the minimum eligibility criteria of the DTCN, were found responsive and declared qualified. So far as the bidder Bibhu Ranjan Parida is concerned, since he had not furnished documents with regard to ongoing works in Schedule-G format, he was disqualified for the said work on the ground of submission of false statement or declaration as per Clause-117 outlined in the DTCN. Therefore, out of three bidders, only two bidders, namely, the petitioner and Sri Sanjaya Kumar Samantary having qualified, the tender evaluation committee unanimously decided to open the financial bids of those qualified bidders. When the date was fixed to 07.10.2016 for opening of the financial bids, complaints were received from one Praksh Kumar Das and Susanta Kumar Kar against the petitioner regarding suppression of 8 numbers of ongoing works and also complaint was received from one Sanjaya Kumar Samantary against the petitioner regarding hiring of machineries for 11 months and 12 months, although the completion period of work was 14 months and after evaluation/verification of allegations, as all the bidders were disqualified, it was decided not to open the financial on the date fixed. As series of complaints were received against the petitioner as well as Sanjaya Kumar Samantary, the tender evaluation committee held the meeting on 28.11.2016 at 5.00 PM and after detailed scrutiny of the bid documents furnished by the bidders, it was found that all the three bidders including the petitioner were disqualified. Therefore, the petitioner was communicated on 30.11.2016 with regard to cancellation of the bid.

11. Though petitioner and Sanjaya Kumar Samantary were qualified in the technical bids by the technical evaluation committee in its meeting held on 03.10.2016 and their financial bids were scheduled to be opened on 07.10.2016, but in the meantime before their financial bids were opened, complaints were received against the petitioner as well as Sanjaya Kumar Samantary on the plea of non-compliance of the conditions stipulated in the DTCN. Therefore, the technical evaluation committee, taking into consideration the complaints lodged against the petitioner as well as Sanjaya Kumar Samantary, convened a meeting on 28.11.2016, examined the same by making a scrutiny of all the documents and complaints received against the petitioner and Sanjaya Kumar Smantary and found that all the three bidders were disqualified. Therefore, the communication was made on 30.11.2016 in cancelling the work in question. Against the said cancellation order and consequential issuance of fresh tender dated 01.12.2016 in Annexure-4, the petitioner has approached this Court by filing the present

application alleging that no opportunity of hearing has been given and as such the cancellation order does not indicate any reasons.

12. Mr. U.C. Mohanty, learned counsel for the petitioner contended that if the cancellation order has been passed without assigning reasons and without compliance of the principle of natural justice, the same has to be quashed and as a consequence thereof fresh tender call notice issued on 01.12.2016 is also liable to be set aside. Much reliance has been placed on ***M/s Sical Logistics Ltd.*** and ***Kailash Chandra Lenka*** (supra), wherein this Court, relying upon various judgments of the apex Court, held that validity of the order must be judged by reasons and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Therefore, the bid in the re-tender should not be accepted simply because it is lowest as the price bid of the petitioner was disclosed and known to all after the reverse bidding was over.

13. There is no dispute that in the impugned order of cancellation it is only indicated that the bids for the work in question invited vide Bid Identification No.CE-DPI&R-19/2016-17 dated 29.07.2016 are cancelled and there is no dispute that the in the order of cancellation of bid, which has been communicated vide Annexure-3 dated 30.11.2016, no reasons have been assigned. In that view of the matter, it is to be seen whether such cancellation order has been issued after opening of the financial bid or not. There is no dispute that the order cancelling the bids has been issued before opening of the financial bid. Therefore, the rates quoted by the parties are not known to anybody. Needless to say, the reasons for cancellation have been specifically dealt with in the file itself. As is seen from the present case, after the petitioner and one Sanjaya Kumar Samantary qualified in the technical bid, pursuant to the evaluation held on 01.10.2016, complaints having been received before opening of the financial bid on 07.10.2016, the technical committee examined the same in its meeting on 28.11.2016 and consequentially found that three bidders are disqualified, pursuant to which the cancellation order has been issued on 30.11.2016. Therefore, no illegality or irregularity can be said to have been committed by the authority concerned.

14. So far as the allegations made that before cancellation of the bid no opportunity of hearing was given, this Court on perusal of the materials available on record found that before cancellation, admittedly no opportunity of hearing was given to the petitioner. But when counter affidavit was filed before this Court, which was received by the petitioner on 12.04.2017,

opportunity was given to the petitioner to file his rejoinder, which was filed on 20.04.2017. Though specific reasons have been assigned with regard to disqualifying the petitioner, but no specific reply has been given in the rejoinder affidavit, despite opportunity given by this Court to meet the compliance of the principle of natural justice. In paragraphs 6 and 7 of the rejoinder affidavit, the petitioner has stated as follows:-

> *"6. That, it is further respectfully submitted that the actions and approaches of the Opp.Parties in absence of any sanction and approval from the Administrative Department and taking a contrary decision on 28.11.2016, according to their own, is purely an attempt to delay the execution of public work, which is equally contrary to the provisions of DTCN and codal provisions, as such subsequent attempt made by the authorities to cancel and inviting fresh tender, the same are also against the public interest and public good and the tenderer cannot be allowed to suffer because of the fault and inactions of the Opposite Parties as held by this Hon'ble Court in the judgment reported 2017(I) ILR CUT 272 (Sampad Samal Vrs. State of Odisha & others).*
>
> *7. That, it is respectfully submitted that a conjoint reading of the proceeding held in the Technical Evaluation Committee meeting on 1.10.2016 being unanimous decision and the EIC being a party to the same, they cannot take a contrary decision, contrary to the provisions of DTCN by mere saying on 28.11.2016 as a unanimous decision to cancel the Tender for no apparent reason. Further the requirement of lease deed for hiring plant and machineries as per the contract data is not mandatory in nature, rather a bare perusal of the Clause-10 r/w Clause-122 and Annexure-I of Schedule-C of the DTCN clearly revealed that the aforesaid lease deed is not an essential condition for qualifying a bidder, rather the provisions clearly revealed that the requirement of lease deed has to be sustained before the award of the work. Therefore in the present case non-submission of lease deed agreement for fourteen(14) months as per contract data is not fatal and even when the petitioner has filed the extended lease deed for 16 months before assessment of the technical bid and in fact the authorities have considered the same when duly qualified the petitioner on 01.10.2016 under Annexure-2 in consonance with the provisions of DTCN at Clause-8.5.3, Clause-122 and Annexure-1 of the Schedule-C of the DTCN, the Opp.Parties are stopped to say that the petitioner has no qualification on the date of assessment of Technical Bid. Further the approach of the Opp.Parties in holding that the petitioner is disqualified as per the Proceeding dtd. 28.11.2016 is equally absolutely bad in law, arbitrary, unreasonable and tainted with malafide with ulterior motive to keep someone in their mind to participate in the fresh selection process so as to get the contract in his favour, as such the proceeding dtd. 28.11.2016 is liable to be quashed by this Hon'ble Court."*

15. Since the petitioner has not been selected by opening the price bid, question of awarding the work in his favour does not arise and as such, there is no denial to the specific contention raised by the opposite parties in their counter affidavit with regard to disqualification of the petitioner for having

not satisfied the conditions of the technical bid on consideration of the complaints received against the petitioner.

16. In ***Chandra Sekhar Swain*** mentioned supra, this Court held that since the technical evaluation committee subsequently rectified the mistake where no right has been accrued in favour of the petitioner because the technical evaluation committee earlier found the petitioner qualified bidder when it was on erroneous basis the decision to hold fresh tender cannot be faulted with. The said judgment was challenged before the Supreme Court in Special Leave to Appeals (C) No.9235 to 9237 of 2017 and the apex Court dismissed the Special Leave Petitions, thereby the law laid down by this Court has got approval of the apex Court by dismissal of the SLP. Applying the said principle to the present context, even if the technical evaluation committee qualified the petitioner pursuant to meeting held on 01.10.2016 and placed the matter for opening of the financial bid on 07.10.2016, but before 07.10.2016 complaints having been received, though the date for opening of the financial bid was fixed to 07.10.2017, the technical evaluation committee reconsidered the technical bids in its meeting dated 28.11.2016 and found that the petitioner as well as the other qualified bidder Sanjaya Kumar Samantary, both are disqualified. Thereby, all the three bidders having been disqualified in the technical bid, the authorities did not allow opening of the financial bids and, by cancelling the tender on 30.11.2016, issued fresh IFB on 01.12.2016, which cannot be faulted.

17. In view of the facts and law discussed above, we are of considered view that the technical evaluation committee in its meeting held on 28.11.2016, having found the petitioner and two other bidders disqualified, the authorities have cancelled the tender on 30.11.2016 and issued fresh tender on 01.12.2016, which cannot be said to be illegal or unreasonable so as to warrant interference of this Court.

18. The writ application is thus dismissed being devoid of merit. No order to costs.

2018 (II) ILR - CUT- 663

K.S. JHAVERI,CJ & K.R. MOHAPATRA, J.

OJC NO. NO. 6608 OF 2000

JAGANNATH PATTNAIK ……..Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the order passed by the OAT rejecting the OA filed by the petitioner challenging his transfer order – Plea that he should have been transferred to his home district – In the alternative he sought for VRS if his request for transfer to his home district is not considered – VRS allowed in 1994 – Plea that since the VRS application was not in proper form and that the Officer passing the order of VRS was not competent, the order of VRS be set aside – Whether such a plea can be accepted – Held, No.

"Before proceeding further in the matter, it is very much clear from the record that all throughout as stated hereinabove, petitioner in all his applications/representations was keen to take VRS and the authority while considering the matter has taken into consideration that it was not possible to accept his request for transfer to Rayagada district. In that view of the matter, the 2nd request of the petitioner was accepted. Apart from that, the Addl. Secretary to the Government is the same authority; it is only delegation of power. Only on technical ground, the VRS cannot be set aside after 22 years. In our considered opinion, the intention of the petitioner is very much clear that he does not want to work at Cuttack or at the transferred place, i.e., Malkangiri. He wanted to be transferred specifically to his home town/district, i.e., Rayagada, which has not been accepted by the State Government and VRS has been accepted." *(Para 7)*

Case Laws Relied on and Referred to :-

1. 1978 (2) SLR 425 : Delhi Electricity Supply Undertaking .Vs. Tara Chand.
2. AIR 2003 SC 534 : Dr. Prabha Atri .Vs. State of U.P. and others.

For Petitioner : Mr. C.A. Rao, Sr.Advocate
M/s. Sarat Kumar Behera & A.Tripathy

For Opp. Parties : Addl. Gov. Adv.

ORDER Date of Hearing: 28.08.2018 Date of Disposed: 28.08.2018

K.S. JHAVERI, CJ.

Heard.

2. Petitioner in this writ petition challenges the judgment order dated 30.04.1999 (Annexure-8) passed by the Odisha Administrative Tribunal,Cuttack Bench, Cuttack in O.A. No.1682(C) of 1994, by which learned Tribunal has rejected the Original Application of the petitioner.

3. Main contention of the learned Senior Advocate for the petitioner was that the petitioner was not granted the benefit of Government Scheme/Policy with regard to transfer and posting of its employees, whereby after serving in the backward districts, an employee is to be transferred to his home district. But, under a misconception, the petitioner was transferred from Padmapur (Koraput) to Cuttack instead of Rayagada (his home district) vide order dated 28.06.1991 (Annexure-1) in the guise of implementation of said Policy decision.

He, accordingly made representations as at Annexure-3 series to the Director of the then Harijan and Tribal Welfare Department at regular intervals, i.e., on 09.07.1992, 30.11.1992 and 31.05.1993. In his first representation dated 09.07.1992, he requested the authority for posting him at any place in Rayagada Welfare district and in any of the blocks like Gudari, Gunupur, Ramanguda, Padmapur or Kasinagar block of Koraput district. He even intimated his intention of taking voluntary retirement, vide his representation dated 30.11.1992 and 31.05.1993, in case his prayer for transfer to his home district is not considered favourably.

However, Director-cum-Additional Secretary to Government in Tribal Welfare Department vide his order dated 20.01.1993, directed for transfer of the petitioner from Marsaghai block in Cuttack district to Malkangiri district on administrative ground. Further, rejecting his prayer for being transferred to Rayagada district, he was directed vide letter dated 25th June, 1993 (Anneuxre-5) of the Deputy Secretary to Government in Tribal Welfare Department to apply for voluntary retirement through proper channel.

4. Pursuant to issuance of Annexure-5, petitioner, vide his letter dated 30th July, 1993 (Annexure-6), intimated the Commissioner-cum-Secretary to Government in Tribal Welfare Department that since he has already offered option for taking voluntary retirement vide representation dated 30.11.1992 and 31.05.1993 in case his prayer for transfer to his home district (Rayagada) is not granted, there is no need of separate application for voluntary retirement.

Subsequently, the Deputy Secretary, Tribal Welfare Department vide order dated 19th August, 1993 (Annexure-6/1) intimated the petitioner that application for voluntary retirement should be submitted without putting any condition. However, since the petitioner did not respond, the Additional Secretary to Government in Tribal Welfare Department, who was in-charge of the Director T & W, Government of Odisha, by his order dated 9th March,

1994, accepted prayer of the petitioner for voluntary retirement with immediate effect.

5. Learned Senior Advocate for the petitioner has mainly contended that in spite of his specific allegation before the Tribunal as well as before this Court, no response/counter was filed by the Government. Relevant paragraphs-3 and 12 of the writ petition are reproduced herein below:-

> "3…..It is submitted here that, all the appointment initially as Agriculture Teacher and Subsequently as W.E.O. was given by the State Government.
>
> xx xx xx
>
> 12. That, even though no voluntary retirement notice as provided under the rule was submitted through proper channel, as is evident from the letter of Deputy Secretary to Govt. In T&W Deptt. Dt. 19.8.93 stating that voluntary retirement on condition merits no consideration. A copy of the aforesaid letter annexed herewith as Annexure-6/1. But surprisingly treating the representation dt.30.7.93 submitted to the Commissioner-cum-Secretary to Govt. in Welfare Department in response to his order dt. 25.06.93, and even though the said representation was submitted out of disgust and utter frustration and the same was a conditional one, without applying his mind and in the absence of any power/authority and not being the appointing authority, the opposite party No.2 himself vide order No.8419 dt.9.3.94 allowed the voluntary Retirement of the petitioner from Government Service."

6. In support of his contention that the appointing authority and the relieving authority being different, the impugned order is not sustainable, learned Senior Advocate strongly relied upon the decision in the case of ***Delhi Electricity Supply Undertaking –v- Tara Chand***, reported in 1978 (2) SLR 425, relevant portion of which reads as under:

> "4. The trouble in this case started with the transfer of Tara Chand from Jama Masjid to Jangpura on 27.01.1962. The respondent did not take kindly to this particularly because it would compel him to walk about 25 miles daily between his quarters and office. He did not report at Jangpura by 31.01.1962 as directed. Instead, he wrote a very long representation to the G.M.-cataloguing a series of grievances and complaints against his immediate superiors and alleging that he was being victimized and ill-treated by them because he, out of loyalty to the undertaking, stood in the way of their benefitting by malpractices and corrupt practices at the cost of the undertaking. He requested that he may be transferred to some other station under the DESU Colony and stated he could prove all his allegations before the enquiry committee. Unfortunately be concluded this letter by saying:-
>
> "Under protest due to cruel behavior and unfair terms of the officers concerned of the DESU throughout of my nine (9) years service I am being compelled by them hereby to resign for the sake of the saving of lives of myself and my family members."

This letter, according to DESU, was a letter of resignation by Tara Chand from his job and was accepted by the administration w.e.f. 1.4.1962. The Labour Court, after examining in detail the circumstances in which this letter came to be written and, 'accepted' and its language, came to the conclusion that it was only a letter of grievances and not one of resignation. Kappur J. was of the view that the proper interpretation of the letter was purely a question of fact and expressed himself unable "to hold that the Labour Court was wrong in treating the letter as not a letter of resignation". The Labour Court also held that, even if it was a letter of resignation, it had not been properly and validly accepted and this finding was also upheld by Kapoor, J. These are the two basic issues for determination in this appeal.

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9. We agree with Sri Dayal that the fact that the letter contains a detailed catalogue of grievances does not militate against its being a letter of resignation. It is not unusual to find a person even when he is actually resigning from an employment, taking advantage of the opportunity for slinging brickbats against the employer which he could not have done with impunity earlier while in service. But it seems to us that it would not be correct, as Sri Dayal does to read only the last sentence and ignore the rest of the letter as irrelevant and meaningless. It is a cardinal rule of interpretation that a document should be read as a whole and the meaning of last sentence should be appreciated in the context of the whole letter. Perusing the letter carefully, it appears to us that there are several passages which show that it was not a resignation letter. At the outset, we may point out, the employee prepared as many as nine copies to various officers which is more consistent with a letter of complaint than one of resignation. Then, the LETTER starts by saying that the writer is in bad health and on sick leave and was compelled by his superiors to write the letter. It proceeds to level various allegations which it is purposeless to repeat, but there are certain passages whose significance cannot be missed. After cataloguing several "misdeeds" of his immediate superiors, there is a prayer that: I may be transferred to some other Station which may be nearer to DESU Colony". There is an assertion that all the allegations "will be proved before your honour and documentary proof will be provided to the E/c (Enquiry Committee)". Even in the ultimate sentence immediately before the sentence on which the entire case of the Corporation is based it is said that documentary proof was ready and that everything will be explained fully in the Enquiry Committee. The penultimate para contains a request "to deal with case as a special," as many new cases will come to the G.M's notice. These passages cannot have any meaning if the employee's wish was only to resign. Above all, in the final sentence the words "hereby to resign from the service" follow upon the words, "compelled by the officer and are in inverted commas. We have perused this letter carefully. We find that there are a number of place where inverted commas appear: but they are all places where the use of inverted commas is appropriate as containing an extract of what someone has said. The use of inverted commas in the last sentenced should also be attached its due significance as incorporating an alleged demand by his superiors that he should resign. The word 'hereby' is also in quotations and though in certain contexts, as in the case cited by Shri Dayal, the

word has been interpreted as "throughout', it cannot be understood in this case to mean that Tara Chand was tendering a letter of resignation.

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12. There is also another aspects which we may mention here, Both the Labour Court and the learned Single Judge have come to conclusion on a consideration of the relevant circumstances, that the letter of 1-3-1962 was not a resignation letter. We agree, for the reasons above discussed, with this conclusion. But even assuming that two views may be possible and that the contention of Sri Dayal is a plausible one. We do not think we would be justified in interfering with the concurrent conclusions arrived at by the Labour Court and Kapur, J. We therefore, confirm on this point the view taken by the Labour Court and Kapoor, J. and hold that the letter dated 1-3-1962 was only a representation of certain grievances against the management and not a resignation letter.

xx xx xx

21. Contention No.3.

But, supporting that an acceptance by the DESU was necessary before the resignation can be effective, was there a valid and proper acceptance here? The case of the respondent is that the resignation can be validly accepted only by the GM to whom the letter of 1-3-1962 was addressed and who was otherwise competent to accept it. Sri Dayal, on the other hand, urged that in an organization that is governed by statutory rules and regulations, it would not be correct to say that the resignation letter can be accepted only by the person who, it was addressed, particularly when copies thereof have been endorsed to all persons including the A.O.G. and A.P.O. We, should, therefore, try to trace the authority empowered by the statute and the regulations thereunder in such matters. The relevant sections of the DMC Act are Ss. 64, 491 and 504. S.64 enacts that, save as otherwise provided in the Act, the entire executive power pertaining to the DESU will vest in the G.M. (Electricity) who shall also, inter alia.

"(ii) prescribe the duties of, and exercise supervision and control over all acts and proceedings of all municipal officers and other municipal employees employed in connection with the Delhi Electric Supply Undertaking and subject to such regulations as may be made in this behalf, disposed of all matters relating to the service of the said officers and other employees and their pay, privileges, allowances and other conditions of service."

xx xx xx

So, it is said, the resignation letter or representation received from the respondent had to be disposed of not by the G.M. but only by the A.O.G.

xx xx xx

31. We may also point out that the very basis of Shri Dayal's argument that the issue has been finally decided in the Rent Control proceedings is not correct. The Rent Controller no doubt expressed an opinion that the letter was one of a resignation but he was primarily influenced by the factual position that Tara Chand

had been relieved of his duties and had not been doing any work in the DESU after 1-4-1962. On appeal the Rent Control Tribunal also confirmed this order observing:

"it is not for this Court to decide how for the appellants dismissal or termination is regular or legal. This matter is said to be pending in some other Court of competent jurisdiction. According to the appellant's own admission, he has not been put to any work under the respondent Corporation. ….and the order of eviction passed against the appellant may appear fully justified because of the cessation of his work about 4 or 5 years ago."

In other words, the effect in law of the LETTERS was not adjudicated upon by these Tribunals which went by the factual position that Tara Chand had ceased to render services to the DESU after 1-4-1962. We, therefore, held that even if Shri Dayal's above contentions are accepted, the bar does not apply on the fact and circumstances of the case.

xx xx xx"

Reliance is also place on the decision in the case of ***Dr. Prabha Atri -v- State of U.P. and others,*** reported in AIR 2003 SC 534, wherein the Hon'ble Supreme Court held as under:-

"7. The only question that mainly requires to be considered is as to whether the letter dated 9.1.1999 could be construed to mean or amounted to a letter of resignation or merely an expression of her intention to resign, if her claims in respect of the alleged lapse are not viewed favourably. Rule 9 of the Hospital Service Rules provided for resignation or abandonment of service by an employee. It is stated therein that a permanent employee is required to give three months notice of resignation in writing to the appointing authority or three months salary in lieu of notice and that he/she may be required to serve the period for such notice. In case of non-compliance with the above, the employee concerned is not only liable to pay an amount equal to three months salary but such amount shall be realizable from the dues, if any, of the employee lying with the Hospital. In Words and Phrases (Permanent Edition) Vol. 37 at page 476, it is found stated that, "To constitute a "resignation", it must be unconditional and with intent to operate as such. There must be an intention to relinquish a portion of the term of office accompanied by an act of relinquishment. It is to give back, to give up in a formal manner, an office." At page 474 of the very same book, it is found stated: "Statements by club's President and corresponding Secretary that they would resign, if constant bickering among members did not cease, constituted merely threatened offers, not tenders, of their resignations." It is also stated therein that "A `resignation' of a public office to be effective must be made with intention of relinquishing the office accompanied by act of relinquishment". In the ordinary dictionary sense, the word `Resignation' was considered to mean the spontaneous relinquishment of one's own right, as conveyed by the maxim: Resignatio est juris proprii spontanea refutatio [Black's Law Dictionary 6th Edition]. In Corpus Juris Secundum. Vol.77, page 311, it is found stated "It has been said that `Resignation'

is a term of legal art, having legal connotations which describe certain legal results. It is characteristically, the voluntary surrender of a position by the one resigning, made freely and not under duress and the word is defined generally as meaning the act of resigning or giving up, as a claim, possession or position."

xx xx xx

10. We have carefully considered the submissions of the learned counsel appearing on either side, in the light of the materials and principles, noticed supra. This is not a case where it is required to consider as to whether the relinquishment envisaged under the rules and conditions of service is unilateral or bilateral in character but whether the letter dated 9.1.1999 could be treated or held to be a letter of resignation or relinquishment of the office, so as to severe her services once and for all. The letter cannot be construed, in our view, to convey any spontaneous intention to give up or relinquish her office accompanied by any act of relinquishment. To constitute a `resignation', it must be unconditional and with an intention to operate as such. At best, as observed by this Court in the decision in P.K. Ramachandra Iyer (supra) it may amount to a threatened offer more on account of exasperation, to resign on account of a feeling of frustration born out of an idea that she was being harassed unnecessarily but not, at any rate, amounting to a resignation, actual and simple. The appellant had put in about two decades of service in the Hospital, that she was placed under suspension and exposed to disciplinary proceedings and proposed domestic enquiry and she had certain benefits flowing to her benefit, if she resigns but yet the letter dated 9.1.99 does not seek for any of those things to be settled or the disciplinary proceedings being scrapped as a sequel to her so-called resignation. The words 'with immediate effect' in the said letter could not be given undue importance dehors the context, tenor of language used and the purport as well as the remaining portion of the letter indicating the circumstances in which it was written. That the management of the Hospital took up such action forthwith, as a result of acceptance of the resignation is not of much significance in ascertaining the true or real intention of the letter written by the appellant on 9.1.1999. Consequently, it appears to be reasonable to view that as in the case reported in P.K. Ramachandra Iyer (supra) the respondents have seized an opportunity to get rid of the appellant the moment they got the letter dated 9.1.1999, without due or proper consideration of the matter in a right perspective or understanding of the contents thereof. The High Court also seems to have completely lost sight of these vital aspects in rejecting the Writ Petition."

Relying on the above two decisions, learned Senior Advocate for the petitioner contended that the voluntary retirement has been wrongly accepted.

7. Learned counsel for opposite party-State, on the other hand, supporting the decision of the Tribunal contended that while accepting the resignation the authority has relieved him and 22 years have passed in the meantime. Thus, the thing which has occurred 22 years back should not be allowed to be altered. Learned counsel for the opposite parties has taken us to

the order of the Tribunal and contended that the Tribunal, while considering the matter, at paragraphs-3 and 4, observed as under:-

> "3. No counter has been filed in this case. Accordingly, with available materials on record we dispose of this O.A.
>
> 4. In terms of the Orissa Service Code, a Government servant can retire from Government Service voluntarily by giving three months' notice. The termination of Service of an employee is permissible both at the instance of the employer and employee. In the case of permanent government servant his services get terminated by notice of three months from either side. Thus when an employee given notice for voluntary retirement, it takes effect, automatically after expiry of three months notice periods. In absence of any specific provision, in the service code the authorities cannot prevent a government servant from retiring voluntarily or force him to continue in service beyond that period. There seems to be no instructions on question of acceptance of such retirement. Mr.Rao the learned counsel for the applicant challenges annexure-8 basing on the decision indicated above. The authority referred to above is distinguishable both on points of fact and law. This is a case of resignation which is always subject to acceptance. In the given case the applicant issued notice for voluntary retirement with effect from 1.3.1993 by addressing annexure-3 dt. 13.11.1992. Since no decision was taken, he again insisted to allow him to retire voluntarily by issuing letter under annexure-5 dt. 31.05.1993. Even though he was asked to submit an application for voluntary retirement separately under annexure-6, he did not comply and insisted through annexure-7, to allow his voluntary retirement. In consideration of his insistence for voluntary retirement, there was no other alternative for respondents than to allow him to retire voluntarily from government service with immediate effect under annexure-8. Even assuming for the sake of argument, that he was inadvertently posted at Cuttack instead of Rayagada under annexure-1, that by itself will not confer on him any enforceable right for a posting at his home district. In that view of the matter, we find no merit in the O.A."

However, before proceeding further in the matter, it is very much clear from the record that all throughout as stated hereinabove, petitioner in all his applications/representations was keen to take VRS and the authority while considering the matter has taken into consideration that it was not possible to accept his request for transfer to Rayagada district. In that view of the matter, the 2nd request of the petitioner was accepted. Apart from that, the Addl. Secretary to the Government is the same authority; it is only delegation of power. Only on technical ground, the VRS cannot be set aside after 22 years. In our considered opinion, the intention of the petitioner is very much clear that he does not want to work at Cuttack or at the transferred place, i.e., Malkangiri. He wanted to be transferred specifically to his home town/district, i.e., Rayagada, which has not been accepted by the State Government and VRS has been accepted.

8. In our considered opinion, the view taken by the Tribunal is just and proper. No interference is called for. Hence, the writ petition being devoid of any merit stands dismissed.

2018 (II) ILR - CUT- 671

I. MAHANTY, J & B. MOHANTY, J.

W.P.(C) NO. 2726 OF 2013

THE MANAGEMENT, BERHAMPUR COOPERATIVE CENTRAL BANK LTD. .....Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the award passed under the I.D. Act – Dispute regarding implementation of 6th pay Commission Report with effect from 01.01.2006 – Plea in writ petition that Employees of the Berhampur Co-operative Central Bank Limited are not workmen and that Labour Court has no Jurisdiction to decide such a dispute – Such pleas were never taken before the Labour court – Held, cannot be accepted as the witnesses of the Management Bank agreed to the claim and the Labour court has jurisdiction to decide such issues as Section 68 of the Orissa Co-operative Societies Act, 1968 clearly permits a dispute required to be adjudicated under the Industrial Disputes Act, 1947 to be so adjudicated.

Case Laws Relied on and Referred to :-

1. 2007 AIR SCW 2882 : Dharappa .Vs. Bijapur Co-operative Milk Producer Societies Union Ltd.
2. 2009 (II) OLR (SC) 658 : General Manager Telecom .Vs. M. Krishann & anr.
3. 53 (1982) C.L.T. 279 : The Workmen of Orissa Police Co-operative Syndicate .Vs. State of Orissa & Ors.

For Petitioner : M/s. Baidhar Sahoo, G.N. Sahu & L. Mohanty.
For Opp. Parties : Mr. L. Samantaray, Standing Counsel.
M/s. S. Ghosh & A.R. Panigrahi
M/s. Dhuliram Pattanayk, N.S. Panda, Niranjan Biswal & Luis Pattanayak.

JUDGMENT Date of Judgment: 12.09. 2018

B. MOHANTY, J.

This writ application has been filed by the petitioner-Management, Berhampur Co-operative Central Bank Limited questioning the award dated 4.10.2012 passed by the learned Labour Court, Jeypore, Koraput Camp at Berhampur in I.D. No.11 of 2010 directing the petitioner to implement 6th Pay Commission Report and Revised Pay Scale of the workmen/employees of Berhampur Co-operative Central Bank Limited with effect from 01.01.2006 and pay the arrears as per Orissa Revised Scales of Pay Rules, 2008 within three months from the date of publication of the award.

The case of the petitioner is that on 10.04.2008, the Registrar, Co-operative Societies, Orissa, Bhubaneswar passed an order under Annexure-5 laying down the guidelines relating to matters such as revision of D.A., introduction of D.P., H.R.A., etc. pertaining to the employees of the District Central Cooperative Bank Limited, for short, "DCCB". It also indicated that 50% of the D.A should be merged with the pay as D.P. and the employees shall be allowed H.R.A., D.A at par with State Government employees from time to time. Further, it made clear that all these things shall come into effect prospectively that is from the date the Managing Committing of each "DCCB" takes decision and passes necessary resolution individually. On 29.04.2009 under Annexure-4, the Managing Committee of the petitioner passed following resolution to request the Registrar, Co-operative Society, Odisha, for short "RCS" to accord necessary approval for the purpose of revision of scale of pay of its employees as per 6th Pay Commission Report of the State Government with effect from 01.01.2006.

> "The GoO implemented the 6th Pay Commission Report with effect from 01.01.2006 for the Govt. Employees. The employees Union of the Bank requested to make applicable the revised pay scale to the employees of the Bank at par with Govt. employees w.e.f. 01.01.2006. The employees of the Bank are getting Dearness Allowance at par with State Govt. Employees from time to time as per the Letter No.16522 Dt.04.09.2004 and Order No.8717 Dt.10.04.2008 of the R.C.S., Orissa, Bhubaneswar. Consequent on implementation of 6th Pay Commission Report for the State Govt. employees, the rate of D.A. of Bank Employees will vary to that of Govt. employees. In order to keep parity and conformity with the rate of D.A. at par with State Govt. Employees for the Bank employees as per the aforesaid letter and orders of the R.C.S., Orissa it requires revision of pay scales as allowed to State Govt. Employees under ORSP Rules, 2008. Besides, the Bank fulfils all the conditions stipulated by NABARD/RCS(O) such as profit earning consecutively for more than 3 years and the capital adequacy of minimum level of 7 %. The Cost of Management is well within the norms prescribed by RCS(O).

> Under the above circumstances, the Management feels it proper and judicious to accede to the demands of the employees in allowing them the revision of scale of pay as per the 6th Pay Commission Report of the State Govt. The Management therefore resolved to request the RCS(O) to accord necessary approval for the purpose w.e.f. 01.01.2006 for the Bank Employees and 01.04.2008 to the Grade VI-A Employees respectively.
>
> The Secretary is advised to prepare a detailed proposal with necessary financial parameters and send it to the RCS(O) with a resolution of the Management for necessary approval."

On 12.06.2009, vide Annexure-8 "RCS" passed an order that the petitioner shall take a decision and pass resolution regarding implementation of 6th Pay Commission in terms of the conditions prescribed in the Office Order dated 10.04.2008 and guidelines issued by NABARD in its letter dated 03.01.2008. It also made clear that the expenditure on payment of salary and allowance should be within the budgetary limit concurred by the Orissa State Cooperative Bank Limited. On 23.06.2009 vide Annexure-22, the "RCS" issued general guidelines on the subject of revision of pay of employees of "DCCB" in tune with the Orissa Revised Pay Scales Rules, 2008 on recommendation of 6th Pay Commission. Therein he permitted revision of scales of pay of the employees of the "DCCB" in line with the pay structure contemplated under Orissa Revised Pay Scale Rules, 2008 subject to extant rules, regulations, guidelines and compliance of the following financial norms and conditions relating to volume of business, profitability, capacity to pay, etc. It was further made clear that the Committee of Management of the bank would be competent to take a decision and it should ensure that no financial liability accrues to the State Government. On 17.09.2009, vide Annexure-9, the petitioner passed a resolution resolving to allow the scale of pay to its employees as per scale of pay recommended by 6th Pay Commission with effect from 01.04.2009. Therein the petitioner made it clear that though the Bank was earning profit, however, the present volume of business was not enough to sustain future profitability and further that the volume of crop loan and non-crop loan lending by the Bank was very low. Further, NABARD had expressed unhappiness over the low volume of business by the bank. The Management was also not satisfied with the performance of the employees as they were often resorting to agitation and stopping of work for fulfilment of their demands causing loss to the bank. Being aggrieved, the employees raised industrial dispute claiming the benefit of revised scale of pay with effect from 01.01.2006. Accordingly, I.D. Case No.11 of 2010 was registered before the learned Presiding Officer, Labour

Court Jeypore, Koraput pursuant to the reference made by the State Government. The petitioner filed its written statement with a list of documents under Annexure-3. Ultimately, the impugned award under Annexure-1 was passed on 04.10.2012. According to the petitioner it filed a review petition vide Annexure-2. However, the said review petition has been kept pending and has not been disposed of though the same was filed within time.

During course of hearing, Mr. Sahoo, learned counsel for the petitioner filed a date chart on 30.07.2018 and raised following contentions. He argued that the Award under Annexure-1 should be set aside as the learned Labour Court has no jurisdiction to go into the subject matter in issue. In this context he relied on the decisions of the Supreme Court in ***Dharappa V. Bijapur Co-operative Milk Producer Societies Union Limited*** reported in ***2007 AIR SCW 2882*** and **General Manager Telecom** v. **M. Krishann & another** reported in **2009 (II) OLR (SC) 658**. He also submitted that in such matters the appropriate authority is the "RCS" and none else. He further submitted that even otherwise, the learned Labour Court should not have gone ahead with deciding the matter as it involved non-workmen. Lastly, he submitted that even otherwise the impugned award is bad in law as the learned Labour Court has not followed Section-28 of the Odisha Cooperative Societies Act, 1962, for short "the Odisha Act", which in such matter gives final authority to the "RCS". In this context, he relied upon the document under Annexure-5 dated 10.04.2008 and particularly, the guideline No.10 by which the "RCS" spoke of prospective operation of any resolution in the matter and submitted that the resolution by the Managing Committee of the "DCCB" in the matter of allowing pay revision can only have prospective operation. In such background, he submitted that impugned order Annexure-1 allowing the benefit with effect from 01.01.2006 is illegal as the ultimate decision to allow the benefit of 6th Pay Commission was made during September, 2009 vide Annexure-9.

Mr. S. Ghosh, learned counsel appearing for Opposite Party No.4, Mr. N. Biswal learned counsel appearing for Opposite Party No.5 strongly defended the impugned Award and submitted that the status of employees of the petitioner whom they represent was never disputed by the petitioner as not falling under the category of workman before the learned Labour Court. Further they submitted that the petitioner could not rely upon documents under Annexures-5 & 6, which were neither exhibited by them before the learned Labour Court nor was there any pleading pertaining to the said

documents in their written statement filed vide Annexure-3. With regard to document under Annexure-7, they pointed out that it should be ignored as the same is a letter issued by the Odisha State Cooperative Bank much after pronouncement of the Award. They also put emphasis on the resolution under Annexure-4 by which the petitioner has resolved to allow the bank employees the benefits of the pay revision as per 6th Pay Commission with effect from 01.01.2006. Both the learned counsel for opposite party nos.4 & 5 made it clear that the issue in the present case revolves around the employees and it has nothing to do with Grade - VI-A employees of the petitioner. They also pointed out about the suppression of documents like letter dated 13.05.2009 (Exhibit-2) by which the petitioner had written to the "RCS" seeking approval of its resolution dated 29.04.2009 under Annexure-4 for allowing the bank employees the benefits of 6th Pay Commission with effect from 01.01.2006. They also highlighted suppression of document under Exhibit-6 dated 23.08.2010 by the petitioner by which it had agreed in principle to consider release of arrears from 01.01.2006 to 31.03.2009 after obtaining formal approval from the "RCS" and to release the arrears within thirty days. They further submitted about suppression of Exhibit-12 by the petitioner which shows positive capital average ratio from 2003 to 2011 including the profit figures. In such background, the learned counsel appearing for opposite party nos.4 & 5 prayed for dismissal of the writ application. They further submitted that it is wrong to say that the learned court below has not taken a decision on the review petition under Annexure-2. In fact such review petition was rejected by the learned court below on 30.01.2013 in presence of the authorised representative of the petitioner-Bank and though the present writ application was filed on 04.02.2013, however, the petitioner has chosen not to challenge the same.

Heard Mr. Sahoo, learned counsel for the petitioner, Mr. L. Samantaray, learned Standing Counsel, Mr. Ghosh, learned counsel appearing for Opposite Party no.4 and Mr. Biswal, learned counsel appearing for Opposite Party No.5.

Perused the LCR.

The industrial dispute in the present case leading to the impugned award under Annexure-1 was raised on account of non-acceptance of demand of employees/workmen of the petitioner for implementation of 6th Pay Commission Report w.e.f 01.01.2006. Vide letter dated 14.01.2009 (Exhibit-1) the Berhampur Central Co-operative Central Bank Employees' Union

through its General Secretary – Opposite Party No.4 raised the demand for implementation of 6th Pay Commission Report for revision of pay scales of the bank employees at par with the State Government employees w.e.f. 01.01.2006. Consequent upon such demand, the petitioner vide its resolution dated 29.04.2009 under Annexure-4 which forms part of Exhibit-2 resolved to accede to the demands of the employees for reasons indicated therein, which have been quoted earlier. Pursuant to such resolution, on 13.05.2009 vide Exhibit-2, the Secretary of the petitioner wrote a letter to the "RCS" indicating therein that the petitioner fulfilled all the conditions stipulated by the NABARD/the "RCS" such as earning net-profit consecutively for more than three years, and having the capital adequacy of minimum level of 7% and maintaining cost of management within the prescribed limit and accordingly sought administrative approval for implementing the revised pay scale and other allowance as provided in the 6th pay commission report for its employees w.e.f 01.01.2006 in order "to maintain industrial peace and harmony in the Bank" (emphasis supplied) Vide Annexure-8 the "RCS" permitted the petitioner to take a decision and pass necessary resolution regarding implementing 6th pay Commission Report for its employees in terms of conditions prescribed in the office Order No.8717 dated 10.04.2008 and guidelines issued by the NABARD. Here there is nothing to show that the "RCS" indicated the date from which such benefit should be allowed to the employees. Though he referred to Order No.8717 dated 10.04.2008 under Annexure-5, however, it may be noted that the said Annexure-5 was never exhibited before the learned Labour Court by the petitioner. Even otherwise the Annexure-5 can have no application to the issues involved here as it laid down guidelines relating to payment of D.P., D.A. and HRA. It no where refers to implementation of 6th Pay Commission Report for employees of "DCCB"s. Further vide Annexure-22, which has been marked as Exhibit-8, the "RCS" while laying down various guidelines for allowing revision of pay to the employees "DCCB', in tune with Odisha Revised Pay Rules, 2008 on the recommendation of 6th Pay Commission, has no where laid down as to from what date such benefits be allowed. However the benefit was allowed by the petitioner with effect from 01.04.2009 by resolution dated 17.09.2009 under Annexure-9. This gave rise to the industrial dispute and ultimately the State Govt. vide order dated 04.09.2010 in the Labour and Employment Department referred the matter to the Presiding Officer, Labour Court, Jeypore, Koraput for adjudication with regard to demand of the Union for implementation of 6th Pay Commission Committee Report in their favour

with effect from 01.01.2006. After the statement of claim was filed by the second party Union, the petitioner filed its written statement under Annexure-3. In the said written statement the petitioner never disputed about status of its employees as not falling under the category of workmen nor did it take the plea that it is not an industry under the Industrial Disputes Act, 1947. Further there is nothing to show in Annexure-3 that the petitioner took the plea that the learned Labour Court has no jurisdiction in the matter as no industrial dispute is involved or on any other ground. It also never took any plea relating to possible cost factor, if demands of the employees were met. Rather the plea of the petitioner was that it was diligently pursuing the matter sympathetically and vide letter No.785 dtd.13.05.2009 (Exhibit-2), it had sought for approval from the "RCS" to implement the benefits of 6th Pay Commission Report for the workmen. Further, it took a plea that the "RCS" has advised the management to take appropriate decision subject to conditions stipulated in Annexures-8 and 22. And accordingly the resolution under Annexure-9 was passed by the petitioner allowing the benefits to its workmen with effect from 01.04.2009. Along with such written statement, the management relied upon five documents which were all exhibited from the side of the workmen/employees as Exhibits 2, 3, 4 and 8. In fact Exhibit 2 covered two documents. A perusal of LCR shows Exhibit-12 reflected the comparative financial position of the petitioner from 2003-04 to 2010-11. After the Award was passed under Annexure-1, a review petition was filed under Annexure-2 and the same was rejected in presence of the authorised representative of the petitioner on 30.01.2013. Though the present writ was filed on 04.02.2013, however such rejection of review has not been challenged in this case.

Now coming to the arguments of Mr. Sahoo, learned counsel for the petitioner. As indicated earlier, his submission was that the impugned award under Annexure-1 ought to be set aside as the learned Labour Court has no jurisdiction to decide the issue involved in the present case, i.e, extending the benefits of 6th Pay Commission to the employees/workmen of the petitioner with effect from 01.01.2006. According to him, the only authority for such purpose is the "RCS" under "The Odisha Act" and non-else. In this context as indicated earlier, he has relied upon two decisions of the Supreme Court in Dharappa's case (*Supra*) and General Manager Telecom's case (*Supra).*

With regard to jurisdiction issue now sought to be raised by Mr. Sahoo relying upon two Supreme Court judgments to the effect that only "the RCS" not the learned Labour Court has/had jurisdiction in the matter, there

exists no such pleading in the written statement filed by the petitioner under Annexure-3 before the learned Labour Court. Now coming to the two decisions of the Supreme Court cited by Mr. Sahoo, it can only be said that those two decisions are not applicable to the facts and circumstances of the present case. In other words those two decisions are factually distinguishable. With regard to Dharappa's case (supra), it may be noted here that "the Odisha Act" does not have a pari materia provision like Section-70 of the Karnataka Cooperative Societies Act, 1959, for short, "the Karnakata Act". The nearest thing in "the Odisha Act" happens to be Section 68 of that Act. Even then, the language of Section-70 of the "the Karnakata Act" as indicated in Paragraph-9 of the Dharappa's Case (*Supra*) is totally different from the language of Section-68 of "the Odisha Act". For ready reference Section 68 of "the Odisha Act" is quoted hereunder:

> **"68. Disputes which may be referred to arbitration -** [(1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, management or the business of a society, other than a dispute required to be referred to the Tribunal and a dispute required to be adjudicated under the Industrial Disputes Act, 1947, [and a dispute relating to non-payment of contribution to the Co-operative Education Fund referred to in sub-section (3) of Section 56] shall be referred to the Registrar if the parties thereto are among the following, namely :
>
> (a) the Society, its committee, past Committee, any past or present Officer or office-bearer, any past or present agent, any past or present servant or the nominee, legal heir or representative of any deceased Officer, office bearer, deceased agent or deceased servant of the Society; or
>
> (b) a member, past member, or a person claiming through a member, past member or deceased member of the society, or of a society which is a member of the society; or
>
> (c) a surety of a member, past member or a deceased member, whether such surety is or is not a member of the society; or
>
> (d) any other society.
>
> ***Explanation I*** - A claim in respect of any sum payable to or by a society, by or to a person or society mentioned in Clauses (a) to (d) shall be a dispute touching the business of the society within the meaning of this section, even in case such claim is admitted and the only points at issue are the ability to pay and the manner of enforcement of payment.
>
> ***Explanation II*** - A claim by a Financing Bank against a member of a society which is a member of the Financing Bank and indebted to it for the recovery of dues

payable by such member to the Society shall be a dispute touching the business of the Financing Bank within the meaning of this section.

Explanation III - The question whether a person is or was a member of a society or not shall be a dispute within the meaning of this section.

Explanation IV - A claim by a surety for any sum or payment due to him from the principal borrower in respect of a loan advanced by a society shall be a dispute within the meaning of this section.

Explanation V - The question whether a person or any one of his family members is carrying on any business prejudicial to the business or interests the society, or whether such family member has common economic interest with such person shall be a dispute within the meaning of this section.]

(2) Any person, society, [or Financing Bank] referring a dispute to the Registrar under Sub-section (1) shall deposit in advance such fees as may be prescribed.

(3) No dispute referred to in this section shall be entertained in any Civil Court and decision of the Registrar in this respect shall, subject to the provisions of Section 70, be final.

(4) If any question arises whether a dispute referred to the Registrar under this section is a dispute touching the constitution, management or the business of society, the decision thereon of the Registrar shall be final and shall not be called in question in any Court.

(5) Nothing in this section shall, where the disputes relate to the recovery of the dues of any society from any of its member be construed to debar any Financing Bank of such society from referring such dispute to the Registrar."

Unlike the " the Karnakata Act", the above Section makes it clear that the Registrar, Co-operative Societies, Odisha can deal with the disputes as permitted by that Section other than a dispute required to be adjudicated under the Industrial Disputes Act, 1947. In interpreting the said provision, this Court in the case of **The Workmen of Orissa Police Co-operative Syndicate** v. **State of Orissa & others** as reported in **53 (1982) C.L.T. 279** has made it clear that the industrial dispute covering a demand of large number of employees has to go before the industrial forum and not before the Registrar, who unlike the industrial forum does not have any power to create new obligation in order to maintain industrial peace and order. In Dharappa's case (supra) referring to Section 70 of the "the Karnataka Act" as it originally stood with its later amended versions, the Supreme Court has held that the jurisdiction to decide any dispute of the nature mentioned in Section 70(2)(d) of the "the Karnataka Act", vested exclusively with the Registrar under section 70 of the "the Karnataka Act" with effect from 20.6.2000 after the

last amendment. Here in the present case, language of Section 68 of "the Odisha Act" nowhere contains such exclusion clause rather it makes clear that certain dispute which are required to be adjudicated under Industrial Disputes Act, 1947 cannot be dealt with by the "RCS". Thus without examining the provisions of "the Odisha Act", Mr. Sahoo has unnecessarily placed reliance on Dharappa's case (*supra*), which in Paragraph-17 of the judgment makes it clear that before applying the principles enunciated with reference to another enactment, care should be taken to find out whether the provisions of the Act to which such principles are sought to be applied, are similar to the provisions of the Act with reference to which the principles were evolved. Here as stated earlier provision of two enactments are completely different. Further as per principles laid down by this Court in the case of The Workmen of the Orissa Police Co-operative Syndicate (*supra*) in a case of present nature demanding pay revisions, the "RCS" cannot be said to have any jurisdiction in the matter to adjudicate the issue.

With regard to the General Manager, Telecom's case (supra) in that case the issue involved was non-payment of telephone bills. In that case, the Supreme Court has made it clear that when there is a special remedy provided under Section-7B of the Indian Telegraph Act, 1985 with regard to disputes in respect of telephone bills, then remedy under the Consumer Protection Act is by implication barred. But in the present as indicated earlier in Section 68 of the Orissa Co-operative Societies Act, 1968 clearly permits a dispute required to be adjudicated under the Industrial Disputes Act, 1947 to be so adjudicated. Therefore, the said decision is factually distinguishable vis-à-vis the present case.

Next contention of Mr. Sahoo was even otherwise since the issue involved demands made by non-workmen, the learned Labour Court ought not to have proceeded in the matter. According to him, since the Labour Court had no jurisdiction to go into the matter there exists error apparent on the face of the impugned Award, which requires to be set aside by this Court.

The above contentions of Mr. Sahoo, learned counsel for the petitioner with regard to jurisdiction of the learned Labour Court has no legs to stand. His submission that the learned Labour Court has decided a non-workmen issue cannot be accepted for the simple reason that such a plea was never taken by the petitioner before the learned Labour Court. In fact a perusal of the statement of claim filed by the petitioner before the learned Labour Court as indicated earlier nowhere shows any such stand having been

taken by the petitioner. Rather in the pleadings under Annexure-3, the petitioner has on a number of times referred to the employees as workmen. Thus, in the pleading under Annexure-3, there exists no dispute about the status of the employees as workmen or about the petitioner not being an industry or that the dispute raised is not an industrial dispute. Further the two Management Witnesses examined on behalf of the petitioner also reflected the readiness of the petitioner for implementing report of 6th Pay Commission in favour of its workmen with effect from 01.01.2006. They also made it clear that the petitioner is earning profit continuously from 2002 till the date of testimony, i.e., 27.09.2012. Both have also stated about adequate business of the bank. Thus the submission of Mr. Sahoo that the matter involved non-workmen is not acceptable.

With regard to the argument of Mr. Sahoo that the learned Labour Court should not have ignored the guidelines issued by the "RCS" on 10.4.2008 vide Annexure-5 in view of Section 28 of "the Odisha Act", it can only be reiterated that the petitioner cannot rely upon a document like Annexure-5 which was never exhibited by it before the learned Labour Court. Conceding for a moment but not admitting that the petitioner can rely upon the same, there is nothing to show that the said document in any manner deals with the issue involved in this case pertaining to revision of pay scales of the employees/workmen of the petitioner pursuant to 6th Pay Commission. In fact the order under Annexure-5 does not whisper anything about recommendation of 6th Pay Commission or its implementation. It is only confines itself to the guidelines relating to payment of D.P., D.A. and H.R.A. to the employees of "DCCB". Therefore, the petitioner cannot make use of Clause-10 of the said Annexure. Further the order dated 23.06.2009 passed by the "RCS" under Ext.8/Annexure-22 dealing with the revision of Pay Scales of the employees of "DCCB" in tune with implementation of 6th Pay Commission, nowhere puts any embargo on the "DCCB" to implement the said recommendations from a particular date. Therefore, the argument of Mr. Sahoo that resolution dated 17.9.2009 under Annexure-9 bestowing the benefit of 6th Pay Commission from 2009 could not be antedated to 1.1.2006 on account of Clause-10 of the guidelines under Annexure-5 has no legs to stand for the reasons indicated earlier. Therefore, it cannot be said that by passing the impugned award under Annexure-1, the Labour Court has ignored the mandate of Section 28 of "the Odisha Act". No doubt Section 28(1)(a)(viii) of "the Odisha Act" speaks of power of the petitioner to revise pay of its employees subject to previous approval of the "RCS". However, as

indicated earlier, vide order dated 23.6.2009 under Ext.8/Annexure-22, the "RCS" had given permission for revision of pay scales of employees in the background of 6th Pay Commission subject to certain conditions. But he had nowhere directed the "DCCB"s like the petitioner to implement the benefits of Orissa Revised Scales of Pay Rules, 2008 from a particular date. Therefore, under the facts and circumstances, it cannot be said that by allowing the prayer for workmen the learned Labour Court in any manner has violated the mandate of Section 28(1)(a)(viii) of "the Odisha Act". Actually what has happened in this case is that though the "RCS" had given go ahead signal in the matter vide order dated 23.6.2009 under Annexure-22, however, the petitioner itself chose to allow the benefit from 2009 taking the plea of Clause-10 of Annexure-5, which has no application to the present case as stated earlier. It may be noted here that vide resolution dated 29.4.2009 under Annexure-4 the petitioner proposed to allow benefits from 1.1.2006 to its employees. Supporting the same the petitioner has written a letter to the "RCS" on 13.5.2009 vide Ext.2 praying for approval of the said proposal. Suddenly four months after vide Annexure-9, the petitioner passed a resolution on 17.9.2009 denying the benefit of the pay scales with effect from 1.1.2006 to the workmen/employees of the Bank taking the plea of various difficulties while admitting the earning of profit by the bank. Apart from this both the Management Witnesses have testified that there is sufficient work load with adequate business and MW-1 has made it clear in his cross-examination that the petitioner is earning profit continuously from 2002 till 27.9.2012, i.e., the date when he testified in the learned Court below. Further, the dismissal of the review petition taking the plea of higher cost involved in implementing the Award has remained unchallenged.

For all these reasons, we are of considered view that there is no error apparent on the face of the record. Accordingly, the writ application stands dismissed. No costs.

2018 (II) ILR - CUT- 682

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

W.P.(C) NO. 11671 OF 2016 & NO. 16372 OF 2017

STATE OF ODISHA & ORS. ……..Petitioners
W.P.(C) NO. 11671 OF 2016

.Vs.

KIRTAN BIHARI SINGH ……Opp. Party

For Petitioners : Addl. Govt. Adv.
For Opp. Party : M/s Saswati Mohapatra & P.Mangaraj

KIRTAN BIHARI SINGH ……..Petitioner
W.P.(C) NO. 16372 OF 2017

.Vs.

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

For Petitioners : M/s Saswati Mohapatra & P.Mangaraj
For Opp. Party : Addl. Govt. Adv.

(A) ORISSA CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1962 – Rule-22 read with Rule-29 – Power of Appellate authority – Appellate authority while considering the appeal directed for joint enquiry – Plea that the appellate authority acted illegally by directing joint enquiry – Held, plea cannot be accepted as the appellate authority has the power to direct for a joint enquiry in case the required conditions are satisfied. (Para 5)

(B) ORISSA CIVIL SERVICES (PENSION) RULES, 1992 – Rule-7 – Provisions under – The question arose as to whether the proceeding initiated against the government servant prior to the date of his retirement can continue after the retirement – Held, Yes, in terms of Rule-7(2) of the Pension Rules, the proceeding initiated against the government servant prior to the date of his retirement would continue and be concluded by the authority in the same manner as if the government servant had continued in service – As such, the joint enquiry under Rule-17 of the CCA Rules can continue against the delinquent even after his retirement from service. (Para 6)

Case Laws Relied on and Referred to :-

1. 2012 (3) SCC 580 : Nanda Kumar Verma .Vs. State of Jharkhand & Ors.

For Petitioner : M/s Saswati Mohapatra & P.Mangaraj
For Opp. Parties : Addl. Govt. Adv.

JUDGMENT Date of Judgment: 11 .05.2018

K.R. MOHAPATRA, J.

W.P.(C) No.11671 of 2016 has been filed by the State of Odisha and its instrumentalities assailing the order dated 20.03.2012 passed by learned Odisha Administrative Tribunal Cuttack Bench, Cuttack in O.A. No. 1135 (C) of 2008. W.P.(C) No. 16372 of 2017 has been filed by Sri Kirtan Bihari Singh questioning the legality and propriety of order dated 07.07.2017 passed by learned Odisha Administrative Tribunal, Cuttack Bench, Cuttack in C.P. No. 499(C) of 2014 arising out of O.A. No. 2753 (C) of 2012. The

facts and point of law involved in both the cases being similar, those are taken up together and disposed of in a common judgment. For convenience of discussion, Sri Kirtan Bihari Singh is described as delinquent and the State of Odisha and its instrumentalities are described in their official capacity.

2. Undisputed facts giving rise to filing of these two writ petitions are that the delinquent while working as Filaria Inspector/ Sanitary Inspector under the Director of Health Services and was posted at Khordha, an unfortunate incident occurred on 29.09.1999. On that date at about 3.30 P.M. one Pradipta Kumar Das, VS Clerk, Haldia PHC had gone to encash G.D. (staff salary) from State Bank of India, Khordha. While returning with the cash of Rs.2,96,549/- along with the delinquent on his Scooter, two unknown persons came on a Motorcycle and snatched away the money. As such, said Sri Pradipta Kumar Das lodged an FIR in Khordha Police Station, which was registered as P.S. Case No.312 dated 29.09.1999. On enquiry, the Investigating Officer submitted final report stating the allegation to be false. For the self-same incident, the Chief District Medical Officer, Khordha issued notice to the delinquent on 15.12.1999 directing him to explain as to why disciplinary action should not be taken against him for such gross lapses and not attending his duty on 29.09.1999. Subsequently, disciplinary proceeding was initiated against the delinquent for vide Office order No.1659 dated 21.02.2003 of Family Welfare Department for negligence in his duty, doubtful integrity, giving false statement, disobedience of orders of the authority and misappropriation of Government money, under Rule 15 of Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 (for short, 'the CCA Rules'). The delinquent submitted his reply to show cause notice on 09.04.2003 denying the charges. Sri Pradipta Ku. Das, VS Clerk, was also departmentally proceeded for self-same allegations vide charge memo dated 03.12.2003 and after due enquiry, he was imposed with a penalty on 24.11.2004 for recovery of Rs.2,96,549/-along with other punishments. Against the punishment imposed upon Sri Das, he preferred appeal. While considering the appeal filed by Sri P.K. Das, the Appellate Authority in exercise of the power under Rule-29 of the CCA Rules superceded all the proceedings drawn up against the delinquent and others and directed to initiate a joint enquiry under Rule-15 read with Rule-17 of the CCA Rules. Accordingly, joint proceeding under Rule-15 read with Rule-17 of the CCA Rules was initiated against the delinquent, Sri P.K. Das, VS Clerk and Dr. P.L. Panda, the then Medical Officer in-charge of the PHC.

Assailing the initiation of joint enquiry, the delinquent filed O.A. No.911(C) of 2007, which was disposed of with the direction to consider the representation of the delinquent. Accordingly, the representation of the delinquent was disposed of vide order dated 29.09.2007 asking him to wait till finalization of the joint enquiry proceeding. Assailing such action of the disciplinary authority, the delinquent filed O.A. No.1135(C) of 2008. Said O.A. was disposed of vide order dated 20.03.2012 holding that the appellate authority, while acting under Rule-29 of the CCA Rules, had no scope to pass order for a joint enquiry and the order of the Government to initiate joint enquiry was not in accordance with Rules. Accordingly, charge memo issued against the delinquent was quashed. In spite of the order of learned Tribunal, the joint enquiry was conducted and the delinquent was found guilty by Enquiry Officer and was directed to submit the representation against the proposed penalty. His representation was, however, rejected vide order dated 10.07.2012. As the delinquent was superannuated in the interregnum, i.e., on 30.06.2006, imposition of punishment of withholding 5% of his pension for five years was passed vide order dated 10.07.2012 under Rule-7(1) of the Orissa Civil Services (Pension) Rules, 1992 (for short, 'the Pension Rules"). Assailing the imposition of punishment, the delinquent filed O.A. No. 2753(C) of 2012. The O.A. was disposed of vide order dated 15.07.2014 holding that since memo of charges against the applicant/delinquent dated 12.6.2006 was quashed, the 2nd show cause notice dated 03.04.2012 as well as the consequential punishment imposed upon him would not stand and hence the same was quashed. The delinquent thereafter filed C.P. No. 499 (C) of 2014 for alleged violation of the order passed in O.A. No.2753(C) of 2012, i.e., non-release of his pension and retiral benefit. The said contempt proceeding was dropped by order dated 07.07.2017 with a finding that in the O.A. direction was given to quash the second show cause notice dated 03.04.2012 and no further direction for payment of pension or retiral benefit was passed. Assailing the same, the delinquent filed W.P.(C) No.16372 of 2017. In the meantime, the State Government have also filed W.P.(C) No.11671 of 2016, assailing the order passed in O.A. No.1135 (C) of 2008.

3. Miss Mohapatra, learned counsel appearing for the delinquent reiterating the above factual aspects submitted that since the delinquent was superannuated from service on 30.06.2006 during pendency of the enquiry under Rule-17 of the CCA Rules, the same could not have continued thereafter. Further, the government money in question amounting to Rs.2,96,549/- has already been recovered from Sri P.K. Das. Thus, there will

be no pecuniary loss caused to the Government. Hence, neither a proceeding under Rule-17 of the CCA Rules nor a proceeding under Rule-7 of the Pension Rules is maintainable. Thirdly, the appellate authority exceeded its jurisdiction in directing for joint enquiry in an appeal filed by Sri P.K. Das. The delinquent was neither a party to the said appeal nor was given any opportunity of hearing. The joint enquiry would not be maintainable in respect of the delinquent on and from the date of his superannuation. When a proceeding under Rule-15 was initiated against the delinquent, it should have been allowed to reach its logical conclusion. When the matter was under consideration of the disciplinary authority, the direction was made for a joint enquiry, which is *per se* illegal. Assailing the same, the delinquent had filed O.A. No.1135(C) of 2008, which was disposed of vide order dated 20.03.2012 quashing the charge memo against the delinquent in respect of the Joint Enquiry, holding it to be violative of provisions of the CCA Rules. The State Government, without assailing the said order, most illegally proceeded with the joint enquiry and issued 2nd show cause notice to the delinquent on 03.04.2012. Assailing the 2nd show cause notice, the delinquent filed O.A. No.2753(C) of 2012, which was disposed of vide order dated 15.07.2014 quashing the 2nd show cause notice as well as the entire proceedings. In spite of the same, the State Government proceeded with the enquiry. For non-release of the pensionary benefit, which was consequential to the order passed in O.A. No. 2753 (C) of 2012, the delinquent filed C.P. No.499(C) of 2014. It is only after receiving notice in the contempt proceeding, the State Government filed W.P.(C) No.11671 of 2016, which is hopelessly barred by time and is not maintainable. Since the contempt proceeding in C.P.No. 499(C) of 2014 was erroneiously dropped vide order dated 07.07.2017 without proper application of judicial mind, she prayed for quashing of the same and to release the pension and other retiral benefit of the delinquent.

4. Mr. Sahu, learned Additional Government Advocate, per contra, submitted that since the delinquent Sri P.K. Das, the VS Clerk and Dr.P.L.Panda, the Medical Officer in-charge were proceeded for the self-same incident, the appellate authority had committed no illegality in directing for a joint enquiry under Rule-17 of the CCA Rules. The appellate authority under Rule-29(i)(a) of the CCA Rules has the power to consider as to whether the procedure prescribed under the said Rules has been complied with, while conducting enquiry. Further, he has power under Rule-29(1)(c)(ii) to remit the matter to any authority with such direction as may deem fit in the circumstances of the case. The order passed by the appellate authority

for initiating the joint inquiry under Rule-17 of the CCA Rules washed away the previous proceedings against the delinquent as well as other government servants against whom joint inquiry was directed. In fact, pursuant to the direction of the appellate authority, joint inquiry was initiated against all the delinquents superseding the proceedings drawn up against each of them. Further, as per provisions under Rule-7(2) of the Pension Rules, the departmental proceeding, if instituted against a government servant while in government service, shall after his retirement, be deemed to be a proceeding under the Pension Rules and shall be continued and concluded by the authority by which they have been commenced, in the same manner as if the government servant continued in service. The joint enquiry under Rule-17 was initiated prior to retirement of the delinquent. Thus, it should reach its logical conclusion. Learned Tribunal, while adjudicating O.A. No.1135 (C) of 2008, had not taken these legal aspects into consideration. Thus, the order passed therein, is illegal and unsustainable. Further, the order passed in O.A. No. 2753(C) of 2012 was a consequence of order passed in O.A. No.1135 (C) of 2008. As such, the same would not stand to the scrutiny of law. Further, C.P. No.499(C) of 2014 was rightly dropped by learned Tribunal, which needs no interference.

5. We have heard learned counsel for the parties and perused the record in detail. The facts involved in these two writ petitions are not seriously disputed by either of the parties. It may be noted here that a sum of Rs.2,96,549/- was lost. An FIR was lodged alleging theft of the government money. However, the Investigating Officer submitted the final report stating the allegations to be false. Individual proceedings were initiated against Sri P.K. Das, VS Clerk, the delinquent and Dr.P.L.Panda, who was Medical Officer in-charge. While the proceeding against the delinquent was in progress, the disciplinary proceeding drawn up against Sri P.K. Das was finalized and he was imposed with punishment. Against the order of punishment, he preferred appeal. However, the appellate authority, in exercise of power under Rule-22 read with Rule-29 of the CCA Rules, directed for a joint enquiry under Rule-17 of the said Rules. Rule-29 of the CCA Rules deals with the matters to be considered in appeal, the relevant portion of which is quoted below:-

> "**29. Consideration of Appeals**-(1) In the case of an appeal against an order imposing any of the penalties specified in Rule 13 the appellate authority shall consider-
> (a) whether the procedure prescribed in these rules has been complied with and, if not whether such non-compliance has resulted in violation of any provisions of the Constitution or in failure of justice;

(b) xx xx xx
(c) xx xx xx

and, after consultation with the Commission if such consultation is necessary in the case, pass orders-

(i) xx xx xx

(ii) remitting the case to the authority which imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case.

xx xx xx"

(*emphasis supplied*)

6. On a bare perusal of Rule-29 makes it clear that the appellate authority has the power to direct for a joint enquiry in case the aforesaid conditions are satisfied. However, Miss Mohapatra, raised an objection to the effect that the appellate authority could not have directed for a joint enquiry against the delinquent while in *seisin* of the appeal filed by Sri P.K. Das. We are unable to accept her submission, inasmuch as Rule-29 does not impose any restriction of such nature on the appellate authority. However, her contention to the effect that the delinquent was neither a party to the appeal nor was given any opportunity of hearing sounds reasonable. But, the submission has a little bearing on the case at hand, inasmuch as the appellate authority directed for supersession of all the previous proceedings against the delinquent as well as other two government servants. Thus, the proceeding under Rule -17 of the CCA Rules was started with a clean slate for all the government servants including the delinquent. The delinquent is free to raise any objection admissible under law in course of the said proceeding, including maintainability of the same. In fact, the delinquent has participated in the proceedings of joint enquiry. Only because a favourable report was submitted by the Enquiry Officer in the earlier proceeding drawn up against the delinquent, initiation of the subsequent joint enquiry will not prejudice him in any manner, as he is free to take all such objections in the joint proceeding/enquiry itself. True it is that, in O.A No.1135(C) of 2008 filed by the delinquent, learned Tribunal had quashed the charge memo against the delinquent and directed for finalizing the previous proceeding initiated against the delinquent under Rule 15 of the CCA Rules. But, while considering the matter, learned Tribunal has not taken into consideration, the scope and ambit of Rule-29 of the CCA Rules and power conferred on the appellate authority under the same. Although there is a delay in assailing the said order by the State Government, but taking into consideration the gravity of the allegation as well as the point of law involved together with the fact

that the joint enquiry had proceeded substantially by the date of disposal O.A. No.1135(C) of 2008, i.e., on 20.03.2012, we are not inclined to entertain the objection raised by learned counsel for the delinquent and overrule the same.

7. The joint enquiry under Rule-17 is also assailed on the ground that it would not be maintainable against the delinquent on and after his date of superannuation, i.e. 30.06.2006 and the proceeding beyond the said date was *non est* in the eyes of law. Miss Mohapatra, learned counsel for the delinquent submitted that on and from the date superannuation, the delinquent ceased to be a government servant. Thus, a proceeding under Rule-7(1) is not maintainable against him. To answer the objection, we may refer to Rule-7(1) of the Pension Rules, which reads as follows:

> *"7.(1) The Government reserve to themselves the right of withholding a pension or gratuity, or both either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if in any departmental or judicial proceedings, the pensioner found guilty of grave misconduct or negligence in duty during the period of his service including service rendered on re-employment after retirement.*
>
> *xx xx xx*
>
> *2) (a) Such departmental proceedings referred to in Sub-rule (1) if instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service;*
>
> *xx xx xx"*

Thus, in terms of Rule-7(2) of the Pension Rules, the proceeding initiated against the government servant prior to the date of his retirement would continue and be concluded by the authority in the same manner as if the government servant had continued in service. As such, the joint enquiry under Rule-17 of the CCA Rules can continue against the delinquent even after his retirement from service.

8. Miss Mohapatra relying upon a decision in the case of ***Nanda Kumar Verma -v- State of Jharkhand and others***, reported in 2012 (3) SCC 580 submitted that there can be only one enquiry in respect of a charge for particular misconduct and that is what the Rules usually provide. Thus, initiation of a joint enquiry, when the Enquiry Officer had already submitted his report in the previous proceeding against the delinquent under Rule-15 of

the CCA Rules, is *per se* bad in law. Paragraph-26 of decision in the case of ***Nanda Kumar Verma (supra)*** is relevant for our consideration, which is quoted herein:-

> *"26. In our opinion, having accepted the explanations and having communicated the same to the appellant, the High Court could not have proceeded to pass the order of initiating departmental proceedings and reverting the appellant from the post of chief Judicial Magistrate to the post of Munsif. On general principles, there can be only one enquiry in respect of a charge for a particular misconduct and that is also what the rules usually provide. If, for some technical or good ground, procedural or otherwise, the first enquiry or exoneration is found bad in law, there is no principle that a second enquiry cannot be initiated.* Therefore, when a completed enquiry proceedings is set aside by a competent forum on a technical or on the ground of procedural infirmity, fresh proceedings on the same charges is permissible."
>
> *(emphasis supplied)*

In the case at hand, the appellate authority having found that the procedure adopted by the disciplinary authority was not in accordance with law, superceded all the three individual departmental proceedings against the delinquent and other two government servants and directed for joint enquiry under Rule-17 of the CCA Rules. Applying the principles decided supra, we are constrained to hold that the delinquent along with other two government servants were proceeded with individually for one and the same incident. Thus, initiation of three individual departmental proceedings could have resulted in failure of justice. Initiation of an enquiry under Rule-17 is, therefore, appropriate in the instant case, as all three government servants, including the delinquent, are involved in one and the same incident.

9. In view of the discussion made above, we are of the firm opinion that the impugned order passed in O.A. No. 1135 (C) of 2008 is not sustainable in law and is accordingly quashed. Accordingly, orders passed in O.A. No. 2753(C) of 2012, which is a consequence of the order passed in O.A. No.1135(C) of 2008, also stands quashed. Since there was no direction for release of pension and retiral dues in favour of the delinquent in any of the aforesaid two Original Applications, C.P. No.499(C) of 2014 was rightly dropped by learned Tribunal and the same needs no interference. Accordingly, W.P.(C) No. 11671 of 2016 is allowed and W.P.(C) No. 16372 of 2017 stands dismissed.

2018 (II) ILR - CUT- 691

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

W.P.(C) NO. 27311 OF 2017

THE CHIEF MANAGER, INDIAN BANK, BHUBANESWAR ……..Petitioner

.Vs.

THE GENERAL SECRETARY, INDIAN BANK EMPLOYEES UNION ……..Opp. Party

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 Writ petition challenging the award of CGIT – Dispute raised by the Workman challenging his order of compulsory retirement – Tribunal interfered with the order of punishment and directed reinstatement with 50% back wages – The question arose as to whether the Tribunal can interfere with the order of punishment – Held, No.

"A Bank officer is required to exercise higher standards of honesty and integrity. He deals with money of the depositors and the customers. Every officer/employee of the Bank is required to take all possible steps to protect the interests of the Bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a Bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the Bank. In view of the case law cited, even in absence of any financial loss to the Management-Bank, the conduct, i.e. indiscipline, insubordination and dereliction in duty of a Bank employee are by itself sufficient to do away with his service as a Bank employee. The Disciplinary Authority, taking into consideration his length of service as well as past service records etc. imposed punishment of compulsory retirement so that he could get his retiral benefits. Learned Tribunal lost sight of the aforesaid vital fact aspect and interfered with the quantum of punishment, which is unwarranted." *(Para 11)*

Case Laws Relied on and Referred to :-

1. AIR 2005 SC 3272 : State Bank of India & Anr. Vs. Bela Bagchi and Ors.

For Petitioner : M/s. S.S.K. Dey, N. Pattnaik
For Opp. Party : Mr. K.C. Kanungo

JUDGMENT Date of Judgment: 15 .05.2018

K.R. MOHAPATRA, J.

The Management-Bank in this writ petition seeks to assail the award dated 16th February, 2017 (Annexure-4) passed by learned Presiding Officer, Central Government Industrial Tribunal-Cum-Labour Court, Bhubaneswar (for short, Tribunal') in Industrial Dispute Case No.14 of 2008 in reducing punishment of compulsory retirement to reinstatement with 50% of back

wages and other service benefits along with stoppage of two annual increments without cumulative effect as a measure of punishment against the workman-Sri Narayan Panda.

2. Bereft of unnecessary details relevant facts for adjudication are as follows:

The workman, while continuing as a Cash Clerk/Shroff in the Dhalapur Branch of the Management-Bank (Indian Bank), was alleged to have misbehaved with his superior authority (Branch Manager) and involved in certain activities as well as certain omissions and commissions on his part during discharge of his duties which amounts to gross misconducts as defined under Clause 19(5)(c) and 19(5)(e) and 19(5)(i), 19(5)(j) and 19(7)(b) of the Bi-partite settlement dated 19.10.1966 between the Management and the Union. As such, he was placed under suspension with effect from 30.05.1995 and charge sheet was issued against the workman on 08.09.1995. The workman faced a domestic enquiry under 12 heads of charges and was found guilty of charge Nos.1,2,5,7,8,9,10 and 12 and was exonerated from all other charges leveled by the Inquiry Officer. Accordingly, he filed his representation against the findings of the enquiry report, so also, against the proposed punishment. The Disciplinary Authority imposed the punishment of compulsory retirement vide his order dated 10.06.2006. The workman preferred appeal against the said order, which was rejected vide order dated 28.09.2006. As such, the workman approached the labour machinery which culminated in referring the matter to learned Tribunal by the appropriate government to adjudicate the following schedule of reference:-

> "Whether the action of the Management of Indian Bank in terminating the service of Shri Narayan Panda, Ex-Clerk-cum-Cashier by way of imposing punishment of compulsory retirement from service with effect from 10.06.2006 is legal and/or justified? If not, relief the workman is entitled to?"

3. Learned Tribunal taking into consideration the rival pleadings of the parties framed the following issues:-

> "1.Whetherthe reference is maintainable?
>
> 2. Whether the domestic enquiry conducted by the Manager was fair and proper?
>
> 3. Whether the punishment by way of compulsory retirement imposed on the disputant was proportionate to the charges?
>
> 4. If not, what relief the disputant is entitled to?"

4. Learned Tribunal, while answering issue Nos.2 and 3 came to a finding that the domestic enquiry was conducted as per the procedure laid down in the certified standing order as well as in conformity with the principles of natural justice and the disputant workman was given just and proper opportunity to defend himself in the enquiry. However, learned Tribunal held that the findings of the Inquiry Officer on Charge Nos. 5, 6, 9 and 10 suffer from conjunctures and surmises being based on no legal evidence. Basing upon the aforesaid finding, learned Tribunal proceeded to modify the punishment imposed upon the workman by holding that the workman is entitled for reinstatement with 50% back wages and other service benefits along with stoppage of two annual increments without cumulative effect as a measure of punishment for the charges found to have been established and further directed to implement the award within a period of two months from the date of publication in the official gazette.

5. The Management-Bank being not satisfied with the impugned award has filed this writ petition.

6. Mr.Dey, learned counsel for the petitioner, based his argument mainly on the ground that learned Tribunal has no jurisdiction to re-appreciate the evidence adduced during domestic enquiry. Learned Tribunal is only expected to examine that the finding arrived at by the Inquiry Officer is based on evidence on record and the same is not perverse or contrary to the evidence on record. Further, learned Tribunal can also examine as to whether the punishment is shockingly disproportionate to the charge proved against the workman. Learned Tribunal has exceeded the jurisdiction vested on him under law for which, the impugned award is not sustainable in the eyes of law. Learned Tribunal has committed error of law as well as facts in converting the punishment of compulsory retirement to that of reinstatement with 50% of back wages and other service benefits etc. Hence, the impugned award (Annexure-4) is not liable to be set aside.

7. Mr.Kanungo, learned counsel for the workman-opposite party, per contra, refuted the contentions raised by learned counsel for the Management-Bank. Supporting the impugned award, he contended that the findings on Issue Nos.5, 6, 9 and 10 are perverse and are based on surmises and conjectures. On a bare reading of the evidence would lead man of prudence to the conclusion that the findings on the aforesaid charges would not sustain. As such, there was no illegality committed by learned Tribunal which warrants interference. Further, taking into consideration the past

service record of the workman, gravity of the charges proved against him as well as the mental agony suffered by the workman for pendency of the domestic inquiry proceeding for a period of more than one decade, learned Tribunal has rightly reduced the punishment. Accordingly, he prayed for dismissal of the writ petition.

8. We have heard learned counsel for the parties at length and perused the case record as well as materials produced before us in detail. On perusal of the records, it appears that the workman was charged under 12 heads. He was found guilty only on charge Nos. 1, 2, 5, 7, 8, 9, 10 and 12. For better appreciation, the aforesaid charges are quoted hereunder:

> "1. On 01.05.1995, he had prepared a debit voucher for payment of rent of Rs.1400/- for generator and sent to the Manager for passing. The Manager released the voucher and the amount was credited to the S.B. A/c. of the generator supplier, Mr. Manoranjan Karna. When Mr. Panda prepared the SB w/s of Mr. Manoranjan Karna filling there the rent amount of Rs.1400/-, the Manager insisted for appropriating a sum of Rs.250/- to the IRDP loan a/c. of Mr. Manoranjan Karna. He became furious and shouted at the Manager stating "you cannot recover the amount from rent proceeds."
>
> 2. That, he had switched off the generator – when the Manager told him that he would pass the w/s only after discussion with the generator supplier –stating that he (Mr. Panda) would not allow anybody to use the generator. On account his above act, the customer service was very much hampered due to current failure.
>
> xx xx xx
>
> 5. That, on 2.5.1995, when he had sent the SB w/s of the generator supplier again to the Manager altering the date without the authentication of Mr. Manoranjan Karna, Manager told him that he would pass the w/s only after discussion with Mr. Manoranjan Karna. On hearing this he told in front of the customers that he would not make any payments henceforth. When the Manager called for reasons, he replied that there was no cash. Again when the Manager told him that sufficient cash was available to make immediate payments, he retorted that he would draw himself whatever cash was available there. When the Manager asked him to draw cash after receipt of remittance from Boudh branch, he shouted in front of the customers" I will not make any payment; I will draw the money myself". When the Manager requested the customers to wait till the arrival of cash remittance from Boudh, he closed the case at 2.00 P.M., while the customers were still waiting for payment.
>
> Xx xx xx
>
> 7. That, on 3.5.1995, when the Manager sent his w/s for Rs.6,000/- for payment, he had deducted a sum of Rs.1400/- and paid the balance amount. When the Manager asked him the reasons, he told Manager that he had kept the amount of Rs.1400/- towards rent on generator. When the Manager insisted in writing for deduction of Rs.1400/- from his payment, he did not obey his orders. Despite Manager's

repeated instructions he had neither made full payment of Rs.6000/- to him nor did he give in writing for deduction of Rs.1400/- from Manager's payment.

8. That, when the Manager was busy in preparing the L.A. statement from the IRDP ledger, he rushed to the Manager in violent mood and snatched the IRDP ledger and threw it away, shouting, I will not allow you to do any clerical work.

9. That, on 18.5.1995, he had arranged Mr. Rama Joshi, Sarapanch of Ramgarh G.P. and Mr. Lakshmi Mahakud, Physical Education Teacher, Dhalpur High School, who are outsiders, to come and threaten the Manager with dire consequences on the generator rent issue and prevented the Manager from leaving the office premises. The situation became so tense that the Manager could not open the branch on 19.5.1995 fearing physical danger to him.

10. That, he had supplied and hired generator to the branch in the name of Mr. Manoranjan Karna and he had been receiving the rent.

Xx xx xx

12. That, he had availed BP facility at Dhalpur Branch by presenting the SB w/s of Smt. Padmini Padhi, holder SB a/c. 4737 of Boudh Branch. The BPs were realized either by transfer from his SB a/c. of Dhalpur branch or by remitting cash."

9. Learned Tribunal, upon consideration of materials on record, exonerated the workman from the charge Nos.5 6, 9 and 10. Although it is vehemently urged by Mr. Dey, learned counsel for the petitioner-Management that learned Tribunal has exceeded its jurisdiction by exonerating the workman from charge Nos.5, 6, 9 and 10, we, after perusing the materials on record and reasons assigned by learned Tribunal, are not inclined to interfere with the same for the reason that learned Tribunal was well within its power and jurisdiction to read into the evidence and interfere with the finding of the Inquiry Officer, if the same is perverse in the context of the evidence and materials led before him. Further, this being a finding of fact and based on certain evidence, we are not inclined to interfere with the same.

10. The next issue that arises for consideration is with regard to the adequacy of punishment. Law is well-settled while interfering with the quantum of punishment, the Court should keep in mind the doctrine of proportionality. In other words, the Court cannot sit over the quantum of punishment as Appellate Authority. The scope to interfere with the quantum of punishment is extremely limited and the power to interfere with the quantum of punishment should be sparingly used only in the cases where the punishment is shockingly disproportionate to the guilt proved against the workman/delinquent. At the same time, it should be kept in mind that an employee of the Bank is required to exercise higher standard of honesty and integrity. Every officer/employee of a Bank is required to take all possible

steps to protect interest of the Bank and to discharge his duties with utmost integrity, honesty, devotion and diligence. He should do nothing, which is unbecoming on the part of an employee of the Bank. Good conduct and discipline are inseparable of functioning of an officer/employee of a Bank. A Bank employee should not do any act, which ultimately affects the interest as well as business of the Bank.

Keeping in mind the aforesaid principles, we have to examine the case at hand. As discussed earlier, in the inquiry the Disciplinary Authority imposed the punishment of compulsory retirement upon the workman basing upon the charge Nos. 1, 2, 5, 7, 8,9, 10 and 12. Learned Tribunal, on reading into the evidence and scrutinizing the materials on record, exonerated the workman from charge Nos. 5, 6, 9 and 10. The workman was a Cashier and handling with the cash. He had no previous record of indiscipline or insubordination. It appears from the materials on record that the genesis of the proved charges is non-payment of rent of a generator. It is clearly proved that the workman on 01.05.1995, refused to comply with the instruction of the Branch Manager to appropriate a sum of Rs.250/- to the IRDP loan account of Mr. Manoranjan Karna, the named supplier of the generator from the rent of Rs. 1400/- and thereby disobeyed the direction of the Branch Manager and when the Branch Manager insisted upon the same, the workman became furious at the Manager and shouted at him in the Bank premises during the office hour saying, "you cannot recover the amount from rent proceeds". Further on the very same day, he had switched off the generator stating that he (workman) would not allow anybody to use the generator. On account of his above conduct, the customer service was disrupted. On the same day, when the Branch Manager was busy in preparing the L.A. statement from the IRDP ledger, the workman rushed to the Manager in violent mood and snatched the IRDP ledger, and threw it away shouting "I will not allow you to do any clerical work". Further on 18.05.1995, the workman had availed both BPs and reversed subsequently without receipt of any credit advice of other Branch, by debiting the same to his account or by payment of cash.

11. Learned Tribunal was of the opinion that the charges proved against him are not that serious which would warrant compulsory retirement. At this stage, it would be profitable to refer to the case of ***State Bank of India and anr. –vs- Bela Bagchi and Ors***., reported in AIR 2005 SC 3272, wherein it is held as follows:-

"11. xx xx xx

A Bank officer is required to exercise higher standards of honesty and integrity. He deals with money of the depositors and the customers. Every officer/employee of the Bank is required to take all possible steps to protect the interests of the Bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a Bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the Bank. As was observed by this Court in Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik, [1996] 9 SCC 68, it is no defence available to say that there was no loss or profit resulted in case, when the officer/employee acted without authority. The very discipline of an organization more particularly a bank is dependent upon of its officers and officers acting and operating within their allotted sphere. Acting beyond one's authority is by itself a breach of discipline and is a misconduct. The charge against the employee were not casual in nature and were serious. That being so, the plea about absence of loss is also sans substance".

xx xx xx

It is contended by learned counsel for the opposite party that the Bank has not suffered any monetary Loss for the conduct of opposite party, which is one of the grounds to interfere with the punishment by learned Tribunal. Loss of money to the Bank may be a ground for determining the quantum of punishment. In view of the case law cited (supra), even in absence of any financial loss to the Management-Bank, the conduct, i.e. indiscipline, insubordination and dereliction in duty of a Bank employee are by itself sufficient to do away with his service as a Bank employee. The Disciplinary Authority, taking into consideration his length of service as well as past service records etc. imposed punishment of compulsory retirement so that he could get his retiral benefits. Learned Tribunal lost sight of the aforesaid vital aspect and interfered with the quantum of punishment, which is unwarranted.

12. In that view of the matter, we are constrained to hold that the conclusion of learned Tribunal so far it relates to punishment (at paragraph-13) is not sustainable in the eyes of law. We, therefore, set aside the conclusion of learned Tribunal with regard to the quantum of punishment and restore the punishment of compulsory retirement with effect from 10.06. 2006 imposed by the Disciplinary Authority.

13. With the aforesaid modification in the impugned award, the writ petition, is disposed of.

2018 (II) ILR - CUT- 698

S.K. MISHRA, J.

CRIMINAL MISC. CASE NO. 800 OF 2017

DOLAGOVINDA PRADHAN & ORS. ……..Petitioners

.Vs.

STATE OF ODISHA & BHARAT MULIA ……..Opp. Parties

CRIMINAL TRIAL – Application by prosecution for recalling its witness who turned hostile on his subsequent cross examination after alteration of charge – The learned court below in consideration of the provision under Section 154 of the Indian Evidence Act allowed the petition – Order challenged before High court – Principles for recall of prosecution witness by the prosecution – Scope of – Indicated.

"Broadly, however, this much is clear that contingency of cross-examining the witness by the party recalling him is an extra-ordinary phenomenon and permission in a specific case. Before a Court exercises discretion in declaring a witness hostile, there must be some material to show that the witness has gone back on the earlier statement or is not speaking the truth or has exhibited an element of hostility or changed side and transferred his loyalty to the adversary. The Court before permitting the party calling the witness to cross-examine must scan and weigh the circumstances properly and should not exercise its discretion in a casual or routine manner. Having applied this principle to the case at hand, this Court takes into note that the P.W.7 has supported the prosecution in his statement under Section 161 Cr.P.C. recorded by the I.O. He was examined in-chief and in-chief he stood by the version he has taken in course of investigation while being examined in-chief and also cross-examined at the first instance but not on recall. He has totally ignored that aspect of the case and has completely stated things, which are contrary to his earlier statement made in the statement before the I.O. and examination in-chief. It is settled principles of law that a clever witness may support the prosecution in examination in-chief and later on being gained over may deliberately make certain mistakes, which would demolish the prosecution case. In such a case, it is open by the prosecution to recall the witness for re-examination and in the process cross-examine him. So, having weighed the facts and circumstances of the case as well as the statement of witness in question with regard to the discussion made above, I am of the view that the order passed by the learned Assistant Sessions Judge, Cuttack is not in any way erroneous requiring correction" *(Paras 4& 5)*

Case Laws Relied on and Referred to :-

1. AIR 1977 SC 170 : Rabindra Kumar Dey .Vs. State of Orissa.

For Petitioners : M/s Prafulla Ku. Jena & S. Behera
For Opp. Parties : Miss. Sabitri Ratho, Addl. Govt. Adv
M/s Banshidhar Baug, M.R. Baug,
D. Tripathy & Mr. P.K. Pani, Amicus Curie.

JUDGMENT Date of Judgment : 10.04.2018

S.K.MISHRA, J.

The petitioners, being the accused in S.T. Case No.240 of 2012 assail the order dated 28.02.2017 passed by the learned Assistant Sessions Judge,

Cuttack, whereby application filed by the prosecution to recall P.W.7 was allowed.

2. Initially, the petitioners were charge-sheeted for the offence under Sections 147, 148, 294, 307, 506, 379, 354 and 427/149 of the IPC in the aforesaid case. After examination of certain witnesses, the charge was altered and additional charge under Section 216 IPC was added. Thereafter, the court recalled all the witnesses for further cross-examination on the additional charge. P.W.7 was examined on recall and it is the case of the informant as well as the case of the prosecution that the said witness presumably resiled from the stance he has taken while giving statement before the police and recorded under Section 161 Cr.P.C., the examination in-chief and the cross-examination that immediately followed. Therefore, they filed an application to recall P.W.7 for further cross-examination by the prosecution by declaring him hostile witness. The petition was allowed. The learned Sessions Judge took into consideration the settled principles of law that a petition under Section 154 of the Indian Evidence Act is maintainable even after cross examination of witness by the defence when he supported the prosecution case in-chief but resiles from such stance in the cross-examination. That direction lies with the court to permit the person, who calls a witness to put leading questions as the circumstances demand. The learned counsel for the petitioners argues that as per the procedure laid down under Section 138 of the Evidence Act, the examination in-chief is to take first, then the cross-examination has to be made and if any new material has come out, then the party calling the witness may have re-examined the witness. It is argued by the learned counsel for the State, the intervener and the Amicus Curie relying upon certain judgments of different courts that Section 154 of the Indian Evidence Act can be invoked by the court at any stage. It is appropriate to take note the exact words used in Section 154 of the Indian Evidence Act. It reads as follows:

> " 154. Question by party to his own witness.— The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.— 2[(2) Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness."

3. A plain reading of the aforesaid provision manifestly makes it clear that it does not specify the stage at which a party, who calls a witness, shall be allowed to put such questions, which were allowed to be put to the witness in cross-examination, by the adverse party. Section 154 of the Evidence Act

is the enabling section recognizing the jurisdiction of the court to allow a party to cross-examine his own witness. It is apparent from the provision itself that the legislature in its wisdom has not put any restriction on the exercise of power under Section 154 of the Act as well the court cannot read into the Section 154 of the aforesaid act and restrict the scope of the same by virtue of Section 137 of the Indian Evidence Act.

4. In the case of ***Rabindra Kumar Dey vs. State of Orissa,*** AIR 1977 SC 170, the Hon'ble Supreme Court has held that merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may favourable to the accused, the discretion to allow the party to cross-examine itself cannot be allowed. The Hon'ble Supreme Court further held that a witness is liable to be examined by the party calling him when the court is satisfied the witness bears hostility against the petitioner for whom he is deposing or he does not appear to be willing to tell the truth. The Hon'ble Supreme Court further held that in order to ascertain intention of the witness or his conduct, the judge concerned may look into the statements made by the witness before the I.O. or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on a most material point with the one which gave before the previous authorities. The court must however, distinguish between a statement made by the witness by way of unfriendly act and one which lets out the truth without any hostile intention.

At para-17 of the aforesaid judgment, the Hon'ble Supreme Court further recognizes the difficulty to lay down a rule of universal application as to why the court will be entitled to exercise it discretion under Section 154 of the Indian Evidence Act and matter depends on the facts and circumstances of each case and satisfaction of the court on the basis of those circumstances. Broadly, however, this much is clear that contingency of cross-examining the witness by the party recalling him is an extra-ordinary phenomenon and permission in a specific case. Before a Court exercises discretion in declaring a witness hostile, there must be some material to show that the witness has gone back on the earlier statement or is not speaking the truth or has exhibited an element of hostility or changed side and transferred his loyalty to the adversary. The Court before permitting the party calling the witness to cross-examine must scan and weigh the circumstances properly and should not exercise its discretion in a casual or routine manner.

5. Having applied this principle to the case at hand, this Court takes into note that the P.W.7 has supported the prosecution in his statement under Section 161 Cr.P.C. recorded by the I.O. He was examined in-chief and in-chief he stood by the version he has taken in course of investigation while being examined in-chief and also cross-examined at the first instance but not on recall. He has totally ignored that aspect of the case and has completely stated things, which are contrary to his earlier statement made in the statement before the I.O. and examination in-chief. It is settled principles of law that a clever witness may support the prosecution in examination in-chief and later on being gained over may deliberately make certain mistakes, which would demolish of prosecution case. In such a case, it is open by the prosecution to recall the witness for re-examination and in the process cross-examine him. So, having weighed the facts and circumstances of the case as well as the statement of witness in question with regard to the discussion made above, I am of the view that the order passed by the learned Assistant Sessions Judge, Cuttack on 28.02.2017 in S.T. Case No.240/2012 is not in any way erroneous requiring correction. Hence, I am not inclined to interfere in the matter and hence, CRLMC is dismissed being devoid of any merit.

2018 (II) ILR - CUT-701

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

W.P.(C) NO. 9124 OF 2006

BIPIN BIHARI BISHI .....Petitioner

.Vs.

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

LEASE PRINCIPLES – Jawan lease – Petitioner, an ex-serviceman was allotted with some land under the Lease principles issued by the Govt. – Lease cancelled by initiating a proceeding under the Orissa Govt. Land Settlement Act, 1962 – Whether cancellation is proper – Held, No.

"When the lease has been granted under the Jawan Lease without disclosing anything about settlement of land under the OGLS Act, it is not understood how in 2006 the same Tahasildar, Sambalpur made appeal for cancellation of lease under the OGLS Act because the lease purportedly granted under the lease principle meant for Jawan or ex-service person cannot be resorted to OGLS proceeding to cancel the same." (Para 18)

Case Laws Relied on and Referred to :-

1994 (II) OLR 149; Rajkishore Das Vs. State of Orissa & Ors.

For Petitioner : M/s. K.A. Guru, A.K. Mohanty, S. Mohapatra & K.K. Nayak

For Opp. Parties: Mr. Bibekananda Bhuyan, AGA
M/s. B.N. Prasad & S.C. Mekap

JUDGMENT Date of Hearing: 29.03.2018 Date of Judgment:18.05.2018

DR. D.P. CHOUDHURY, J.

Challenge has been made to the order of resumption of the case land by the Sub-Collector, Sadar, Sambalpur on 23.6.2006.

FACTS

2. The unshorn details of the facts of the case leading to the writ petition is that the petitioner is a resident of Gopalmal, Sambalpur town but originally he belongs to village Janhapada. In the year 1974, petitioner joined in Indian Army as a Jawan. Due to some dissention in the family, petitioner shifted to Sambalpur Town permanently in 1985 and then resided there till 2005. Petitioner retired from Indian Army as Hawlidar in the year 1998. Since he has worked in Indian Army, in the year 1997, the petitioner has approached the Zilla Sainik Board, Sambalpur for a piece of land. After due investigation, Zilla Sainik Board directed him to apply to the Tahasildar Sadar, Sambalpur for grant of lease of land.

3. Be it stated that although the petitioner was born at village Janhapada under Attabira Tahasil, in the Bargarh district but he has no landed property in the paternal village. Accordingly he got a Landless Certificate vide Misc. Case No.278 of 1999 under the jurisdiction of Attabira Tahasil. As per the application of the petitioner, Jawan Lease Case No.2 of 1997 was initiated and after due verification, the Tahasildar, Sadar, Sambalpur-opposite party No.3 recommended for sanction of lease of Ac.3.84 decimal of Abad Jogya Anabadi land in mouza A. Katapali and accordingly the Sub-Collector, Sambalpur confirmed the settlement of such lease on 20.5.2000 in favour of the petitioner vide Jawan Lease Case No.2/97. Thereafter the case land was mutated in favour of the petitioner in the Consolidation by the Consolidation authority under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (hereinafter called "the Act, 1972)".

4. It is stated that a Misc. Appeal (Jawan Lease) Case No.2 of 2006 was initiated by the Sub-Collector, Sambalpur to cancel the lease on various

grounds. He got a notice and accordingly participated in the proceeding. After hearing the petitioner and the Tahasildar, the Sub-Collector passed order for resumption of the case land on the ground that the petitioner is not a permanent resident of Sambalpur, he is not a landless person and the wife of the petitioner has got landed property purchased in her favour. So, the writ petition is filed challenging such impugned order.

SUBMISSIONS

5. Learned counsel for the petitioner submitted that the lease has been granted under Jawan Lease Case No.2 of 2006. Although the petitioner has got birth at Janhapada under Bargarh district but since 1985 the petitioner has been living at Sambalpur Town. There is no mistake on the part of the Tahasildar, Attabira in issuing Landless Certificate in favour of the petitioner vide Misc. Case No.278 of 1999 because petitioner has no landed property in his paternal village. Learned counsel for the petitioner further submitted that the grant of lease not only was recommended by the Tahasildar Sadar, Sambalpur but also it was confirmed by the Sub-Collector, Sambalpur after verifying all formalities for which it cannot be said that grant of lease under the lease principles is illegal or improper.

6. Learned counsel for the petitioner submitted that the Sub-Collector has erred in law by observing in the impugned order that the petitioner is not a landless person qualifying to get the Jawan Lease under the Government Grants Act, 1895 or lease principles. Learned Sub-Collector has failed to understand that the petitioner's share in his paternal property for less than one acre would be counted as landless person, if at all the Sub-Collector, Sambalpur construed the case under the Orissa Government Land Settlement Act, 1962 (hereinafter called "the Act, 1962").

7. Learned counsel for the petitioner submitted that the impugned order of resumption is based on surmises and conjectures and the Sub-Collector has no jurisdiction to resume the case land as he has not been given sufficient opportunity of being heard while passing the order to resume the case land. On the other hand, the impugned order suffers from violation of the principles of natural justice of the petitioner.

8. Learned counsel for the petitioner further submitted that the case land has been already settled with rayati status of the petitioner and same has been recognized by the Consolidation authority. When the Consolidation authority has allowed to record the land in question in favour of the petitioner, the Sub-

Collector, Sambalpur has no authority to cancel the same as cancellation of lease amount to encroachment upon the Consolidation authority. It is well settled in law that the Consolidation authority has got power of the Civil Court.

9. Learned counsel for the petitioner submitted that since the lease has been granted by observing all formalities, the impugned order of cancellation of lease is illegal, improper and beyond jurisdiction for which the same is liable to be set aside.

10. Mr. Bibekananda Bhuyan, learned Additional Government Advocate appearing for the opposite parties submitted that the petitioner is not entitled to get the lease vide Jawan Lease Case No.2 of 1997 because he has suppressed about his permanent residence at Janhapada, district Bargarh. He has only submitted application showing him as permanent resident of Sambalpur. Moreover, the petitioner has also suppressed the material fact that he has got paternal property at Bargarh.

11. Learned counsel for the State further submitted that the learned Tahasildar has shown the petitioner as landless person without verifying the fact. Only the landless person can be leased out the property under Jawan Lease. Now the Sub-Collector confirmed the lease without following the due procedure of law. Apart from this, the land allotted for agricultural purpose has not been used for such purpose. After due notice to show cause issued, the resumption proceeding was started and rightly the Sub-Collector has passed the impugned order to cancel the lease granted to the petitioner.

12. Mr. B.N. Prasad, learned counsel for the intervenor submitted that the case land has already been allotted in favour of the intervenor-petitioner who has already taken physical possession of the same since 2004. So, in his presence the matter should be disposed of. According to him, the intervenor-petitioner is also an ex-serviceman and has been allotted the case land under the Jawan Lease.

13. The main point for consideration:

(i) Whether the order for resumption passed under Annexure-5 is liable to be quashed and restore the lease already granted in favour of the petitioner?

DISCUSSION

14. It is not in dispute that the petitioner was ex-service person and has retired as Hawalidar in the year 1998. It is admitted fact that the petitioner

has applied for lease of land under Jawan Lease category. It is also admitted fact that he has obtained Certificate showing him landless person. It is not in dispute that after the settlement of land with the petitioner it was recorded in his favour but subsequently notice was issued to cancel the lease.

15. During pendency of this case, the intervenor intervened the case as in his presence the case is to be disposed of. It is his claim that land has been already allotted to him under Jawan Lease and he is in possession of the same. We have passed the order that petition of the intervenor would be disposed of along with this writ petition. Accordingly we have also taken into consideration the submission of the learned counsel for the intervenor.

16. In course of hearing, we have called for the case record in Lease Case No.02 of 1997. From the record, it appears that the present petitioner has applied to Zilla Sainik Board, Sambalpur for allotment of case land pertaining to Plot No.1617 measuring an area 1.72 decimals and Plot No.2488 measuring an area 2.12 decimals, both under Khata No.441 at village A. Katapali in Jawan Lease Misc. Case No.2 of 1997 at Sambalpur. It further reveals that after due proclamation and R.I. report submitted with regard to his stay at Sambalpur, 85 decimals of land which is less than standard one acre has been leased out. It appears that on 10.5.1999, the Tahasildar after detailed verification of the particulars with regard to his residentship, the land being reserved for the Jawan lease and no objection received on proclamation, lease was granted in favour of the petitioner. It was sent to Sub-Collector for confirmation. On 20.5.2000 the Sub-Collector confirmed the Jawan Lease in favour of the petitioner for agricultural purpose. So, all formalities in Jawan Lease case has been gone through.

17. From the record, it appears on 25.1.2006 the Tahasildar raised the issue for cancellation of the lease on the ground that the petitioner belongs to district Bargarh and not permanent resident of district Sambalpur and he was not landless person for which settlement of land under the OGLS Act and Rules does not qualify him to settle lease of the land in question in his favour.

18. When the lease has been granted under the Jawan Lease without disclosing anything about settlement of land under the OGLS Act, it is not understood how in 2006 the same Tahasildar, Sambalpur made appeal for cancellation of lease under the OGLS Act because the lease purportedly granted under the lease principle meant for Jawan or ex-service person cannot be resorted to OGLS proceeding to cancel the same as submitted by the learned counsel for the petitioner.

19. It is reported in **1994 (II) OLR 149; Rajkishore Das v. State of Orissa and others,** where Their Lordships observed at para-7 in the following manner:

> "7. Learned counsel for the petitioner has relied upon Government of Orissa, Home Department Resolution No. 11323-3S-29/63-Poll dated 14-5-1963 which declares the facilities to be given to the Jawans of Orissa who proceeded to forward areas. This was decided in consideration of the risk and sacrifice of the officers and men who are proceeding to forward areas in active service. The categories of the persons and men who would be entitled to such facilities have been enumerated therein. It is not disputed that the petitioner is one of the eligible persons to the facilities declared under the aforesaid Resolution. One of the concessions available to the eligible person under the said Resolution is that such person on return from service will get five acres of land free and make ready for cultivation at Government cost. In case a person is killed, the widow or the dependants will receive the land. Such facilities were subsequently extended to army personnel who have completed five years of service with which we are not concerned at the moment. Learned counsel appearing for the petitioner has referred to the lease principles approved by the Government which authorised the Tahasildar of the area or where there is no Tahasildar, the Subdivisional Officer, who is the competent authority to decide the settlement of land in accordance with the principles to be decided by the Government. The Government Order No. 4898-R dated 28-1-1966 has been relied upon by the learned counsel for the petitioner, paragraph 4 of which provides for special reservation. It says that Twenty per cent of the area from the arable Government lands shall be reserved for allotment to persons belonging to Orissa, who have Joined the regular Armed Forces and for members of the Orissa Military Police and Territorial Army belonging to Orissa who have been posted in the forward areas and personnel of the Auxiliary Air Force belonging to Orissa, who have been called up. The essence of his submission is that the aforesaid Government order read with the Government resolution No. 11323-3S-29/63 Poll dated 14-5-1963 would make it clear that Jawans of the categories mentioned in different Government orders should not be treated on the same footing as private individuals and settlement of land in their favour cannot be conceived under the Act inasmuch as a Jawan is entitled to settlement of five acres of land which obviously is beyond the prescribed limit under the said Act and also for the reason that the settlement in favour of a Jawan does not require time taking detailed procedures to be followed as prescribed under the Act. The learned Additional Government Advocate could not reconcile as to how the Government orders and principles declaring settlement of five acres of land in favour of Jawans could be made under the Scheme of the Act. In the aforesaid premises the conclusion is irresistible that the settlement of five acres of land in favour of petitioner was not made in accordance with the provisions of the Act, but it was under the lease principles read with Government notifications which made special provision for special categories of persons who could not be treated on the same footing as private individuals. It, therefore, follows that a suo motu proceeding under Section 7-A(3) of the Act could not be resorted to for examining the correctness or otherwise of the settlement made in favour of the petitioner. The suo motu

> proceeding initiated against the petitioner is, therefore, held incompetent and the order of the Additional District Magistrate in Annexure-5 is bound to be quashed on this count alone. It is, therefore, unnecessary to answer the other questions raised by the learned counsel for the petitioner as the proceeding itself was without jurisdiction and the order passed thereunder cannot be maintained."

20. With due regard to the said decision, it appears that if Jawan Lease has been granted under the Home Department Notification dated 14.5.1963, OGLS Act will not be applicable to resume such case land.

21. Now adverting to the case in hand, it appears that Jawan Lease case has been started as the petitioner was an ex-Army personnel. Moreover, the notification dated 14.5.1963 of the Government of Orissa, Home Department is as follows:

> "In view of the present crisis due to external aggression, the Government look forward to the Jawans of the State to proceed to forward areas to defend our country against the enemy's attack and to protect the life and property of the peace loving people of the country. It is very encouraging that a large number of people from all walks of life not only have been volunteering for service but also have been contributing considerably in cash and kind for the purpose.
>
> 2. In consideration of the rink and sacrifice of officers and men who have proceeded or will be proceeding to forward areas for active service, the State Government have been pleased to decide that the following categories of officers and men will be entitled to the facilities detailed below. Provided that they are unable to manage without some form of assistance from Government and/or their family members desire to avail themselves of the concession mentioned against item 1-3 below :-
>
> Personnel to be entitled to the facilities.
>
> (1) Personnel of Territorial Army belonging to Orissa posted in the forward areas and personnel of the Auxiliary Air Force who have been called up.
>
> (2) Personnel of the Orissa Military Police posted in the forward areas.
>
> (3) Personnel of the Indian Army, Navy and Air Force belonging to Orissa.
>
> (4) Other categories of officers or men who are specially declared eligible for these concessions by the State Government.
>
> Concessions
>
> xxx xxx xxx
>
> (d) Each person on return will get 5 acres of land free and made ready for cultivation at Government cost. In case a person is killed the widow and the dependants will receive the land."

Such lease principle is extended to Jawan for the simple reason that the facility to Jawans will encourage the other people to join the defence

organization to protect the life and property of the peace loving people of the country. This is an honour to the ex-service person who has really been engaged for keeping independent territory of the country. Be that as it may, it is very clear from the aforesaid decision and provision that once the lease has been granted under the lease principle to a Jawan, same cannot be taken away by the Government machinery in the garb of OGLS Act or Rule made thereunder.

22. There is nothing found from the resolution dated 14.5.1963 that a Jawan can only apply for land in his native village or nearby. But it is clear from the notification dated 16.4.1998 issued by the State Government in Revenue & Excise Department that they will get one standard acre of Government land near their house. The impugned order shows that the petitioner even if belongs to Bargarh, has asked for allotment of land at Sambalpur. But the allotment order shows that the petitioner has been living at Sambalpur from 1985 and same report has been confirmed by the Collector. In absence of any provision that the petitioner is only entitled to the concession up to one standard acre at his own native village but not at his place of stay, the ground for resumption as available in the impugned order is indefensible.

23. The impugned order shows that the petitioner is not landless person as he and his wife has land at village Janhapada but it is not clear from the order that such land is agricultural property. All the considerations being made for resumption are only based on the criteria available under the OGLS Act which is not applicable to the lease granted to petitioner as it is Jawan Lease. Not only this but also the intervenor has alleged that same land has been allotted as a Jawan lease to him in 2004. If at all the notice is issued in 2006 to cancel the lease, it is not understood as to how another Jawan was leased out the same land in 2004. Thus, the order of resumption of the case land purports that cancellation of lease granted to the petitioner was preplanned as the opposite parties have to lease out the same to the intervenor.

24. The impugned order does not show that the petitioner was given personal hearing to cancel the lease except allowing to file show cause. Also there is no enquiry held by the learned Sub-Collector while cancelling the lease. In terms of the above discussion, we are of the view that the lease granted in favour of the petitioner is not liable to be cancelled and the impugned order rather is liable to be quashed.

The point is answered accordingly.

CONCLUSION

25. In the writ petition, it has been prayed to quash the order passed under Annexure-5. As discussed above, we have already observed that the cancellation of the lease granted in favour of the petitioner is liable to be quashed and the Court do so. Accordingly, the lease granted in favour of the petitioner is restored. In view of the fact that lease is restored with petitioner, the petitioner-intervenor lacks brevity in his intervention and accordingly the intervention petition is rejected. The writ petition is disposed of accordingly.

2018 (II) ILR - CUT- 709

S.K. MISHRA, J.

W.P.(C) NOS.15614, 5030, 7522, 19024, 19027,19029, 19469 & 20416 OF 2017

RABINDRA SAHU ……..Petitioner
W.P.(C). No.15614 of 2017

.Vs.

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

For Petitioner : Mr. K.A. Guru, A.K. Mohanty & S.K. Mohapatra
For Opp. Parties : Mr. S. Dash, ASC
M/s P.K. Mishra and S.K. Dash

GOURANGA CHANDRA DASH & ORS. ……Petitioners
W.P.(C). No.5030 of 2017

.Vs.

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

For Petitioners : M/s A.K. Mohanty, K.A. Guru & S.K. Mohapatra
For Opp. Parties : Mr. S. Dash, ASC

PRASANNA KU. DHAR & ORS. ……..Petitioners
W.P.(C). No.7522 of 2017

.Vs.

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

For Petitioners : M/s A.K. Mohanty, Mr. K.A. Guru, & S.K. Mohapatra
For Opp. Parties : Mr. S. Dash, ASC

MANIKARA SAHU & ORS. ……Petitioners
W.P.(C). No.19024 of 2017

.Vs.

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

For Petitioners : M/s A.K. Mohanty, Mr. K.A. Guru & S.K. Mohapatra
For Opp. Parties : Mr. S. Dash, ASC

BIJAYA KUMAR PADHAN & ORS. ……..Petitioners
W.P.(C). No.19027 of 2017

.Vs.

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

For Petitioners : M/s A.K. Mohanty, Mr. K.A. Guru & S.K. Mohapatra
For Opp. Parties : Mr. S. Dash, ASC

SMT. CHANCHALA MUNDA ……..Petitioner
W.P.(C). No.19029 of 2017

.Vs.

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

For Petitioners : M/s A.K. Mohanty, Mr. K.A. Guru & S.K. Mohapatra
For Opp. Parties : Mr. S. Dash, ASC

MARKANDA PRADHAN & ORS. ……..Petitioners
W.P.(C). No.19469 of 2017

.Vs.

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

For Petitioners : M/s A.K. Mohanty, Mr. K.A. Guru & S.K. Mohapatra
For Opp. Parties : Mr. S. Dash, ASC
M/s. B.P. Satpathy, B.K. Nayak,
S. Ray, D. Debadarsini (intervener)
M/s. B. S. Panigrahi and J.K. Rout (Intervener)

BIBHUTI KUDEI & ORS. …….Petitioners
W.P.(C). No.20416 of 2017

.Vs.

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

For Petitioners : M/s A.K. Mohanty, Mr. K.A. Guru & S.K. Mohapatra
For Opp. Parties : Mr. S. Dash, ASC

ODISHA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 41 – Notification under – Challenged in batch of writ petitions – Alternative remedy available – Whether writ jurisdiction can be exercised – Held, No, it is well settled position of law that when the statutory forum is created by law for redressal of grievances, the writ petition should not be entertained ignoring statutory dispensation subject to certain

exceptions – Non-entertainment of petitions under the writ jurisdiction by the High Courts where efficacious or alternative remedy is available, is a rule of self-imposed limitation – It is essentially a rule of policy, convenience and discretion rather than a rule of law – Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 of the Constitution of India despite existence of an alternative remedy – However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or if there is sufficient grounds to invoke the extraordinary jurisdiction under Article 226 of the Constitution of India. (Para 11)

Case Laws Relied on and Referred to :-

1. 1989 (1) OLR 367 : Govinda Chandra Tripathy & Ors. .Vs. the State of Orissa, represented through Secretary to Government of Orissa, Revenue Department & Ors.
2. 1988 (I) OLR 334 : Sundarmani Bewa .Vs. Dasarath Parida.
3. 1992 (I) OLR 322 : M/s Modern Fabricators, Firm .Vs. Rajendra Harichandan & Ors.
4. (2007) 1 SCC 584ESI: Corporation .Vs. C.C. Santha Kumar.
5. AIR 1970 SC 406 : Shivlal and Anr. .Vs. Filmistan Distributors (India):
6. 1993 (II) OLR 194 : Gulzar Khan .Vs. Commissioner of Consolidation and Ors:

JUDGMENT Date of judgment: 07.09.2018

S.K. MISHRA, J.

These writ petitions are interlinked and the points involved being common, are disposed of by this common judgment.

02. The petitioners in all these writ petitions have assailed the Notification No.5678 dated 19.02.2016 issued by the Government of Odisha, Revenue and Disaster Management Department, under Sub-Section (1) of Section 41 of the Odisha Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (hereinafter referred to as "the OCH & PFL Act" for brevity), whereby the Consolidation Operation has been closed in respect of the area mentioned in the Schedule-'A' given therein under Annexure-1.

03. It appears from the averments made in the writ petitions that the petitioners, in all these writ petitions, are the residents of village Dhankauda, Dandeipali, Bohidarnuapali, Khirapali, Gengutipali, Sarnkarma and Khadual in the district of Sambalpur. The lands in questions of the aforesaid villages

are coming under the Sambalpur Municipal Corporation. The Government of Odisha, Department of Housing and Urban Development considering the objections and suggestions received as called for in the Extraordinary issue of the Odisha Gazette No.2221, dated the 16th November, 2013, issued Notification dated 21st November, 2014 specifying the aforesaid villages along with other some villages with boundaries thereof as a larger urban area under Annexure-5. It is also apparent from the records that the Deputy Director, Consolidation of Holdings, Sambalpur has submitted the proposal for issuance of Notification under Section 41(1) of the OCH and PFL Act to the Deputy Secretary, Consolidation, Board of Revenue, Odisha, Cuttack vide letter No.543/CH., dated 11.12.2015 under Annexure-2. The Government of Odisha, Revenue and Disaster management Department issued the Notification No.5678 dated 19.02.2016 notifying that the consolidation Operation has been closed in respect of the area mentioned in the Schedule-"A" given therein, wherein the villages of the petitioners are found place, in exercise of power conferred under Sub-Section (1) of Section 41 of the OCH and PFL Act. Challenging the said Notification No.5678 dated 19.02.2016 under Anexure-1, the petitioners have filed these writ petitions.

04. Mr. Kousik Anand Guru, learned counsel for the petitioners argued that a Notification under Section 32 of the Orissa Town Planning and Improvement Trust Act, 1956 was issued by the Sambalpur Regional Improvement Trust, notifying for the General Public that a Master Plan for Sambalpur comprising Sambalpur Municipal area and the revenue villages as scheduled therein has been duly prepared and published under Section 31 (1) of the Orissa Town Planning and Improvement Trust Act, 1956 inviting objections and suggestions vide Notification No.961-STPU, dated the 1st July, 1972 of the defunct Sambalpur Special Planning Authority at Town Planning Unit, Sambalpur and Published in the Orissa Gazette in Notification No.207-C.A.D, Part-VII-P-1357, dated the 14th July, 1972 and after considering the objections and suggestions received from the public, the Government of Housing and Urban Development, Orissa have approved the Master Plan under Section 32 of the Orissa Town Planning and Improvement Trust Act, 1956, vide G.O. No.48168-TP-MP-12/83-HUD., dated the 10th November, 1983 under Annexure-8. The said Notification was issued in respect of 22 villages wherein the villages of the petitioners are found place. That apart, the Notification under Section 22 of the OCH & PFL Act i.e. with regard to final publication of map and the record-of- rights was made on

31.03.1984. The 1st contention of Mr. Guru, learned counsel for the petitioners is that Notification under Section 41(1) of the OCH and PFL Act has been issued on 19.02.2016, after 30 years of final publication of ROR. So, it is contended that the delay in issuing Notification under Section 41(1) of the OCH and PFL Act itself vitiates the provisions under Section 5 of the OCH and PFL Act.

05. Mr. Guru, learned counsel for the petitioner relied upon the reported case of ***Govinda Chandra Tripathy and others vs. the State of Orissa, represented through Secretary to Government of Orissa, Revenue Department and others,*** 1989 (1) OLR 367, wherein the Division Bench of this Court has held that Notification of cancellation can be issued by the State Government under Section 5(1) of the OCH and PFL Act before publication of final map and record-of-rights under Section 22(1) of the OCH and PFL Act.

06. Learned counsel for the petitioners also argued that the revenue authorities have the right of conversion of agriculture land into homestead under the provisions of Orissa Land Reforms Act, as a result of which most of the lands available in the 22 villages are no more agriculture land. It will not be in the interest of achieving aim and objectives of the OLR Act. Admittedly, it is for the purpose of development of agriculture by preventing fragmentation and permitting consolidation. He also submitted that the consolidation authority has allowed fragmentation of land in certain cases. He relied upon the reported case of ***Sundarmani Bewa vs. Dasarath Parida,*** 1988 (I) OLR 334, wherein at paragraph-4, the purpose of consolidation has been defined and according to Mr. Guru, the learned counsel for the petitioners, the said purpose has been frustrated because of fragmentation of land.

07. The next important argument of Mr. Guru, learned counsel for the petitioners was with regard to Section 38 of the OCH and PFL Act which provides power of Board of Revenue. The Board of Revenue having general superintendence over all consolidation proceedings can exercise powers conferred upon him. In this case, the Commissioner, Consolidation, Board of Revenue, Orissa, with respect to the district of Sambalpur has already passed an order on 12.08.1987 in Case No.1287 of 1985 under Annexure-9 observing therein that the village Khirapalli, which is the village of some petitioners of the aforesaid writ petitions, has come within the Master Plan area of Sambalpur Town and has been notified under Section 32 by the Housing and Urban Development Department and has been published by the

Sambalpur Improvement Trust vide Notification Order 2240/SPTT dated 18.06.1984, hence, consolidation will cease to operate in that area. Admittedly, this order has been passed keeping in view the amendment of Section 34 by insertion to Sub-Section (5) of Section 34 of the OCH and PFL Act. It is argued that since the power of Board of Revenue under Section 38 of the OCH and PFL Act is of superintendence over the consolidation proceedings, the Notification under Section 41 of the OCH and PFL Act is of no effective value. He also relied upon the case of ***M/s Modern Fabricators, Firm vs. Rajendra Harichandan & others,*** 1992 (I) OLR 322, wherein the Division Bench of this Court has held that in exercise of power under Section 38 of the OCH & PFL Act, any administrative order may be passed by the member of Board of Revenue though he may not set aside the order of consolidation officer. Another aspect, which was argued by the learned counsel for the petitioners that in the meantime for development of railway track and the road connecting Sambalpur with Rourkela, process has been started and the lands belonging to different persons, compensation and rehabilitation scheme have been extended to the land oustees as per the previous major settlement and it has not been done as per record-of- rights in accordance with the notification published under Section 22 of the OCH and PFL Act in the year, 1984.

08. The learned counsel for the petitioners also relied upon the case of ***ESI Corporation vs. C.C. Santha Kumar,*** (2007) 1 SCC 584, wherein the expression “reasonable time” is explained. Similarly in the case of **Baldevdas Shivlal and Anr. –vrs.- Filmistan Distributors (India**): AIR 1970 SC 406, the Hon’ble Supreme Court has observed that the expression "case" is not limited in its import to the entirety of the matter in dispute in an action. Mr. Guru, learned counsel for the petitioners also relying on Sections 30 and 32 of the Orissa Town Planning and Improvement Trust Action Act, 1956 submitted that in the year, 1972 the declaration of Master Plan for Sambalpur comprising Sambalpur Municipal area and the revenue villages including the aforesaid 22 villages was made, as would be apparent from Annexure-3 to the writ applications. Similarly, in Annexure-8, the Notification under Section 32 of the said Act was issued.

09. However, at the time of argument, the learned counsel for the petitioners did not place much reliance on the amendment and insertion in Sub-section (5) of Section 34 of the OCH and PFL Act.

10. On the other hand, on this account, the learned Additional Standing Counsel Mr. S. Dash has relied upon the case of ***Gulzar Khan vs.***

Commissioner of Consolidation and others: 1993 (II) OLR 194, wherein full Bench of this Court has answered the reference and held that after the Notification under Section 41 of the OCH and PFL Act, remedy under Section 37 of the OCH and PFL Act would be available, it cannot be spelt out and has to depend on probability of situation arising and whether in a particular case the same would be available, it has to be decided by the Consolidation Commissioner depending on facts and circumstances of the case. If it is personal grievance of any of the parties, he/she may get his/ her dispute settle by preferring revision before the concerned Commissioner having jurisdiction to decide the same. Further, in reply to the argument advanced by the learned counsel for the petitioners, Mr. S. Dash, the learned Addl. Standing Counsel would argue that even when a single case is pending between two different parties and any appeal or revision is pending before the appellate or revisional authority, then it would not be proper to issue notification under Section 41 of the OCH and PFL Act. This is the reason for delay in conversion of agriculture land to homestead under Section 8-A of the Orissa Land Reforms Act, 1960 and it will have no effect on the case as the consolidation authority has no jurisdiction over the same and he is bound by the OLR courts. But, most important aspect, which advanced by Mr. S. Dash, learned Additional Standing Counsel was that if Notification under Section 41 of the OCH and PFL Act, which is challenged in this case, is quashed, then the entire proceeding of the OCH and PFL Act will relegate to Section 22 stage and it will not serve any purpose. So, if the notification itself is quashed, no useful purpose would be served. Herculean efforts were undertaken in preparing the consolidation records and if in a single order entire proceeding is quashed, it will not end the litigation and cause insurmountable difficulties to people, who have already got their dispute settled before the consolidation authorities.

11. As has been observed by the Division Bench of this Court in the case of ***Govinda Chandra Tripathy*** (supra) relied upon by the learned counsel for the petitioners that notification of cancellation can be issued by the State Government under Section 5(1) of the OCH and PFL Act before publication of final map and record-of-rights under Section 22(1) of the OCH and PFL Act, on the other hand, the Full Bench of this Court in the case of ***Gulzar Khan*** (supra) relied upon by the learned Additional Standing Counsel that a forum has to be available to be a person who was to be aggrieved, after Section 41 notification has been issued, with any order having been passed or anything having been done during the consolidation operations affecting his right, title and interest. It is also observed that there cannot be a right without

any remedy and according to them, the remedy can be made available principally by Section 37 of the OCH and PFL Act. That apart, it is well settled position of law that when the statutory forum is created by law for redressal of grievances, the writ petition should not be entertained ignoring statutory dispensation subject to certain exceptions. Non-entertainment of petitions under the writ jurisdiction by the High Courts where efficacious or alternative remedy is available, is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 of the Constitution of India despite existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or if there is sufficient grounds to invoke the extraordinary jurisdiction under Article 226 of the Constitution of India.

12. In that view of the matter, this Court is of the opinion that the aforesaid reported cases relied upon by the learned counsel for the petitioners are not applicable to the cases at hand. Hence, the aforesaid writ petitions are dismissed being devoid of merit. Interim orders passed earlier in all the aforesaid writ petitions stand vacated.

2018 (II) ILR - CUT- 716

C.R. DASH, J.

CRLMP NO.1115 OF 2018

DEBI PRASAD PATTNAIK ……..Petitioner

.Vs.

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

LAWYERS' STRIKE – Effect on the Society at large vis-à-vis dignity of lawyer – Held, the dignity of a lawyer is everything to him – The dignity of the Court also depends on the dignity of the lawyers in the society – If the dignity of a lawyer is lost, everything is lost for him – It is like the virtue of a chaste woman and the health of a living being – If that one is lost, everything is lost – Who is an advocate ? A man of dignity, a man who is disciplined in his utterance and conduct, one who is suave, a man who commands respect in the society, a wise man, a logical man, a prudent man, one who is brilliant in his work and steady in his

perseverance, one who is courageous, broad and level headed, one who has all the human qualities of benchmark value like compassion, empathy, love for truth and justice, and so on, and in one word, someone who is a gentleman – If one claims himself to be an advocate, he must ask himself whether he has any of the above qualities, whether he is disciplined in his conduct and utterances and whether he is a gentleman – Whatever was done, was done – But the damage that has been done to the general public by a prolonged strike cannot be compensated in any way – I can also feel the plight of marginal advocates and the new entrants to the Bar, who are still working as Juniors, for this prolonged strike – The dignity of the lawyers have however been preserved because of their sincere attempt to settle all the matters, respecting the larger interest of the public by shifting their stand. (Paras 13 to 15)

For Petitioner : M/s. Soura Ch. Mohapatra, D. Panda, D. Mohapatra, S. Mahanty & G. Mishra.

For Opp. Parties : Mr. Soubhagya Ketan Nayak, Addl. Govt. Adv. Mr. Tapas Ku. Praharaj, Addl. Standing Counsel.

ORDER Date of Order : 14.11.2018

C.R. DASH, J.

It was about 4.30 P.M. on 28.08.2018. A four-wheeler (Maruti 800 Car) bearing Registration No.OR-14C-3810 lightly hit a two-wheeler bearing Registration No.OR-05V-7774. The spot was at Nayabazar (Cuttack town). Owing to the impact of the light collision, the occupants / riders of the aforesaid two-wheeler fell down on the road. The incident was followed by a public commotion. The driver of the four-wheeler (Maruti 800 car) was man-handled by the local people. Some from the public made a call to the Police. The P.C.R. Van arrived there at the spot. But, before arrival of the P.C.R. Van, one Dillip Singh is alleged to have taken away forcibly the ignition key of the Maruti 800 car in question, and he is alleged to have beaten the driver of the car on his head and other parts of the body. The Police personnels present in the P.C.R. Van asked the driver of the Maruti 800 car to come with them to the Police Station. He protested by saying that he being innocent and he having been man-handled and beaten by the public, why should he go to the Police Station. There was commotion on the road paralyzing the traffic. Some of the police personnels of the P.C.R. Van are alleged to have beaten the driver of the said Maruti 800 car with lathi and the driver of the car was alleged to have been taken to the Police Station forcibly. The said driver of the four-wheeler (Maruti 800 car) was Mr. Debi Prasad Pattnaik, who is a

practicing advocate of Orissa High Court. This news spreaded to the advocates' fraternity. Many Advocates rushed to the concerned Police Station in groups and Mr. Debi Prasad Pattnaik was allowed to leave the Police Station by the police.

2. On 29.08.2018, i.e. on the next day itself of the occurrence, a call for strike was given by the Orissa High Court Bar Association along with other Bar Associations of Cuttack town demanding arrest of five accused persons including the police personnels, a Home-guard and aforesaid Dillip Singh. Subsequently the other Bar Associations of the entire State were invited to the Orissa High Court Bar Association, a meeting was held, a Joint Action Committee was formed and the strike continued, and even today, i.e. on 14.11.2018 the strike is on, demanding arrest of the three police personnels namely Prasanna Kumar Behera (Havildar), Dillip Kumar Samal (Constable) and Udaya Bhuyan (Constable), who are alleged to have beaten advocate Mr. Debi Prasad Pattnaik (the driver of the car in question). In the meantime, accused Dillip Singh and the Home-Guard Kishor Jena have been arrested and released on bail.

3. Many attempts by Hon'ble the Chief Justice, Orissa with his good gesture along with his companion judges failed to break the impasse. Order passed by the Hon'ble Supreme Court of India directing the lawyers' fraternity to end the strike also could not yield any positive result. When there was sight for a slight hope of joining the members of the Bar in Court work, some untoward incidents happened and the matter still aggravated prolonging the unfortunate impasse.

4. The Division Bench presided by Hon'ble the Chief Justice, Orissa also judicially dealt with the matter, passed different orders and ultimately passed order for supervision of the investigation conducted by the I.G. of Police, CID (Crime Branch), as per the direction of the Hon'ble Supreme Court, by a sitting judge of the Orissa High Court. Though the lawyers of the Bar undertook to call off the strike on passing of that order by Hon'ble the Chief Justice, somehow or other the leadership could not impress upon the General Body of the Bar and thus the strike continued further.

5. During continuance of the strike, an unfortunate incident happened on 29.10.2018 when some lawyers allegedly belonging to a particular political party tried to force their entry to the Court to conduct cases in spite of the strike call by different Bar Associations of the State. On that day, in the corridor of the Court of the Hon'ble Chief Justice (in the heritage building of

the High Court) some police personnels, who were on duty in civil dress (plain clothes) were allegedly beaten by some of the advocates, pictures (videos) of which have been captured by different Close-Circuit Cameras installed in the Court's corridor. One of the police personnels is stated to have been severely injured and some of them narrowly escaped with minor injuries on their person.

6. As I understand from the arguments advanced by the learned counsels from the Bar, since the police personnels were in civil dress, they were mistaken to be the members of the particular political party who had come to the Court premises in guise to create problems in the peaceful strike run by the advocates, and for that reason they were beaten up. It is further submitted that, the advocates so accused had no intention to hurt any police personnel and whatever had been done, was done for mis-identity.

7. In the meantime, the D.G. of Police initiated an endeavour from his side to hold talk with the Office Bearers of the Orissa High Court Bar Association and invited them for a talk to be held in the premises of the office of the D.G.P. The invitation letter was put for consideration of the General Body of the Bar and the General Body agreed to initiate / join in the talk, provided the meeting is held in a third place (an impartial place). Ultimately, the meeting was held at about 5.00 P.M. on 11.11.2018 to resolve the issue and it continued for about three hours. As I understood, the meeting was conducted under the Chairmanship of Dr. R.P. Sharma, D.G. of Police in presence of the President, Secretary of the High Court Bar Association and other members of the Action Committee of different Bars of the State, learned Commissioner of Police (Bhubaneswar-Cuttack), learned I.G. (Headquarters), learned D.C.P., Cuttack and the Office Bearers of the Constable, Sepoys & Havildar Confederation, Odisha (as they were also the stake holders in the meeting). The discussion in the meeting revolved round three principles mainly, i.e. :-

(i) The dignity of the Lawyers as a community should be preserved;
(ii) The moral of the Force (Police) should not be down; and
(iii) Modalities for checking recurrence of such type of incident in future.

8. The discussions in the aforesaid meeting, as I understand, was positive and it was conducted in a cordial and friendly manner. The larger interest of the general public was the driving force for all the participants in the meeting. The following mutual acceptable solutions with follow up modalities and sequences were to be worked out, as decided in the meeting :-

(i) The alleged erring police personnels shall feel sorry for their act relating to the incident dated 28.08.2018 and shall apologise;

(ii) Two of the lawyers from amongst the accused lawyers, who are alleged to have beaten the police personnels on 29.10.2018 in the High Court's corridor, shall feel sorry for their act and shall apologise.

(iii) All the cases and counter cases relating to the alleged incident dated 28.08.2018 and 29.10.2018 shall be withdrawn.

(iv) The modalities, as aforesaid, shall be taken up after the strike is called off.

9. Still the strike was not called off, the Division Bench presided by Hon'ble the Chief Justice on 12.11.2018 passed order keeping in abeyance the order passed by competent Authority, revoking the suspension order of the so called three erring police personnels. On the same day itself in this CRLMP, prayer was made to give effect to the compromise reached in the meeting dated 11.11.2018, by a judicial order in the larger public interest. Accordingly, the case (CRLMP) is taken up today on the basis of the composition reached in the meeting dated 11.11.2018 under the Chairmanship of the learned D.G. of Police.

10. Sri Prasanna Kumar Behera (Havildar No.163), Sri Dillip Kumar Samal (Constable No.C/447) and Sri Udaya Bhuyan (Constable No.OAPF/58) being personally present in Court felt sorry for the alleged incident dated 28.08.2018 and begged unqualified apology before the Court for the said unfortunate incident dated 28.08.2018. They have also filed a written memo to that effect in Court today, which be kept on record.

11. Mr. Satyabrata Mohanty, learned Secretary of the Orissa High Court Bar Association, who is stated to be an accused in the alleged incident dated 29.10.2018, with much magnanimity, apologized before this Court for the unfortunate incident dated 29.10.2018. He also files a written memo to that effect, which be kept on record. It is specifically submitted that, though the lawyers have gone on strike for a cause, they have no grudge against the entire police force, and the incident dated 29.10.2018 happened unfortunately under a peculiar circumstance.

12. I feel appropriate to reproduce here a quote of **Bishop Robert South,** which I think is apt to the situation and convey the idea that nobody belittle himself by saying "sorry" –

" Repentance hath a purifying
power, and every tear is of a

cleansing virtue; but these penitential clouds must be still kept dropping; one shower will not suffice; for repentance is not one single action, but a course."

Repentance or feeling sorry for a particular act is not the act of a coward. It needs courage, it needs dignity, it needs proper human values in a person. A man, who can feel sorry, is undoubtedly a courageous and dignified human being.

As quoted supra, if repentance would be a course and not a single action, the act for which we repent shall not get repeated in future. I must appreciate the wisdom of Dr. R.P. Sharma, learned D.G. of Police, who confined the discussion among the stake holders in the meeting dated 11.11.2018 to two cardinal principles :-

(i) Preservation of the dignity of the Lawyers as a community, and

(ii) Preservation of the moral of the Force.

13. The dignity of a lawyer is everything to him (lawyer). The dignity of the Court also depends on the dignity of the lawyers in the society. Much credibility of the Bar Associations in the public eye has had been lost for this prolonged strike, and I must appreciate the efforts of learned members of the Bar who had participated in the meeting dated 11.11.2018 for conducting themselves in the meeting in a dignified manner exhibiting their broadness of mind than meanness of heart. Such an appreciation must also be bestowed on the Office Bearers of the Odisha Constable, Sepoys & Havildar Confederation.

14. If the dignity of a lawyer is lost, everything is lost for him. It is like the virtue of a chaste woman and the health of a living being. If that one is lost, everything is lost. Who is an advocate ? A man of dignity, a man who is disciplined in his utterance and conduct, one who is suave, a man who commands respect in the society, a wise man, a logical man, a prudent man, one who is brilliant in his work and steady in his perseverance, one who is courageous, broad and level headed, one who has all the human qualities of benchmark value like compassion, empathy, love for truth and justice, and so on, and in one word, someone who is a gentleman. If one claims himself to be an advocate, he must ask himself whether he has any of the above

qualities, whether he is disciplined in his conduct and utterances and whether he is a gentleman.

15. Whatever was done, was done. But the damage that has been done to the general public by a prolonged strike cannot be compensated in any way. I can also feel the plight of marginal advocates and the new entrants to the Bar, who are still working as Juniors, for this prolonged strike. The dignity of the lawyers have however been preserved because of their sincere attempt to settle all the matters, respecting the larger interest of the public by shifting their stand. I trust and hope that the learned lawyers must be satisfied with the result that came after the prolonged strike.

Critics with a myopic vision and a narrow perspective may question, "who won or who lost ultimately ?" They may say if the strike could have been called off on the ground of unqualified apology tendered by the erring police officials, why such prolongation of the strike period ? I would say, it was not a battle or war between the lawyers and the police. It was a fight for a cause. Much efforts were put by Hon'ble the Chief Justice (who is totally new to the State), by the leadership of the Bar and the agencies of the State to bring down the matter to today's situation, which would not have been possible, but for the perseverance and continuous efforts of all the stake holders. The matter is ultimately going to be resolved not in a "win-loss situation" but a "win-win situation" for all in the larger public interest. I therefore appreciate the courage of both the Bar Association and the Constable, Sepoys & Havildar Confederation to bring the matter to an end in a "win-win situation". None has won, none has lost, but the beam of a win is there in everybody's face and that is the power of reaching a composition.

16. Moral of the Force, according to me, is the prime mover for the police personnels to act against injustice, control law and order situation and to fight against the criminals and the extremist elements. If that morale is down for any reason today, tomorrow there may be anarchy in the society. The way the matter has been brought to an end by efforts of all deserve appreciation. According to ***Lassiez Fair Theory***, no doubt, the police is a necessary evil for a developed society. But they are necessary to preserve law and order and to provide security to us, so that we can live peacefully and enjoy our liberty in a free and fearless manner.

17. The meeting dated 11.11.2018 held under the Chairmanship of the learned D.G. of Police having resolved to take certain steps, I feel it proper, in the larger public interest and for the benefit of the litigant public who are

yearning for the protection of their rights, to give judicial stamp to the composition reached. Extraordinary situation not only needs extraordinary remedy but also needs extraordinary approach.I, therefore, invoke my plenary powers under Article 226 of the Constitution of India to ordain the composition reached on 11.11.2018, by judicial clothing.

18. Regarding the alleged incident dated 28.08.2018, the following cases have been initiated :-

(i) Chauliaganj P.S. Case No.215 of 2018 / CID-CB Case No.17 of 2018 (Siba Prasad Sahu – informant vrs. Debi Prasad Pattnaik – accused) – Offence under Sections 279/337/338/294/323/506, I.P.C.

(ii) Chauliaganj P.S. Case No.216 of 2018 / CID-CB Case No.18 of 2018 (Hav. Prasanna Kumar Behera – informant vrs. Debi Prasad Pattnaik – accused), Offence under Sections 294/323/353/506, I.P.C.

(iii) Chauliaganj P.S. Case No.217 of 2018 / CID-CB Case No.19 of 2018 (Debi Prasad Pattnaik – informant vrs. Hav. Prasanna Kumar Behera, Dillip Kumar Samal, Udaya Bhuyan, Kishor Jena and Dillip Singh – accused), Offence under Sections 294/325/307/34, I.P.C.

(iv) Chauliaganj P.S. Case No.218 of 2018 / CID-CB Case No.20 of 2018 (Dillip Singh – informant vrs. Debi Prasad Pattnaik – accused), Offence under Sections 279/323/294/506, I.P.C.

In all the aforesaid four cases, Notice by the Police was given to the accused persons under Section 41-A, Cr.P.C. Sri Prasanna Kumar Behera, Havildar, Dillip Kumar Samal, Constable and Udaya Bhuyan, Constable appeared before the Police in obedience to the Notice under Section 41-A, Cr.P.C. and their statements under Section 161, Cr.P.C. were recorded. Accused Dillip Singh and Kishor Jena (Home-Guard) however did not appear in obedience to the Notice under Section 41-A, Cr.P.C. Therefore, both of them were arrested, their statements were recorded, they were produced before the Magistrate and released on bail.

19. In course of supervision of the cases, I have found that no offence under Section 307, I.P.C. is made out prima facie against any of the accused persons. However, the I.O. was directed to look into that aspect taking into consideration the entire materials on record, at the time of filing of charge-sheet. Notice having been given to the accused persons in all the cases under Section 41-A, Cr.P.C., it can be held that, no accused person(s) is involved in any serious offence. Therefore, taking into consideration the larger interest of the public and especially the interest of the litigants, the F.I.Rs. in all the aforesaid four cases are quashed.

20. So far as the unfortunate incident dated 29.10.2018 is concerned, on the basis of F.I.R. lodged by one Jitu Nemai, Lalbag P.S. Case No.167 of 2018 for the offence under Sections 341/323/325/294/427/365/506/395/34, I.P.C. has been initiated. Similarly, on the basis of F.I.R. lodged by one Satya Narayan Chhualsingh, Lalbag P.S. Case No.166 of 2018 for the offence under Sections 332/294/365/395/34, I.P.C. has been initiated.

It is fairly submitted at the Bar that, addition of Section 395, I.P.C. in the F.I.R. is a technical addition, as the incident happened in a mob frenzy and offence under Section 365, I.P.C. in both the cases has been added, as the police personnels were dragged to the Bar Association Hall on the ground of mis-identity that they are members of a political party. However, the matter having been settled between the parties and apology having been tendered by one of the supposed accused persons and especially the Secretary of the High Court Bar Association, the F.I.Rs. in both the aforesaid cases are also quashed.

21. Competent petition may be filed by the State before the Division Bench of Hon'ble the Chief Justice for recalling the order dated 12.11.2018, keeping in abeyance the administrative order of revocation of the suspension in respect of Havildar Sri Prasanna Kumar Behera, Constable Sri Dillip Kumar Samal and Constable Udaya Bhuyan, and the same may / shall be dealt with judicially in view of quashing of the F.I.Rs. in all the aforesaid cases. Any consequential administrative proceeding initiated against the alleged erring police personnels be dropped by the competent authority in the administrative side.

22. I feel persuaded to observe here that the magnanimity of the parties in saying "sorry" before the Court and tendering apology for the respective incidents shall not be treated as "Admission" for any subsequent legal proceeding, if any.

23. Though the talk among the parties was initiated mainly on three principles, the minutes of the meeting supplied to me by the State does not address the third principle, i.e. checking of recurrence of such incident in future. Now-a-days, if someone throws a stone, that may land on the head of a person, who may claim himself to be an advocate, though he may not be a real advocate in the true sense of the term. Any person having a license granted by the Bar Council is technically treated as an advocate. But, in fact, an advocate is one who has got a standing practice in litigation side.If I address the issue on my own without assistance from experts, the guidelines

so framed may be a cloak for some unwanted persons to take undue benefit by diminishing the morale of the force.

In view of such fact, I direct the appropriate Government to constitute a Committee under the Chairmanship of a retired High Court Judge of the choice of the Government within 7 (seven) days from today. The Additional Chief Secretary to Govt. in Home Department shall be the Member Secretary of the said Committee and other official members shall be (1) Secretary to Govt. in Law Department, (2) D.G. of Police, (3) I.G. of Police (Headquarters) and (4) Commissioner of Police, Bhubaneswar-Cuttack. Further, the President and Secretary of the Orissa High Court Bar Association in their official capacity shall be the Ex-officio Members of the Committee. Besides them, 3 (three) advocates selected by the Executive Body of the Orissa High Court Bar Association shall be the Members of the Committee, out of whom 2 (two) Members must be recognized Senior Advocates with minimum 35/40 years of practice experience, who, in my view, have seen transition of law, lawyers and lawyering. No Advocate member of the proposed Committee should be a member of any political party. The Committee should be constituted within 7 (seven) days from the date of receipt of this order, and they shall give their report within 2 (two) months of their first meeting. The non-official Members of the Committee shall be given T.A. and D.A. at the rate applicable to the learned Advocate General for each day's sitting. The recommendation of the Committee shall be scrutinized judicially after it is received with the assistance and submissions by Members of the Bar, who may volunteer to submit before the Court in the matter. It is reiterated here that, the Committee shall suggest ways and means and modalities for checking recurrence of such incident in future.

24. Before parting with the order, I may mention here that the Constitution Bench of the Hon'ble Supreme Court, in the case of **EX-CAPT. HARISH UPPAL *vrs.* UNION OF INDIA AND ANOTHER,** ***(2003) 2 Supreme Court Cases 45,*** have held that Lawyers have no right to go on strike or even token strike or to give a call for boycott of Court. Hon'ble Supreme Court having given the reason for such a conclusion, I do not find it proper to reiterate the same by extraction. I, however, request the Orissa High Court Bar Association to take appropriate measures not to jump on unnecessary strike on prima facie picture of a particular incident, without applying wisdom on the entire issue.

25. Fraction in the Bar on party line is not a good sign for the Bar and Bench. Though I have no advisory jurisdiction to advise the Bar Association

regarding the aftermath that followed the incident dated 29.10.2018, I hope and trust that, forgetting all past bickering, all members of the Bar crossing party-line shall be one again for the larger interest of the Bar.

26. I also appreciate the assistance rendered by all concerned in course of hearing of the case, including the assistance by the Addl. Government Advocate and the Addl. Standing Counsel.

27. List this matter in the last week of January, 2019 for further orders.

28. Five free copies of this order be supplied to the learned Advocate General, Odisha for onward transmission of the same to different Government Authorities.

2018 (II) ILR - CUT- 726

DR. A.K.RATH, J.

W.P.(C) NO. 2944 OF 2016

RUDRA PRASAD DWIBEDI ……..Petitioner

.Vs.

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

SERVICE LAW – Rehabilitation assistance – Petitioner's father, who was serving as a peon in an aided educational institution died while in service – Claim of rehabilitation assistance – Plea raised that the rehabilitation assistance scheme does not apply to the employees of an aided educational institution – Held, No – Reasons indicated. (Ritanjali Giri @ Paul vs. State of Odisha and others reported in 2016 (1) ILR 1162 Followed).

Case Laws Relied on and Referred to :-

1. (W.P.(C) No.5022 of 2013 : Ritanjali Giri @ Paul Vs. State of Odisha & Ors.

For Petitioner : Mr. A.K. Saa.
For Opp. Parties : Mr. R.P. Mohapatra, A.G.A. & Mr. D.K. Panda.

JUDGMENT Date of Hearing: 20.07.2018 Date of Judgment: 20.07.2018

DR. A.K.RATH, J.

By this application under Article 226 of the Constitution of India, challenge is made to the order dated 28.1.2016 passed by the Director, Higher Education, Odisha, Bhubaneswar, opposite party no.2, vide Annexure-8, whereby and whereunder the application of the petitioner for appointment under the rehabilitation assistance scheme has been rejected.

2. Rabindranath Dwibedi, father of the petitioner, was functioning as Peon in Mahanadi Mahavidyalaya, Ratilo, Cuttack. Pursuant to the order dated 21.5.2011 issued by the Directorate of Higher Education, Orissa, Bhubaneswar, he was receiving grant-in-aid (block grant). He expired on 28.8.2013. He was the sole bread earner of his family. After his demise, the family received a setback. The petitioner filed an application to appoint him under the rehabilitation assistance scheme. The same was rejected on 28.1.2016, vide Annexure-8, on the ground that the rehabilitation assistance scheme is not applicable for Block Grant deceased employee.

3. Notice was issued on 22.2.2016. But no counter affidavit has been filed.

4. Heard Mr. A.K. Saa, learned counsel for the petitioner, Mr. R.P. Mohapatra, learned Additional Government Advocate for the State-opposite party nos.1 and 2 and Mr. D.K. Panda, learned counsel for the opposite party no.3.

5. Mr. Saa, learned counsel for the petitioner, submits that the father of the petitioner was functioning as Peon in Mahanadi Mahavidyalaya, Ratilo, Cuttack. He died leaving behind his widow and the son-petitioner. 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) I.L.R- CUT-1162]

6. Per contra, Mr. Mohapatra, learned Additional Government Advocate, submits that the rehabilitation assistance scheme does not apply to the employees of an aided educational institution.

7. 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."

8. The ratio in *Ritanjali Giri @ Paul* (supra) applies proprio vigore 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, Orissa, Bhubaneswar, opposite party no.2, for re-consideration of the application of the petitioner in accordance with law.

9. The petition is allowed.

2018 (II) ILR - CUT- 728

DR. A.K.RATH, J.

ARBA NO. 35 OF 2018

M/S.TORRENT ADVERTISERS ……..Appellant

.Vs.

M/S. OPPO MOBILES, ORISSA PRIVATE LTD. ……...Respondent

ARBITRATION AND CONCILIATION ACT, 1996 – Section 9 – Application under for grant of interlocutory injunction – Appellant's contract has been cancelled – Application for appointment of Arbitrator pending – Principles to be followed – Held, mandatory injunction should be granted in rarest of the rare cases as it amounts to granting the final relief – It can be passed only to restore status quo and not to establish a new state of things, differing from the position which existed at the date, when the suit was instituted – The contract has been cancelled – The petitioner has filed ARBP No.6 of 2018 before this Court under Section 11 of the Act for appointment of Arbitrator – The same is sub-judice – The alleged loss sustained by the petitioner can be quantified – Learned court below has rightly held that the petitioner will not suffer any irreparable loss and injury – There is neither any jurisdictional error nor perversity in the order passed by the learned court below. (Paras 9 to 11)

Case Laws Relied on and Referred to :-

1. AIR 1993 SC 276 : Dalpat Kumar & Anr .Vs. Prahlad Singh & Ors.
2. AIR 1990 SC 867 : Dorab Cawasji Warden .Vs. Coomi Sorab Warden and others,
3. CLT (2008) Supplement 832 : Maa Sarala Distributor .Vs. Hindustan C. Beverages Pvt. Ltd.,

For Appellant : Mr.Ranjan Kumar Rout
For Respondent : Mr.Tushar Kanti Satpathy

JUDGMENT Date of Hearing: 10.8.2018 & Date of Judgment:20.8.2018

DR. A.K.RATH, J.

This appeal is directed against the order dated 4.5.2018 passed by the learned District Judge, Khurda at Bhubaneswar in Arb(P) No.05 of 2018, whereby the learned District Judge, Khurda dismissed the application filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996 (in short 'the Act').

2. The appellant-petitioner filed an application under Section 9 of the Act before the learned District Judge, Khurda praying, inter alia, to stay the letter dated 17.11.2007 issued by the respondent-opposite party, not to appoint any other person to carry on advertisement on the locations, payment of monthly rental fee as per the terms of the agreement and for a direction to the opposite party to furnish a Bank guarantee of rupees ten crores till dispute is arbitrated. The case of the petitioner is that it is a registered partnership firm having its registered office at Bhubaneswar. It is engaged in offering advertisement service by means of hoardings, etc.. The opposite party is a company, which runs wholesale trading, marketing of mobile handsets, accessories etc. The opposite party approached the petitioner for rendering advertisement service. A contract was entered into between the parties on 14.7.2017 for a period of two years with a condition that it cannot be cancelled by either of the parties, unless the situation is beyond the control of the service provider. After the contract, the petitioner installed the hoardings at different places and locations and invested huge amount of money by engaging men and material on payment of monthly remuneration. But all of a sudden, the opposite party sent a notice on 14.11.2017 intimating cancellation of the contract in all 84 locations with effect from 10.11.2017. There is no deficiency in service. Termination of the contract is illegal. With this factual scenario, the petitioner filed an application seeking the reliefs mentioned supra.

3. The opposite party filed objection denying the allegations made in the petition. It is stated that the petitioner has raised hoardings ignoring the specifications and design. It suffered loss for which the agreement has been terminated with effect from 10.11.2017. The petitioner is not entitled to any monthly rent, since the contract has already been terminated by the opposite party's notice dated 14.11.2017. The petitioner has already been paid for the actual work.

4. Learned District Judge came to hold that the petitioner has prima facie chance of success, the balance of convenience tilts in favour of the petitioner. The existence of a valid contract can be agitated in arbitration. The loss incurred by the petitioner can be compensated. Held so, it dismissed the application.

5. Heard Mr.Ranjan Kumar Rout, learned Advocate for the appellant and Mr.Tushar Kanti Satpathy, learned Advocate for the opposite party.

6. Mr.Rout, learned Advocate for the appellant submitted that the petitioner took lease of land from different persons, railways authority and municipality for display of the advertisement of hoardings in 84 locations. Referring to the agreement is for providing advertisement services, he submitted that the contract period is for two years i.e., from 15.5.2017 to 14.5.2019. The contract can only be cancelled at the option of service provider i.e., the petitioner. The same cannot be cancelled by the opposite party. The opposite party cancelled the contract unilaterally. The petitioner employed number of employees. The petitioner is unable to pay the salary, dues of municipality, railway and private land owners. The petitioner is still continuing. The service charges for the month of October, 2017 and November, 2017 have not been paid. The opposite party may not be available after the award is passed. Thus, the award cannot be enforced. The petitioner has sustained approximately loss of rupees ten crores. He further submitted that the petitioner has a prima facie chance of success, the balance of convenience tilts heavily in favour of the petitioner and moreover the petitioner will suffer irreparable injury, if injunction is not granted. The finding of the court below that the petitioner will not suffer irreparable injury is perverse.

7. Per contra, Mr.Satpathy, learned Advocate for the respondent submitted that clause providing cancellation of contract is applicable to Airports Authority of India. The loss quantified by the petitioner is imaginary. The allegation that the opposite party will flee from the country is baseless. Further, the petitioner has filed ARBP No.6 of 2018 before this Court for appointment of Arbitrator. The petitioner violated the terms and conditions of the contract and engaged the outsiders for which contract was cancelled.

8. The relevant clauses of the agreement are quoted hereunder:-

> "Contract Period:- The contract period for the above advertisement will be for a minimum of 2 years w.e.f. date: 15.05.2017 to 14.05.2019 and cannot be cancelled

> in between other than for reasons beyond the control of "Service Provider" e.g. AAI rules and regulations etc.
>
> Dispute Resolution Process:-In cases of disputes between parties hereto arising out of this Agreement or in relation thereto or regarding the interpretation of this Agreement, shall be referred to an arbitrator appointed by OPPO and the provisions of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification thereof shall be applicable to such reference."

9. The cardinal principles of grant of interlocutory injunction are well known. While exercising the discretion, the Court normally applies the following tests:-

(i) Whether the plaintiff has a prima facie case;

(ii) Whether the balance of convenience tilts in favour of the plaintiff ; and

(iii) Whether the plaintiff would suffer an irreparable injury in the event his application is rejected.

In *Dalpat Kumar and another vs. Prahlad Singh and others,* AIR 1993 SC 276, the apex Court that "the phrases 'prima facie case', 'balance of convenience' and' irreparable loss' are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by man's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice. All the three essentials to be kept in view while granting temporary injunction.

10. Mandatory injunction is granted in rarest of rare cases, as it amounts to granting the final relief. In *Dorab Cawasji Warden vs. Coomi Sorab Warden and others,* AIR 1990 SC 867, the apex Court held thus:

> "The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested-status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm.
>
> (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
>
> (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
>
> (3) The balance of convenience is in favour of the one seeking such relief. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory

injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as a pre-requisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

It is settled law that even if all the necessary ingredients are established, the court may refuse to grant an interim injunction.

11. On a survey of the decisions of the apex Court, a Division Bench of this Court in the case of *Maa Sarala Distributor vrs. Hindustan C. Beverages Pvt. Ltd.,* CLT (2008) Supplement 832 held that mandatory injunction should be granted in rarest of the rare cases as it amounts to granting the final relief. It can be passed only to restore status quo and not to establish a new state of things, differing from the state which existed at the date, when the suit was instituted.

12. The contract has been cancelled. The petitioner has filed ARBP No.6 of 2018 before this Court under Section 11 of the Act for appointment of Arbitrator. The same is sub-judice. The alleged loss sustained by the petitioner can be quantified. Learned court below has rightly held that the petitioner will not suffer any irreparable loss and injury. There is neither any jurisdictional error nor perversity in the order passed by the learned court below.

13. A priori, the appeal fails and is dismissed.

2018 (II) ILR - CUT- 732

DR. A.K. RATH, J.

S.A. NO.137 OF 1992

GUMUDU CHITTIBABU .....Appellant

.Vs.

KOTNI NARASIMHA MURTY & ORS. .....Respondents

CODE OF CIVIL PROCEDURE, 1908 – Order 14 Rule 2(2) – Provisions under – Application filed to decide some issues as preliminary issue on the question as to whether the suit is barred – Allowed – Order confirmed in first appeal – In second appeal the question arose as to whether the mixed question of fact and law can be taken as preliminary issue – Principles – Discussed.

"If the court is satisfied that a particular issue passes the tests laid down in sub-rule(2) and if the court thinks it fit it may postpone the settlement of the other issues until after that issues have been determined, and may deal with the suit in accordance with the decision on that issue. It further held that on reading the provisions of sub-rule (2) it is clear that the tests laid down are stringent and their compliance is to be strictly enforced. This is because, as noticed earlier, the provisions of sub-rule (2) is in the nature of exception to the general procedure provided in sub-rule (1) of Rule 2 of Order 14. The courts have therefore viewed with reluctance any request to take up an issue as a preliminary issue. From the provisions in sub-rule (2) it is manifest that whether an issue is to be tried as a preliminary issue or not is at the discretion of the trial court and while exercising its discretion the court must be satisfied that the suit or any part thereof may be disposed of an issue of law only and that issue relates to jurisdiction of the court or a bar to the suit created by any law for the time being in force." (Para 14)

Case Laws Relied on and Referred to :-

1. AIR 1971 SC 246 : The Nagar Rice and Flour Mills & Ors .Vs. N. Teekappa Gowda & Bros.& Ors,
2. 69 (1990) CLT-18 : Shyama Sundar Mohapatra .Vs. Janaki Ballav Patnaik & Ors,
3. 2014 (II) OLR-1101 : Kar Clinic and Hospital Pvt. Ltd. & Anr .Vs. Swarna Prava Mishra.

For Appellant : Mr. S.S. Rao, Mr. B.K. Mohanty.

For Respondents: Mr. C.A. Rao, Sr. Advocate
Mr. S.K. Behera,
Addl. Gov. Adv.

JUDGMENT Date of Hearing :08.08.2018 Date of Judgment:20.08.2018

DR. A.K. RATH, J.

This is plaintiff no.1's appeal against a confirming judgment.

2. The appellant and respondent no.3 as plaintiffs instituted the suit for permanent injunction. The case of the plaintiffs is that plaintiff no.1 and defendant no.1 are villagers of village-Hadubhangi in Parlakhemundi Sub-Division. Plaintiff no.1 is the owner of a rice mill and flour mill. Plaintiff no.2 is also the owner of a rice mill. There are two rice mills at village Hadubhangi and other two at village Vistala and Kinigam. The four rice mills situated in Hadubhangi Gram Panchayat. The licenses have been granted by the Sub-Collector, Parlakhemundi under the Rice Milling Industry (Regulation) Act, 1958 (in short, "the Act"). There is business rivalry between the plaintiff no.2 and defendant no.1. To wreck the personal vengeance, the defendant no.1 applied to the Government of Orissa in its Food and Civil Supplies Department for granting permission to establish a

rice mill at Hadubhangi in March, 1985. Defendant no.1 in order to obtain permission assured that he will prepare Chuda (Flattened rice) in the rice mill and there is no such rice mill in the vicinity. The Government of Orissa in its Food and Civil Supplies Department granted permission to the defendant no.1 to establish a rice mill at Hadubhangi. Instead of constructing mill to prepare flattened rice, the defendant no.1 constructed a rice mill. The permission granted by the authorities expired in February, 1989. The license has not been renewed. Hadubhangi village is adjacent to the boundary line of Andhra Pradesh State. The quantity of paddy produced annually is not sufficient for the existing four mills to cover a quarter of a year. The village is thickly populated by economically backward classes. The guideline for establishing of a rice mill is under consideration of the Government. The Government of Orissa have decided that Panchayat should be considered as a unit for the purpose of considering the productivity so that the same may be taken as primary consideration. In utter disregard to the Government order and without renewal of permission, the defendant no.1 has been proceeding with construction of the rice mill. In the event the defendant no.1 establishes a rice mill, the same will cause irreparable injury to the plaintiffs. With this factual scenario, the plaintiffs instituted the suit seeking the reliefs mentioned supra.

3. The defendant no.1 filed written statement denying the assertions made in the plaint. The case of the defendant no.1 is that he has obtained permission under Sec.5 of the Act. He has completed the construction prior to filing of the suit. The defendant no.2-Sub-Collector, Parlakhemundi, the licensing authority has also supported his case. According to the defendant no.2, after complying the provision made under Sec.5 of the Act, the permit has been issued to the defendant no.1 in the year 1987. The same has been renewed for the year 1988-89. The last date of renewal was on 1.9.88. The permit was valid till 3.2.89. On 23.1.89, he had submitted the completion report.

4. Stemming on the pleadings of the parties, learned trial court struck fifteen issues. The defendant no.1 filed an application under Order 14 Rule 2(2) C.P.C. to decide issue nos.9, 10 and 14 as preliminary issue. Those are as follows:

> "9. Whether the suit is barred u/s.21 of the Rice Milling Industry Act ?
>
> 10. Whether the suit is barred under the provisions of sec.41 of the Specific Relief Act ?
>
> 14. Whether the suit is maintainable in law ?"

5. Plaintiffs filed counter stating inter alia that the issues are mixed question of law and fact. None of the issues pertains to jurisdiction of the court or the bar created under any statute. The same can be adjudicated after adduction of the oral and documentary evidence.

6. Learned trial court allowed the application. The plaintiffs filed T.A. No.25 of 90 before the learned Additional District Judge, Parlakhemundi. Placing reliance on the oft quoted decision of the apex Court in the case of *The Nagar Rice and Flour Mills and others vs. N. Teekappa Gowda & Bros. and others,* AIR 1971 SC 246, learned lower appellate court came to hold that one competitor in same business cannot approach the civil court against any mill owner. No notice under Sec.80 C.P.C. was issued to the defendant no.2 before institution of the suit. For contravention of any order passed by the licensing authority, appeal lies. The Specific Relief Act does not envisage to injunct an individual not to act on the regulatory order of the Act. The suit is barred under Sec.41 of the Specific Relief Act. Held so, it dismissed the appeal.

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

> "Whether the suit itself is barred under Sections 21 and 22 of the Rice Milling Industry Regulation Act ?"

8. Heard Mr. S.S. Rao, learned Advocate along with Mr. B.K. Mohanty, learned Advocate for the appellant, Mr. C.A. Rao, learned Senior Advocate along with Mr. S.K. Behera, learned Advocate for the respondent no.1 and learned Additional Government Advocate for respondent no.2.

9. Learned Advocate for the appellant submitted that issue nos.9, 10 and 14 are mixed question of law and fact. The issues can be decided by adduction of evidence. Only jurisdictional issue or a bar to the suit created by any law can be decided under Order 14 Rule 2 C.P.C. Sec.5(4) of the Act postulates that before granting any permit under sub-section (3), the Central Government shall cause a full and complete investigation to be made in the prescribed manner in respect of the application and shall have due regard to—(a) the number of rice mills operating in the locality; (b) the availability of paddy in the locality; (c) the availability of power and water supply for the rice mill in respect of which a permit is applied for; (d) whether the rice mill in respect of which a permit is applied for will be of the huller type, sheller type or combined sheller-huller type; (e) whether the functioning of the rice mill in respect of which a permit is applied for would cause substantial unemployment in the locality; (f) such other particulars as may be prescribed.

Thus permission is a *sine qua none* for establishment of a rice mill. The license granted to the defendant no.1 had expired on February, 1989. The same was not renewed. Notwithstanding the expiry of license, the defendant no.1 had established a rice mill. The suit is not barred under Secs.21 and 22 of the Act. The courts below fell into patent error of law in deciding the issue which are mixed question of law and fact. Since the defendant no.1 had not established the rice mill, the ratio in the case of *The Nagar Rice and Flour Mills and others* (supra) shall not apply. To buttress the submission, he placed reliance to the decisions of this Court in the case of *Shyama Sundar Mohapatra vs. Janaki Ballav Patnaik and others*, 69 (1990) CLT-18 and *Kar Clinic and Hospital Pvt. Ltd. and another vs. Swarna Prava Mishra,* 2014 (II) OLR-1101.

10. Per contra, learned Senior Advocate for the respondent no.1 submitted that the rice mill was constructed on 3.3.1989. The Bank had sanctioned loan for construction of the mill. Electric connection was made to the mill. The plaintiffs are rival businessmen. The suit is not maintainable. Grant of permission is a matter between the licensee and the State. If there is any violation of the conditions of license, there is penal provision in the statute.

11. It is apt to state here that during pendency of the appeal, the defendant no.1 filed an affidavit that his rice mill had been defunct and stopped functioning for more than 17 years. The plaintiffs filed objection to the same. This Court called for a report from the Tahasildar, Kashinagar. The Tahasildar, Kashinagar submitted the report on 28.4.2018 stating therein that the defendant no.1 established the mill in the year 2002. The mill is operationalised till date. The same has been leased out to one P. Ramu since 25.10.2017 by means of an unregistered lease deed.

12. Before adverting to the contentions raised by the counsel for both parties, it will necessary to set out some of the provisions of the Act. Secs.21 and 22 of the Act are quoted hereunder.

> "21.Protection of action taken under the Act.—(1) No suit, prosecution or other legal proceeding shall lie against any officer or authority for anything which is in good faith done or intended to be done in pursuance of this Act or any rule or order made thereunder.
>
> (2) No suit or other legal proceeding shall lie against the Government for any damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of this Act or any rule or order made thereunder.
>
> 22. Power to make rules.—(1) The Central Government may, subject to the condition of previous publication, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

(a) the form of application for the grant of a permit under section 5 and the particulars it may contain;

(b) the manner in which an investigation is to be made in respect of an application for a permit and the matters to be taken into account in granting or refusing a permit;

[(bb) the form of a permit under section 5 and the conditions (including conditions relating to improvements to existing machinery, replacement of existing machinery and use of improved methods of rice-milling) subject to which a permit may be granted and the time within which such conditions shall be complied with;]

(c) the form of application for the grant or renewal of a licence in respect of a rice mill and the particulars it may contain;

(d) the form of a licence which may be granted or renewed under section 6 and the conditions subject to which the licence may be granted or renewed, including conditions relating to improvements to existing machinery, replacement of existing machinery, use of improved methods of rice-milling and polishing of rice, the time within which such conditions shall be complied with, the fees to be levied for the grant or renewal of a licence and the deposit of any sum as security for the performance of such conditions;

(e) the circumstances under which licences may be varied or amended under sub-section (2) of section 7;

(f) the submission of returns relating to a rice mill by the owner and the forms in which, and the authorities to which, such returns may be submitted; and the collection of any information or statistics in relation to rice mills;

(g) the form and manner in which appeals may be filed under section 12 and the procedure to be followed by appellate officers in disposing of the appeals;

(h) any other matter which has to be, or may be, prescribed under this Act.

(3) Any rule made under this section may provide that a contravention thereof shall be punishable under sub-section (2) of section 13.

(4) Every rule made by the Central Government under this section shall be laid as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

The Act was repealed by the Rice Milling Industrial (Regulation) Repeal Act, 1997 (Repeal Act 21 of 1997) on 28.5.1997. Since the suit was instituted prior to the Act was repealed, the same is governed under the Act.

13. Order 14 Rule 2(2) C.P.C. is quoted hereunder.

> "2. Court to pronounce judgment on all issues-
>
> xxx xxx xxx
>
> (2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of an issue of law only, it may try that issue first if that issue relates to –
>
> (a) the jurisdiction of the Court, or
>
> (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

14. In *Shyama Sundar Mohapatra* (supra), a Division Bench of this Court held that in a civil suit piecemeal trial of the issues should be avoided and attempt should be made to consider all the issues together as far as possible. This principle is embodied in sub-rule (1) of Rule 2 of Order 14 of C.P.C. Sub-rule (2) of the said Rule contains an exception where issues both of law and of fact arise in the same suit and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. If the court is satisfied that a particular issue passes the tests laid down in sub-rule(2) and if the court thinks it fit it may postpone the settlement of the other issues until after that issues have been determined, and may deal with the suit in accordance with the decision on that issue. It further held that on reading the provisions of sub-rule (2) it is clear that the tests laid down are stringent and their compliance is to be strictly enforced. This is because, as noticed earlier, the provisions of sub-rule(2) is in the nature of exception to the general procedure provided in sub-rule (1) of Rule 2 of Order 14. The courts have therefore viewed with reluctance any request to take up an issue as a preliminary issue. From the provisions in sub-rule (2) it is manifest that whether an issue is to be tried as a preliminary issue or not is at the discretion of the trial court and while exercising its discretion the court must be satisfied that the suit or any part thereof may be disposed of an issue of law only and that issue relates to jurisdiction of the court or a bar to the suit created by any law for the time being in force. The same view was reiterated in the case of *Kar Clinic and Hospital Pvt. Ltd. and another* (supra).

15. On a conspectus of sub-sec.(1) of Sec.21 of the Act, it is evident that no suit, prosecution or other legal proceeding shall lie against any officer or authority for anything which is in good faith done or intended to be done in pursuance of this Act or any rule or order made thereunder. Sub-sec.(2) provides that no suit or other legal proceeding shall lie against the Government for any damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of this Act or any rule or order made thereunder. The plaintiffs do not claim any relief against the State. The bar contained in Sec.21 of the Act shall not apply.

16. The question does arise as to whether a competitor in the business can seek to prevent another competitor from exercising his right to carry on business. The subject matter of dispute is no more res integra. An identical question came up for consideration in the case of *The Nagar Rice and Flour Mills and others* (supra). The apex Court in paragraphs 9 and 10 of the report held thus:

> "9. The Parliament has by the Rice Milling Industry (Regulation) Act, 1958, prescribed limitations that an existing rice mill shall carry on business only after obtaining a licence and if the rice mill is to be shifted from its existing location, previous permission of the Central Government shall be obtained. Permission for shifting their rice mill was obtained by the appellants from the Director of Food & Civil Supplies. The appellants had not started rice milling operations before the sanction of the Director of Food & Civil Supplies was obtained. Even if it be assumed that the previous sanction has to be obtained from the authorities before the machinery is moved from its existing site, we fail to appreciate what grievance the respondents may raise against the grant of permission by the authority permitting the installation of machinery on a new site. The right to carry on business being a fundamental right under Article 19(1)(g) of the Constitution, its exercise is subject only to the restrictions imposed by law in the interests of the general public under Article 19(6)(i).
>
> 10. Section 8(3)(c) is merely regulatory : if it is not complied with the appellants may probably be exposed to a penalty, but a competitor in the business cannot seek to prevent the appellants from exercising their right to carry on business, because of the default, nor can the rice mill of the appellants be regard as a new rice mill. Competition in the trade or business may be subject to such restrictions as are permissible and are imposed by the State by a law enacted in the interests of the general public under Article 19(6), but a person cannot claim independently of such restriction that another person shall not carry on business or trade so as to affect his trade or business adversely. The appellants complied with the statutory requirements for carrying on rice milling operations in the building on the new site. Even assuming that no previous permission was obtained, the respondents would have no locus standi for challenging the grant of the permission, because no right vested in the respondents was infringed."

17. The ratio in the case of *The Nagar Rice and Flour Mills and others* (supra) applies proprio vigore to the facts of the case. The issue being a pure question of law, both the courts are perfectly justified in deciding the same as preliminary issue. The substantial question of law is answered accordingly.

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

2018 (II) ILR - CUT- 740

B. MOHANTY, J. & K. R. MOHAPATRA,J.

JAIL CRIMINAL APPEAL NO. 38 OF 2005

BRAJA @ BIRGU LAKRA ……..Appellant

.Vs.

STATE OF ORISSA …… Respondent

INDIAN PENAL CODE, 1860 – Section 302 – Conviction – Life imprisonment – Quarrel between brothers developed into a fighting – Assault appears to be premeditated and nothing to show that during course of sudden quarrel/sudden fight and in the heat of the passion, the appellant had assaulted the deceased – Cause of death to be inter cardinal haemorrhage due to head injury – Dying declaration of victim makes it clear that the assault was by means of a piece of wood – Statement of the victim is also corroborated by the versions of P.Ws.1, 2 and 3 as before all of them the victim has stated that it was the appellant who assaulted him – Held, present case is clearly covered by Clause 'Thirdly' of Section 300, IPC and Exception 4 of Section 300 IPC can have no application – Conviction confirmed. (Para 9)

Case Laws Relied on and Referred to :-

1. (2016) 64 OCR (SC) 712 : Arjun Kisan .Vs. State of Orissa
2. (2017) 66 OCR 284 : Gopinath Paraja .Vs. State of Orissa
3. (2018) 69 OCR 500 : Miniaka Masuri .Vs. State of Orissa
4. (2018) 70 OCR 267 : Hadi Sisa .Vs. State of Orissa.
5. AIR 2004 SC 1264 : State of Rajasthan, Appellant .Vs. Dhool Singh.

For Appellant : Mr. Bijaya Kumar Behera-1
For Respondent : Mr. Janmejaya Katikia, Addl. Gov. Adv.

JUDGMENT Date of Hearing: 04.05.2018 Date of Judgment: 25.06.2018

B. MOHANTY, J.

The appellant, namely, Braja @ Birgu Lakra has preferred the above noted Jail Criminal Appeal challenging the judgment dated 10.02.2005

passed by the learned 2nd Additional Sessions Judge, Sundergarh in Sessions Trial No.18/150 of 2003-04 by which he has been convicted under section 302 of the Indian Penal Code and has been sentenced to undergo imprisonment for life. He has also been directed to pay a fine of Rs.10,000/- (rupees ten thousand), in case of default in making payment, he undergo rigorous imprisonment for a period of six months.

2. The case of the prosecution is that on 06.03.2003 at about 08:30 P.M. the appellant and his elder brother were quarreling over a Dimiri Tree as the same had been cut away by somebody. The elder brother of the appellant blamed him for cutting of the said Dimiri Tree. This quarrel developed into a tussle and the appellant bringing out a dry wooden stick from his house and while saying that he would kill the elder brother, gave blows on his head and other parts of the body as a result of which the elder brother sustained bleeding injury on his head. Since it was night, the injured elder brother could not be brought to the hospital and on the next day morning he was brought to the Government hospital at Kutra and thereafter informant on the basis of information received from the wife of the deceased lodged written report at police station, which was marked as Ext.1 during trial. On the strength of the said FIR Kutra P.S. Case No.08 of 2003 was registered under section 341/294/323/506 of the Indian Penal Code and P.W. 10 took up investigation. During course of investigation dying declaration pursuant to requisition under Exhibit 12 was recorded by the treating Doctor (P.W.6) on 07.03.2003. Thereafter, the victim was referred to District Headquarters Hospital, Sundergarh for better treatment but he died on the way. Accordingly the death of the elder brother of appellant was reported to police. Thus the case was converted to one under Section 302, IPC. During such investigation, inquest was held. Thereafter the investigation was taken over by P.W.8, who seized one wooden frame of a cot and arrested the appellant on 07.03.2003 at 3:00 P.M. and he recorded the statement of the appellant and sent the seized weapon of offence to P.W.12, the Doctor who conducted the post mortem examination for his opinion. Seized materials were also sent to SFSL, Rasulgarh for chemical examination. On completion of investigation P.W.8 filed charge sheet against the appellant under section 302, IPC and accordingly the appellant stood his trial.

3. The prosecution in order to bring home the charge examined as many as 12 witnesses. P.W.1 is the widow of the deceased. P.W.2 is the informant and is the nephew of both the appellant and deceased. P.W.3 is a neighbour, who also appears to be the Grama Rakhi. P.W. 4 is a co-villager. P.W.5 is

also a co-villager, who was a witness to inquest. He is also a witness to the seizure of weapon of offence under Ext. 3/1. P.W.6 happens to be the first Doctor who treated the victim at Primary Health Centre, Kutra and recorded the dying declaration of the victim through P.W.11. P.W.7 is the crime havildar, Kutra Police Station. P.W.10 is the first Investigating Officer and P.W.8 is the second Investigating Officer. P.W.9 is the brother-in-law of the deceased. P.W.11 is the Pharmacist at Kutra Hospital who noted down the dying declaration. P.W.12 is the Doctor who conducted the autopsy. Further from the side of the prosecution 13 documents were marked as exhibits. Also from their side six material objects were marked.

4. The plea of the appellant was complete denial. Further during his examination under section 313, Cr.P.C. the appellant stated that he was not present in the house on the date of occurrence. None has been examined from his side and no document has been exhibited on his behalf.

5. Learned trial Court after scanning the evidence on record came to hold that the prosecution has succeeded in establishing its case and accordingly convicted the appellant under section 302, IPC.

6. Learned counsel for the appellant urged that this being a case of circumstantial evidence and since the chain of circumstance is not complete, the learned trial Court has gone wrong in recording conviction of the appellant under section 302, IPC. In the alternative he submitted that conceding for a moment but not admitting that prosecution has been able to make out a case against the appellant, even then the appellant could not have been convicted under section 302, IPC as his case would fall under Exception-4 of Section 300, IPC. In this context he submitted that the evidence of P.Ws.1, 2, 3 and 9 clearly pointed out that prior to occurrence both the appellant and deceased had a quarrel over Dimiri Tree being cut and later the quarrel developed into fighting/tussle between the two brothers and following such quarrel when the victim was moving out, at that point of time the appellant assaulted the victim by means of a wooden frame of a cot (MO-I) thereby causing bleeding injury on his head, which ultimately resulted in his death. Thus according to him since the occurrence took place without pre-meditation following a sudden quarrel in the heat of the passion, defence case is clearly covered by Exception 4 of Section 300, IPC. He further submitted that appellant is in custody for more than fifteen years and since there has been a wrong appreciation of the evidence by the learned Trial Court either the appellant be acquitted of the charge or in the alternative he be set at liberty after altering his conviction to one under Section 304 Part I IPC and

by sentencing him for the period he has already suffered incarceration. In this context, learned counsel for the appellant has relied on the decisions of this Court in ***Arjun Kisan Vrs. State of Orissa*** reported in ***(2016) 64 OCR (SC) 712, Gopinath Paraja Vrs. State of Orissa reported in (2017) 66 OCR 284, Miniaka Masuri Vrs. State of Orissa*** reported in ***(2018) 69 OCR 500, Hadi Sisa Vrs. State of Orissa*** reported in ***(2018) 70 OCR 267*** and decision of Supreme Court in ***State of Rajasthan, Appellant Vrs. Dhool Singh***, respondent as reported in ***AIR 2004 SC 1264***. He also filed a date chart/written note of argument.

7. Learned Standing Counsel for the State on the other hand defended the impugned judgment and submitted that the submissions made by the learned counsel for the appellant should not be accepted as there exists enough material on record for convicting the appellant under section 302, IPC. He mainly relied on evidence of P.Ws.1,2,3,6 and 11. He also placed strong reliance on the dying declaration as recorded by P.W.6 through P.W.11.

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

At the outset it may be noted that homicidal nature of death of the victim has remained undisputed.

P.W.1, who happens to be the wife of the deceased has testified that the appellant is her brother-in- law and two years back in one evening there was a quarrel between her deceased husband and the appellant concerning a Dimiri Tree, which has been cut away by somebody. Such quarrel got converted into fight between two brothers and she persuaded them not to quarrel and accordingly they separated. Sometime thereafter when the victim was coming out of the house, at that time, the appellant assaulted him by means of the wooden frame of a cot. Hearing the sound of the assault, she came out and saw her husband lying on the ground with bleeding injury on his face and chest. He was senseless and the appellant was standing near him holding the wooden frame of a cot by which he has assaulted the victim. Upon nurturing, the victim regained sense and disclosed before her that the appellant had assaulted him. Hearing her cry, P.Ws.2 and 3 came to her house and she narrated the incident before them. P.W.3 snatched away the weapon of the offence from the appellant and kept the same with him. She could not take her husband to the hospital since it was night. On the next day morning she brought him to hospital at Kutra with the help of P.Ws.2 and 3.

Thereafter, she sent P.W.2 to report the matter at the Police Station. Since the condition of her husband deteriorated, the Doctor at Kutra referred her husband to District Headquarters Hospital, Sundergarh but her husband died on the way. Accordingly they returned back and the fact of death was reported at the Police Station. She further stated that at that point of time her husband was wearing Lungi and Ganji which were stained with blood. She further admitted that she had stated before the police that the appellant had confessed before P.W.3 in her presence that he had assaulted her husband. In cross-examination she stated that P.Ws.2 and 3 are her immediate neighbours and she denied a suggestion that the deceased husband fell down during the tussle between him and the appellant resulting in injuries, which ultimately led to his death. She however admitted that there was quarrel between her husband and the appellant prior to the occurrence and a meeting was convened in the village to resolve the dispute.

P.W.2, who happens to be the informant in his examination-in-chief has testified that hearing the cry of P.W.1, he went to her house and found her husband with bleeding injuries on his head and chest. At that point of time some villagers including P.W.3 were present in the spot but the appellant was not there. P.W.1 disclosed him that appellant had assaulted her husband by means of wooden frame of a cot following quarrel over a Dimiri Tree. On the next day morning he along with others (P.Ws.1, 3 and 4) took the injured to the hospital at Kutra. After admitting the victim at hospital, he went to the police station as per instruction of P.W.1 and lodged a written report/FIR relating to the occurrence as under Ext.1. When he returned back to the hospital, he came to know that the Doctor at Kutra had referred the victim to District Headquarters Hospital, Sundergarh for better treatment. However, the deceased succumbed to the injuries on the way. In this background, they returned back to Kutra and went to the police station along with P.W.3 and reported the matter. On receipt of the information, police came to Barigaon where the dead body was kept and held inquest over the same. In his cross-examination, he stated that the husband of P.W.1 was conscious when he met him in night, after occurrence and he narrated before him that the appellant had assaulted him. There was an injury on the forehead of the deceased. Though in cross examination P.W.2 stated that he scribed the FIR as per the dictation of police, however in the re-examination on recall he made it clear that the facts stated in the FIR were within his knowledge as derived from P.W.1 and her deceased husband. He scribed the FIR since police instructed him to give a written report. In further cross-examination, he denied a suggestion that he had scribed the FIR as per dictation of the police.

P.W.3 also reached the spot after he heard the cry of P.W.1 and found the husband of P.W.1 with bleeding injuries on his face and chest. On being asked by him, the victim stated that the appellant had assaulted him. This version corroborates similar testimonies by P.Ws.1 and 2. He has further stated that P.W.1 disclosed before him that there was a quarrel between her deceased husband and the appellant concerning a Dimiri Tree and that the appellant had assaulted the deceased by means of wooden frame of a cot. At that point of time the appellant was standing nearby holding the wooden frame and he snatched the same from him. He also spoke of seizure of wooden frame by police. The version of P.w.3 with regard to statement of the victim that on being asked the deceased told that the appellant had assaulted him remains un-demolished in the cross-examination. However, this version of the statement of victim corroborates the statements of P.W.1 and 2 with regard to the same.

P.W.4 though has been declared hostile, in his examination-in-chief has admitted that when hearing hue and cry, he went to the house of the deceased, he found him in conscious state with bleeding injuries on his head.

P.W.5 is witness to the seizure of wooden frame of cot under M.O-1 vide Eexhibit-3/1.

P.W.6 is the first Doctor who has testified that the three external injuries were simple injuries. However there was symptom of internal haemorrhage. He further made it clear that these injuries can cause death of a person in ordinary course. In cross-examination he opined that had the patient been treated by a neurologist surgeon immediately after the occurrence, he could have survived. On further cross-examination on recall he testified that he recorded the dying declaration of the deceased in presence of P.W.11 and another Rambhabati Pradhan. According to him the victim/patient was in a fit medical condition and his examination was in a question answer form. The victim was able to understand the question and was also able to give answers. In response to his question as to how injuries were caused, the victim replied that injuries were caused due to assault by the appellant by means of a piece of wood. He further testified that P.W.11 recorded the statement of victim as per his instruction. He verified such statement recorded by P.W.11 and found the same to be true and correct and accordingly put his signature with official seal. The statement of the victim has been marked as Ext.12/2. In further cross-examination, he denied the suggestion that the victim had not given any dying declaration in his presence.

P.W.11 is the Pharmacist attached to the Kutra Hospital. He testified that on police requisition, P.W.6 examined the deceased and recorded his statement. The statement was recorded in a question answer form. P.W.6 instructed him to note down the version. Accordingly he noted down the version. He specifically testified that victim in his answer made it clear that he suffered injury on account of assault by his brother. In his cross-examination, he stated that the entire recording of the statement of the victim took about half an hour to forty-five minutes.

P.W.12 is the doctor who conducted autopsy on 07.03.2003 he has testified that following injuries were found on the dead body.

a) Lacerated wound of face, ½" X 6", 1/6" size ½" below left eye.

b) Lacerated would on scalp ½" X ¼" X 1/6" on left side parietal region.

c) Bruise 3" X 2" on left side thorasic region on the back.

Further he has stated that the internal examination of the body revealed fracture of 9th and 10th ribs and also small depressed fracture of skull on the left side parietal region with hematoma. He has made it clear that all the injuries were ante-mortem in nature and cause of death was due to intra carnial haemorrhage on account of head injury. Most importantly he has made it clear that these injuries were sufficient to cause death of a person in ordinary course of nature. He also opined that the injuries found on the person were possible by the wooden frame of a cot, which was sent to him for his opinion. In the cross-examination he stated that injuries found on the person of the deceased can be possible in exceptional cases if someone falls on hard and blunt surface.

P.W.10 is the 1st Investigating Officer who received the FIR under Ext.1 and examined the informant. He issued injury requisition. Since the condition of the patient was deteriorating, he issued requisition for recording dying declaration under Ext.12 and accordingly P.W.6 recorded dying declaration in presence of P.W.11 and another. He testified that he handed over the investigation to P.W.8. He has stated that he was present when P.W.8 kept the seized materials in connection with this case. Accordingly he identified M.O.I to VI. According to him M.O.-II and M.O.III were blood stained. In his cross-examination he has stated that the dying declaration of the victim was recorded at 1:00 P.M. and that the patient was conscious. He has also stated that the M.O.I was stained with the blood at the time of seizure.

P.W. 8 in his testimony has stated that he took over the investigation from P.W.10 and recorded the statement of witnesses. He visited the spot and seized one wooden frame of a cot on production by the Grama Rakhi. Accordingly he prepared seizure list under Ext.3/1. He arrested the appellant at 3:00 P.M. on 07.03.2003. On 24.04.2003 he made a query with regard to the weapon of offence under Ext.9 and on the same day he received back the query report along with the MOs from the medical officer. He also proved the chemical examination report under Ext.11. He also testified about the statements of P.W.1 and 4 made before him during course of investigation from which they had resiled in the cross-examination. He also stated that material objects which he had seized during investigation are not available in Court on that date. He denied a suggestion that he had submitted a charge sheet even though not enough material is there against the appellant.

P.W.7 is the havildar and as per his statement he is a witness to the seizure of wearing apparels of deceased and command certificate was produced by him.

P.W.9 is the brother-in-law of the deceased, who has reiterated his sister's (P.W.1) version to him that following a family quarrel the appellant caused bleeding injuries on the head of the deceased by means of a piece of wood.

09. The analysis of evidence of the prosecution witnesses reveals as follows:-

An analysis of evidence of P.W.1 shows that the core story as delineated by her in examination –in- chief relating to quarrel and assault on her husband by the appellant remain un-demolished. Her testimony makes it clear that she has seen both of them were quarreling though she has not seen the actual assault which occurred sometime after the quarrel. Further, her version that after regaining the sense, the victim disclosed her that the appellant had assaulted him remains un-demolished in the cross-examination. Though in her cross-examination, she has stated about confession of appellant before P.W.3 in her presence, however this has not been corroborated by P.W.3. However in her cross-examination, she has made it clear that there was quarrel between the deceased and the appellant prior to occurrence and a meeting was convened in the village to resolve the dispute.

An analysis of evidence of P.W.2 show that on hearing the cry of P.W.1, he went to her house and found the victim with bleeding injuries on his head and chest. He has also clearly testified that the victim was conscious

and was talking when he met him. The victim clearly narrated before him that the appellant had assaulted him. With regard to scribing of FIR that though there is some contradiction, however, the P.W.2 in his re-examination on recall has made it clear that the facts stated in the FIR were within his knowledge as derived from P.W.1 and the deceased and that he had not scribed the FIR as per the dictation of police but since police instructed him to give a written report, he scribed the same. Thus P.W.2 corroborates the version of P.W.1 with regard to the fact that even after the assault victim was conscious and implicated the appellant. P.Ws. 2 and 3 also corroborate the version of P.W.1 relating to the statement of victim being assaulted by appellant.

An analysis of evidence of P.W.6 shows that according to him all the injuries can cause death in ordinary course and his testimony on the dying declaration of the victim has remained un-demolished. It is well settled that a dying declaration can form sole basis of conviction, if it inspires the confidence of the Court. It is important to note here that P.W.6 has clearly stated that the victim was in a fit mental condition and was able to understand the questions, further was also able to give answers. He clearly testified that on being questioned, the victim had replied that it was the appellant, who assaulted him by means of a piece of wood. Further such dying declaration has been corroborated by the version of P.Ws.1, 2 and 3. There is no reason to disbelieve the Doctor namely, P.W.6 when there is nothing on record to show that he was inimically disposed towards the appellant.

An analysis of the evidence of P.W.11, another witness to dying declaration, shows that his version corroborates the version of P.W.6 with regard to recording of the dying declaration. His testimony also corroborates the statements of P.Ws.1, 2 and 3 with regard to the version of deceased as to how he was assaulted.

An analysis of the evidence of P.W.12 shows that his version in examination-in-chief remains un-demolished and there is nothing to disbelieve his version as there is no evidence to show that he has been inimically disposed towards the appellant.

To summarise it is clear from the evidence on record that there was quarrel between the brothers (appellant and the deceased) on account of cutting of Dimiri Tree. Later on, as per the version of P.W.1 the quarrel developed into a fighting. She being an eye witnesses to the quarrel, separated them. Thereafter a meeting was convened in the village to resolve the dispute and sometime thereafter when her husband was coming out of the

house, he was assaulted by the appellant by means of wooden frame of cot resulting in bleeding injuries on his face and chest. Thus there is nothing to show that during course of sudden quarrel/sudden fight and in the heat of the passion, the appellant had assaulted the deceased. Rather from the evidence of P.W.1 it is clear that there exists a time gap between the fight/quarrel and the timing of assault. There is nothing on evidence/record to show that the span of such time gap to be extremely short. Rather in her cross-examination, P.W.1 has made it clear that after the quarrel between her husband and the appellant, a meeting had been convened in the village to resolve the dispute. In such background it would be reasonable to arrive at a conclusion that the assault had taken place much after certainly with premeditation and not in a sudden fight in the heat of passion. Further there is no evidence to show that appellant picked up the weapon of offence from the spot and suddenly attacked the deceased. Though the external injuries have been described as simple by P.W.6, however both he and P.W.12 have spoken about the symptoms of internal hemorrhage. P.W.12 has specifically testified about fracture of 9^{th} and 10^{th} Ribs and fracture of skull. He has further clearly stated the cause of death to be inter carnial haemorrhage due to head injury. It is extremely important to note here that both the Doctors have stated that injuries were sufficient to cause death of a person in ordinary course of nature. Further the dying declaration of victim makes it clear that the assault was by means of a piece of wood. All these can only lead to the conclusion that for a small issue of cutting of a Dimiri Tree, the appellant had acted in a cruel and unusual matter after due premeditation. In fact as indicated earlier a Court can record its conviction solely basing on dying declaration. The materials reveal that at the time of recording of dying declaration upon police requisition, the victim was conscious and was in a fit state of mind to understand the questions and was able to give answers. There he has clearly stated that he has suffered injury on account of assault by appellant by means of a piece of wood. Even otherwise this statement of the victim is also corroborated by the versions of P.Ws.1, 2 and 3 as before all of them the victim has stated that it was the appellant who has assaulted him. In such background the dying declaration inspires confidence and this Court is satisfied that it was done in a voluntary and truthful manner. The testimony of P.W.6 in his cross-examination that had the deceased got timely treatment, he could have survived is of no consequence as both the doctors namely P.W.6 and 12 have admitted that the injuries caused to the victim are sufficient in ordinary course to result in death. Further P.W.12 has opined

that injuries suffered by the deceased was possible by wooden frame of a cot i.e. M.O.I. Besides this the Chemical Examination report also shows human blood on the same. All these indicate that present case is clearly covered by Clause 'Thirdly' of Section 300, IPC and Exception 4 of Section 300 IPC can have no application to the facts of present case.

10. Now coming to the judgments of this Court cited by Mr. Behera, learned counsel for the appellant, in our view the said judgments are distinguishable on facts and have no application to the present case.

With regard to Arjun Kisan's case (supra) this Court has come to a conclusion that the appellant therein had intended to celebrate the annual festival of Pusa Purnima with the money provided by the Manager. When the deceased refused to pay money, the appellant was provoked with sudden anger and at the spur of the moment assaulted the deceased with wooden handle of a spade found lying at the spot. Thus there was no premeditation. Accordingly this Court altered the conviction from one under Section 302, IPC to one under Section 304, Part I, IPC. But in the present case as discussed there exists a time gap between quarrel and assault and there is nothing to show that such time gap is extremely small. Further there is nothing to show that the appellant had picked the weapon of offence at the spot. Thus here the element of suddenness is absent. Here as indicated during quarrel, P.W.1 separated the appellant and deceased and thereafter a meeting was convened to resolve the dispute and thereafter the assault took place. It is not a case where assault took place during quarrel in the heat of passion. The village meeting and the sequence of events show that there was enough time gap for the appellant to reflect and the carry out the assault. Therefore it cannot be said that there was no premeditation and whatever happened, happened in an accidental manner.

With regard to case of ***Gopinath Paraja*** (supra), in the said case the incident had occurred all on a sudden inside the house and the appellant had given only a single blow and the appellant had sustained only one injury. In the present case as indicated earlier element of suddenness is absent and further as deposed by P.Ws.6 and 12, the deceased had suffered three external injuries which according to both the doctors were sufficient in ordinary course of nature to cause death. Thus the said case is factually distinguishable. Further is nowhere the settled position of law that a single factual blow can never fall within the scope of Section 300, IPC. We will discuss this point a bit later.

With regard to the case of Miniaha Masuri (Supra) there, unlike the present case, the incident occurred during sudden quarrel between father of the appellant and deceased and the appellant was also a party to same. Thus the said case is also factually distinguishable.

With regard to the case of ***Hadi Sisa*** (supra), it may be noted that there the death was on account of a single blow shot by arrow and no motive could be proved. In the present case as indicated earlier, there exists a number of injuries on the vital parts of the body and the doctors have clearly opined that the injuries are sufficient in ordinary course of nature to cause death. Further in the present case cutting of Dimiri Tree giving rise to quarrel clearly indicates the motive for assaulting the deceased. Moreover here dying declaration has been well proved. Thus case of ***Hadi Sisa*** (Supra) is distinguishable on facts. No doubt in Hadi Sisa case (supra) the Doctor opined that had the patient been treated immediately he could have been saved. In such background and in the background of single blow given the appellant, this Court has concluded that it cannot be said that the appellant therein had any intention to kill. But in the present case both the doctors have stated that the injuries caused are sufficient in ordinary course of nature to cause death. Further in ***Gopinath Paraja*** case (Supra) and ***Hadi Sisa*** case, it appears that the attention of this Court was not drawn to the decision of Supreme Court in ***Dhool Sigh*** case(Supra) wherein it has been made clear that a single blow does not necessarily reflect lack of intention to cause death particularly when an injury is caused to a vital part of body. There the case of death was on account of cut in the neck resulting in excessive bleeding and heart failure. There though the learned trial Court held the Dhool Singh guilty of an offence punishable under Section 302, IPC, the High Court altered the punishment to one under Section 304 Part-II IPC as the convict had inflicted one blow/one injury and since the doctor had not stated that the injury was sufficient in ordinary course of nature to cause death. While restoring the trial Court judgment; with regard to single blow, the Supreme Court opined as follows:-

> "**13.** In regard to the finding of the High Court that the prosecution has not even established that the respondent herein had acted with an intention of causing death of the deceased we must note that the same is based on the fact that the respondent had dealt a single blow which according to the High Court took the act of the respondent totally outside the scope of Exception I to section 300 IPC. Here again we cannot agree with the finding of the High Court. The number of injuries is irrelevant. It is not always the determining factor in ascertaining the intention. It is the nature of injury, the part of body where it is caused, the weapon used in causing

such injury which are the indicators of the fact whether the respondent caused the death of the deceased with an intention of causing death or not. In the instant case it is true that the respondent had dealt one single blow with a sword which is a sharp-edged weapon measuring about 3 ft. in length on a vital part of body namely the neck. This act of the respondent though solitary in number had severed sternoclinoid muscle, external jugular vein, internal jugular vein and common carotid artery completely leading to almost instantaneous death. Any reasonable person with any stretch of imagination can come to the conclusion that such injury on such a vital part of the body with a sharp-edged weapon would cause death. Such an injury in our opinion not only exhibits the intention of the attacker in causing the death of the victim but also the knowledge of the attacker as to the likely consequence of such attack which could be none other than causing the death of the victim. The reasoning of the High Court as to the intention and knowledge of the respondent in attacking and causing death of the victim, therefore, is wholly erroneous and cannot be sustained."

In the present case as indicated earlier the testimony of both the Doctors show presence of a number of injuries on vital parts of the body.

With regard to the opinion of the doctor about chance of deceased surviving, if proper medical care would have been given, the Supreme Court in Dhool Singh's Case (Supra) had to say as follows:-

"**14.** xxxx xxxx xxxx

Learned counsel then submitted that according to the doctor, if proper medical care were to be provided, the injured could have survived. This, in our opinion, is a hypothetical answer given by the doctor and is not something which is applicable to the facts of this case. Even otherwise we are not in agreement with the views expressed by the doctor that with the injury like the one suffered by the victim, in the normal course he could have survived. Section 300 does not contemplate such a situation of miraculous survival.

xxxx xxxx xxxx"

In the present case as indicated earlier notwithstanding a similar statement by P.W.6, however both P.Ws 6 and 12 have opined that the injuries inflicted on the deceased can cause death in ordinary course of nature.

For all these reasons, we are not inclined to interfere in the matter. Accordingly while upholding the impugned judgment and sentence the JCRLA is dismissed. LCR be sent back forthwith.

2018 (II) ILR - CUT-753

DR. B.R.SARANGI, J.

W.P.(C) NO. 5910 OF 2005

BHIMSEN ROUTA ……...Petitioner

.Vs.

STATE OF ORISSA & ORS. …… Opp.Parties

SERVICE LAW – Disciplinary proceeding – Petitioner was suspended on 16.03.2004 – On 09.03.2005 he was served with the memorandum of charges and the written statement submitted within the time – No enquiring officer was appointed to cause further enquiry into the charges and furnish his findings under Rule 15(4) of O.C.S.(C.C.A.) Rules, 1962 – Petitioner superannuated from service on 31.12.2007 – Inordinate delay in concluding the proceeding – Effect of – Held, the proceeding is liable to be quashed.

"Applying the aforementioned principles, as laid down by the apex Court, to the present case, on perusal of the counter affidavit filed by opposite party no.5 it is found that nothing has been placed on record to indicate why till date enquiring officer has not been appointed nor the petitioner has been given the benefit as due admissible to him in accordance with law from the date of his superannuation i.e., 31.12.2007, save and except payment of provisional pension for a period of three months. It has been held by the apex Court, that the delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. No doubt it is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Nothing has been placed on record indicating that delay causes due to laches on the part of the employee." (Para 7)

Case Laws Relied on and Referred to :-

1. AIR 1998 SC 1833 : State of Andhra Pradesh Vs. N. Radhakishan.

For Petitioner : M/s. V. Narasingh, R.L. Pradhan, J. Samantaray & G. Das.

For Opp. Parties : Mr. B. Senapati, Addl. Gov. Adv.
M/s. S.K. Pradhan & P.C. Mishra.

JUDGMENT Date of Hearing: 26.11. 2018 Date of Judgment : 28.11.2018

DR. B.R.SARANGI, J.

The petitioner has filed the writ petition to quash the order of suspension dated 05.07.2004 published in daily "Sambad" in Annexure-5

and the memorandum of charges dated 09.03.2005 in Annexure-9 issued by opposite party no.5. He further seeks for direction to the opposite parties to release the suspension allowance in full along with other emoluments admissible to the post.

2. The factual matrix of the case in hand is that the petitioner, after completion of Higher Secondary Certificate Examination, was initially appointed on temporary basis in the post of Tax Sarkar (Collector), Kodala Notified Area Council (NAC). Pursuant to approval of the Chairperson-opposite party no.4, the petitioner was given regular appointment in the post of Tax Sarkar (Collector) vide order dated 11.11.1977 of opposite party no.5-Executive Officer, Kodala NAC. Opposite party no.5 being satisfied with sincerity, honesty and integrity of the petitioner in due discharge of his duties vide order dated 19.09.1981 recommended his name to opposite party no.4 for promotion to the post of Junior Clerk stating that the services of the petitioner were more useful than a new entrant and he could manage the work of a Clerk very satisfactorily. Opposite party no.2-Director of Municipal Administration, Housing & Urban Development Department forwarded the representation of the petitioner for promotion to the post of Junior Clerk to the Government for consideration vide order dated 10.09.1981 of opposite party no.5. On 08.03.1984, the Deputy Director, Municipal Administration, Housing and Urban Development Department directed opposite party no.5 to fill up the vacant post of Junior Assistant by giving promotion to the petitioner on ad hoc basis if he was senior most amongst the Tax Sarkars under the NAC. Consequentially, the petitioner was promoted to the post of Junior Assistant on ad hoc basis on 26.03.1984 and he was continuing without being confirmed in the said post.

2.1 After election held in the year 2003 under the Orissa Municipal Act, 1950, the newly elected body took over charge of Kodala NAC with effect from 30.09.2003. But one day prior to the same, the petitioner went on leave from 29.09.2003 to 01.10.2003 for medical check-up of his health at M.K.C.G. Medical College and Hospital, Berhampur which was duly sanctioned by opposite party no.5 vide order dated 27.09.2003. Since the petitioner was advised prolonged treatment for restoring his normal health, he had to apply for extension of his leave through telegram till 29.02.2004. Though opposite party no.5 acknowledged receipt of the application for extension of leave through telegram on 31.10.2003, later the application for extension of leave was returned to the petitioner with the endorsement either ‘addressee is absent’ or ‘addressee refused’. However, the petitioner, after

recovery from illness and being duly certified to that effect by the treating doctor, submitted his joining report along with the medical certificate before the Chairperson-opposite party no.4 on 01.03.2004. But opposite party no.4 refused to receive his joining report and also denied to give anything in writing to that effect. Consequentially, the petitioner submitted a representation on 08.03.2004 before opposite parties no.2 and 3. On 16.03.2004, the Tahasildar, Kodala took over the charge of Executive Officer of the NAC and on the very same day at about 4 P.M, the petitioner submitted a copy of his joining report along with the medical certificate before him personally who, though received the same, did not entrust him any work. Therefore, the petitioner approached opposite party no.5 for entrustment of work. Opposite party no.5 on 05.07.2004 directed the petitioner to submit a fresh joining report, although joining report submitted on 16.03.2004 was already available with him. But opposite party no.5 rejected his joining report stating that the petitioner had already been put under suspension with effect from 16.03.2004 which, the petitioner having avoided to receive, was published in local daily 'The Sambad' dated 05.07.2004 vide order dated 06.07.2004. Then the petitioner submitted representation before opposite party no.2 on 20.08.2004 requesting him to direct opposite party no.5 to accept his joining report with effect from 01.03.2004. Opposite party no.5 by order of the Chairperson on 09.03.2005 served the memorandum of charges along with article of charges, statement of imputation in support of such charges and the list of witnesses on the petitioner calling upon him to submit written statement of defence within 30 days from the date of receipt of the memorandum, failing which it would be presumed that he admitted all the charges/allegations levelled against him. Therefore, the order of suspension and consequential memorandum of charges in Annexures-5 and 9 are subject-matter of challenge before this Court in the present writ petition.

3. Mr. V. Narsingha, learned counsel for the petitioner contended that opposite party no.3-Collector, Ganjam, vide letter dated 25.02.2005, issued to opposite party no.5 stated that as per Clause-2(a) of the circular vide D.O. No.24042/Gen/18.09.1991 of the Chief Secretary, Orissa-opposite party no.1 addressed to all departments charges against an officer placed under suspension should be served within three months from the date of suspension, departmental proceeding should be initiated within first three months of suspension and period of suspension should not ordinarily extend beyond six months from the date of framing of charges, but in the case of the

petitioner period of suspension having already exceeded more than 11 months, immediate action as per the guidelines prescribed by Government be taken and compliance communicated within 7 days from the date of receipt of the letter. It is further contended that the departmental proceeding, which has been initiated against the petitioner, has no basis. Therefore, the very initiation of departmental proceeding much after the order of suspension beyond the statutory period is contrary to the Government circular vide Annexure-8 dated 17.09.1991 which states guidelines for dealing with cases of suspension of officers.

Referring to Annexure-E/5 dated 09.06.2005, it is further contended that the memorandum, along with the imputation of charges, was served on the petitioner on 09.03.2005. He had submitted his written statement of defence on 06.04.2005, i.e, within due date and had not admitted the charges. Therefore, it was necessary to appoint an enquiring officer to further investigate into the charges and furnish his findings under Rule 15(4) of Orissa Civil Service (Classification, Control and Appeal) Rules 1962. But till date no such enquiry officer has been appointed. Thus, there is gross delay on the part of the authority to proceed with the matter against the petitioner.

It is further contended that in the meantime on attaining the age of superannuation the petitioner has been superannuated from service on 31.12.2007. Even after retirement, no enquiry officer has been appointed pursuant to letter dated 09.03.2005, nor the petitioner has been paid all the dues, save and except provisional pension for a period of three months. Therefore, for the delay in causing enquiry, the proceeding has to be quashed, and all consequential benefits in accordance with law be granted to the petitioner.

4. M/s. S.N. Mohapatra and associates initially entered appearance for opposite party no.5 and filed counter affidavit. When the matter was listed on 11.07.2017, Mr. S. Ghose, learned counsel for opposite party no.5 sought time to obtain instruction whether opposite party no.5 was interested to proceed with the disciplinary proceeding initiated against the petitioner or not, which is pending since 2005. On 26.07.2017 when the matter was listed Mr. S. Ghosh, learned counsel for opposite party no.5 by filing a memo in Court stated that he had no further instructions in the matter and his appearance be ignored. Accordingly, his appearance was ignored and the petitioner was permitted to take fresh notice against opposite party no.5 by registered post with A.D., but none appeared for opposite party no.5.

Consequentially, the petitioner took notice by special messenger pursuant to order dated 12.01.2018. In response to same, Mr. S.K. Pradhan, learned counsel entered appearance for opposite party no.5 by filing vakalatnama on 19.01.2018. When the matter was listed on 16.03.2018 since his name was not reflected in the cause list, this Court directed to list the matter after one week showing the name of Mr. S.K. Pradhan as learned counsel for opposite party no.5. On that date, he made request to list the matter after one week to enable him to obtain necessary instructions. When the matter is listed today, none appeared for opposite party no.5. Since this matter is of the year 2005 and in the meantime 13 years have elapsed and the petitioner has been retired from service on 31.12.2007 without getting any financial benefits as due admissible to him, this Court is not inclined to grant any further adjournment to the opposite parties and decided to proceed with the matter on the basis of the materials available on record.

5. Heard Mr. V. Narasingha, learned counsel for the petitioner and Mr. B. Senapati, learned Additional Government Advocate for opposite parties no.1 to 3 and perused the counter affidavit filed by opposite party no.5. With the consent of learned counsel for the parties, the matter is being disposed of at the stage of admission.

6. The facts narrated above are undisputed. Admittedly, the petitioner was served with memorandum along with imputation of charges on 09.03.2005 calling upon him to submit his written statement of defence, which was done on 06.04.2005, i.e., within the due date, wherein the petitioner has not admitted the charges levelled against him. Therefore, necessary implications would be that enquiring officer was to be appointed to make enquiry and submit his report. But till date, no enquiring officer has been appointed to cause further enquiry into the charges and furnish his findings under Rule 15(4) of O.C.S.(C.C.A.) Rules, 1962 which is applicable to the petitioner. The action of opposite parties no.4 and 5 clearly indicates a gross laches and negligence in conducting enquiry as against the petitioner. No doubt the memorandum of charges has been framed calling upon the petitioner to submit written statement of defence within the time stipulated and the same has been complied with. If the authorities were not satisfied, then they should have appointed an enquiring officer to cause further enquiry into the charges and furnish report. Even though the proceeding was initiated in 2005 and in the meantime the petitioner has been superannuated from service on 31.12.2007 and the matter is pending before this Court since

2005, till date no enquiry has been conducted against the petitioner and in the meantime, more than 11 years have elapsed from the date of his retirement.

7. In **State of Andhra Pradesh v. N. Radhakishan,** AIR 1998 SC 1833, the apex Court held in paragraphs-19 and 20 as follows:-

> ***"19****. It is not possible to lay down any pre-determined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. The essence of the matter is that the Court has to take into consideration all relevant factors and to balance and weigh them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when delay is abnormal and there is no explanation for the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether delay has vitiated the disciplinary proceedings the Court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the Court is to balance these two diverse considerations.*
>
> ***20****. In the present case we find that without any reference to records merely on the report of the Director General, Anti-Corruption Bureau, charges were framed against the respondent and ten others, and all in verbatim and without particularizing the role played by each of the officers charged. There were four charges against the respondent. With three of them he was not concerned. He offered explanation regarding the fourth charge but the disciplinary authority did not examine the same nor did it choose to appoint any inquiry officer even assuming that action was validly being initiated under 1991 Rules. There is no explanation whatsoever for delay in concluding the inquiry proceedings all these years. The case depended on records of the Department only and Director General, Anti- Corruption Bureau had pointed out that no witnesses had been examined before he gave his report. The Inquiry Officers, who had been appointed one after the other, had just to examine the records to see if the alleged deviations and constructions were illegal and unauthorised and then as to who was responsible for condoning or approving the same against the bye-laws. It is nobody's case that*

respondent at any stage tried to obstruct or delay the inquiry proceedings. The Tribunal rightly did not accept the explanations of the State as to why delay occurred. In fact there was hardly any explanation worth consideration. In the circumstances the Tribunal was justified in quashing the charge memo dated July 31, 1995 and directing the State to promote the respondent as per recommendation of the DPC ignoring memos dated October 27, 1995 and June 1, 1996. The Tribunal rightly did not quash these two later memos."

Applying the aforementioned principles, as laid down by the apex Court, to the present case, on perusal of the counter affidavit filed by opposite party no.5 it is found that nothing has been placed on record to indicate why till date enquiring officer has not been appointed nor the petitioner has been given the benefit as due admissible to him in accordance with law from the date of his superannuation i.e., 31.12.2007, save and except payment of provisional pension for a period of three months. It has been held by the apex Court, that the delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. No doubt it is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Nothing has been placed on record indicating that delay causes due to laches on the part of the employee.

8. In that view of the matter, this Court is of the considered view that initiation of proceedings against the petitioner and delay in concluding the same causes great prejudice to the petitioner. Therefore, the order of suspension published in newspaper in Annexure-5 dated 05.07.2004 suspending the petitioner from service on 16.03.2004 and consequential memorandum issued in Annexure-9 dated 09.03.2005 cannot sustain in the eye of law. Therefore, the same are liable to be quashed and accordingly quashed. Consequentially, the petitioner is entitled to get all the benefits as due admissible to him in accordance with law and the same should be paid to the petitioner as expeditiously as possible, preferably within a period of three months from the date of communication of the judgment.

9. The writ petition is thus allowed. No order as to cost.

2018 (II) ILR - CUT- 760

D.DASH, J.

R.S.A. NO. 316 OF 2007

RAJA BRAJENDRA KISHORE SINGH
@ RAJA BIRENDRA KISHORE SINGH (DEAD)
HIS POWER OF ATTORNEY HOLDER,
BRAJA MOHAN DAS ……..Appellant.

.Vs .

DISTRICT COLLECTOR, NAYAGARH ……..Respondent.

CODE OF CIVIL PROCEDURE, 1908 – Section 100 – Second appeal – Suit for declaration of right, title and interest over two nos. of Tank – Suit as well as first appeal dismissed – Plea before the second appellate court to exercise power under Order 7 Rule 7 of the Code and grant relief of fishing right over the tanks as recorded in the remarks column of the ROR – No document filed by the plaintiff showing grant of such right – Held, mere recording of fishing right in remarks column of ROR would not be sufficient to grant such relief.

"This right over the tanks in question is claimed in perpetuity to be resting with the person so noted as the right holder in the record of right and heritable. In that event, the grant or conferment can never be through mere noting as in the remark column of the record of right which may at best go to reflect the position as on that date of preparation of record of right and nothing more than that to say that it is legally so recognizable. The plaintiff in order to succeed in getting such a declaration as to his fishery right having not proved any registered document as to its conferment or grant in perpetuity, it cannot be so recognized and said to have been there in favour of the father of the plaintiff so as to further say that the plaintiff has inherited said fishery right over the tanks. The courts below appear to have completely overlooked this important legal position and the conclusion thus is legally unsustainable being fundamentally incorrect and opposed to law. For all the aforesaid, declaration of fishery right of the plaintiff over the suit tanks cannot be made." *(Para 17)*

Case Laws Relied on and Referred to :-

1. AIR (38) 1951 of SC 180 : Mrs. Fatma Haji Ali Mohammed Hajee and Others .Vs. State of Bihar.
2. AIR 1956 SC 17 : Ananda Behera .Vs. State of Orissa.

For Appellant : M/s. Biswa M. Pattnaik, P.K. Behera, P.R. Pat, B.K. Tripathy, S.R.Singhsamanta Naik, B. Vinay, M/s. G. Mukherjee, P. Mukherjee, R. Sharma.

For Respondents: Addl.Standing Counsel.

JUDGMENT Date of Hearing: 31.07.2018 Date of Judgment : 19.11.2018

D.DASH, J.

The appellant by filing this appeal under section 100 of the Code of Civil Procedure (for short, hereinafter called as 'the Code') has assailed the judgment and decree passed by the learned Adhoc Additional District and Sessions Judge, Nayagarh in Title Appeal No. 04 /11 of 1997/1995.

By the said judgment and decree, the lower appellant has confirmed the judgment and decree passed by the learned Civil Judge (Sr. Division), Nayagarh in Title Suit No. 63 of 1993. The appellant as the plaintiff having been unsuccessful before the trial court, had carried the appeal, where he has also failed in getting the fruitful result in setting aside the order of dismissal of the suit.

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

3. The plaintiff's case is that his father Raja Krushna Chandra Singh Mandhata was the Ruler in Chief of Ex-State of Nayagarh. It is stated that the two tanks as have been described in schedule-A and B of the plaint were the personal property of late Raja Krushna Chandra Singh Mandhata, who was in possession of the same from the time of his ancestors. It is further stated that after Merger of the Ex-State of Nayagarh with the Union of India in the year 1947, Raja Krushna Chandra Singh Mandhata continued to possess and enjoy the suit tanks as his personal property till 1983 and after his death, the plaintiff has been in possession and enjoyment of the same. It is the further case of the plaintiff that although the tank under schedule-A stood recorded in the name of Raja Krushna Chandra Singh Mandhata, subsequently the same has been recorded under Rakhit Anabadi Khata of the State, the defendant. So far as the tank described in schedule-B of the plaint is concerned, it is said that right at the time of Merger, it stood recorded in the name of the Provincial Government with a note in the remarks column of the ROR as to the Fishery Right in favour of the ruler.

It is asserted that by such erroneous recording of the tanks described in the schedule-A and B in the sabik as well as hal settlement, the right, title and interest of the plaintiff therein have not been taken away.

The plaintiff has also projected a case that by virtue of open, peaceful and continuous possession of the suit tanks and exercising the right of ownership by leasing out the same to different persons, for all these period,

he has to be treated to be the rightful owner in possession of the said tanks. It is stated that though the plaintiff had sent notice to the defendant-State challenging said wrong recording of the suit tanks in the records of right, no such response had come in. It is, further stated that taking advantage of the such wrong recording, on 15.09.1993, when the Tahasildar, Nayagarh auctioned the suit tanks, the plaintiff filed a writ application before this Court; wherein the fishery right had been recognized. An alternative case, has also been projected by the plaintiff that by virtue of such open, peaceful and continuous possession of the suit tanks in exercising all the rights of ownership, stretching over a century or even more to the knowledge of all concerned including the State, the plaintiff has perfected his title by way of adverse possession.

4. The defendant-State contested the suit stating that the suit tanks were not the personal properties of Raja Krushna Chandra Singh Mandhata. It has been said that the suit tanks were the properties of the Ex-Princely State of Nayagarh and were being maintained by the State with funds coming from the State exchequer during Darbar Administration. The pisciculture activity was being carried out by the Durbar Administration and the income therefrom was going to the State exchequer towards the collection of revenue of the State. The exercise of fishery right by late Raja Krushna Chandra Singh Mandhata over the suit tanks in his personal capacity has been stoutly denied. It has been further stated that in the settlement operation in the year 1932-33 during Durbar Administration, the suit tanks had been recorded in favour of Public Works Department, Nayagarh Estate and Nayagarh State Nizi Dakhal. So after independence in the year 1947 and on merger of the princely States including the State of Nayagarh, all such properties of the State of Nayagarh became the properties of the State of Odisha. Accordingly, by order in Mutation Case No. 920 of 1949-50, the tanks have been recorded in the name of the State which has been repeated in the later settlement recording. It is, therefore, stated that neither Raja Krushna Chandra Singh Mandhata nor his son, the plaintiff has any manner of right, title and interest over the suit tanks. The note with regard to fishery right in favour of the Raja Krushna Chandra Singh Mandhata in the remark column of the record of right is attacked as illegal and to have conferred no right, title and interest either on Raja Krushna Chandra Singh Mandhata or the plaintiff. A plea of non-joinder of necessary party has also been taken, specifically pleading that all the sons and daughters of Raja Krushna Chandra Singh Mandhata more particularly, the children born through his second wife, Rani Saubhagya

Manjari having not been made party, the suit for the reliefs claimed is in competent and has to fail.

5. On the above rival pleadings, the trial court has framed as many as thirteen issues.

Answering the most crucial issue relating to the claim of the plaintiff that the suit tanks are the personal properties of Raja Krushna Chandra Singh Mandhata, the finding has been returned that the said tanks were not the personal properties of Raja Krushna Chandra Singh Mandhata and therefore neither he nor the plaintiff as his son has the right, title and interest over the suit tanks. The trial court has also recorded a finding that all the legal representatives of late Raja Krushna Chandra Singh Mandhata are not parties to the suit. The suit thus, has been dismissed.

6. The unsuccessful plaintiff being highly aggrieved by the said dismissal of the suit had filed this appeal. The lower appellate court upon analysis of the evidence in the backdrop of the rival pleadings has again recorded the same findings as that of the trial court that the plaintiff has failed to establish his case of right, title and interest over the suit tanks; as also the alternative case as projected and that the plaintiff is not entitled to the reliefs claimed in the suit. The finding of the trial court with regard to non-joinder of necessary parties has also been agreed upon.

7. The second appeal has been admitted on the following substantial questions of law:-

> I. Whether the learned courts below have acted contrary to law in dismissing the suit of the appellant solely on the ground of non-joinder of parties, even though such a plea was not taken in the written statement by the defendant?
>
> II. Whether the learned courts below have acted illegally in not affording an opportunity to the plaintiff to implead the parties, who according to the courts below were necessary parties to the suit?
>
> III. Whether the learned courts below on coming to the conclusion that the suit is bad for non-joinder of parties, should have exercised their jurisdiction under Order-1, Rule-10 C.P.C. by issuing direction to implead the said persons as proforma-defendants in the suit?

8. On going through the above, it is clear that all the three formulated substantial questions of law concern with the non-joinder of necessary parties. Perusal of the impugned judgments reveals that non-joinder of necessary party is not the sole ground for dismissal of the suit and that has been found to be an infirmity in the suit after the conclusive finding that the

suit tanks are not the personal property of the plaintiff down from the hands of his ancestor. Both the courts have concurrently found that the plaintiff has failed to establish that the suit tanks were the personal properties of Raja Krushna Chandra Singh Mandhata who happens to be the father of the plaintiff and that he was in possession of the same and after him, the plaintiff as his son is continuing to possess as such in exercise of his own right.

This being the position, learned counsel for the appellant fairly submitted that in this case one more substantial question of law also surfaces that whether the courts below have erred in law by recording a finding that the suit tanks are not the personal properties of Raja Krushna Chandra Singh Mandhata as to have devolved on his death upon his legal representatives including the plaintiff. So, he urged for formulating this substantial question of law and hear on that for ruling on it. He then submitted that such a finding even though is concurrent suffers from the vice of perversity as the outcome against the case of the plaintiff is the result of perverse appreciation of evidence on record without keeping in view the case projected by the plaintiff in the plaint in its proper perspective.

He next submitted that such a finding has been rendered against the case of the plaintiff without even taking note of the entry in the remarks column of the record of right as regards the fishery right. He further submitted that when the courts below have found that the father of the plaintiff was having the fishery right over the suit tanks, the same right being heritable, the plaintiff's suit granting said relief of declaration of fishery right and injunction so as to safeguard that right ought to have been passed in exercise of power under order-7 rule-7 of the Code. He therefore urges for also framing another substantial question of law in the light of above.

9. Learned counsel for the State accorded his agreement with the submission as regards the fourth and fifth substantial questions of law. However, he contended that the finding of the court's below that the suit tanks are not the personal properties of Raja Krushna Chandra Singh Mandhata is based on just and proper appreciation of evidence on record, and there being absolutely no documentary evidence to support the claim of the plaintiff, the courts below had no other option but to dismiss the suit. He next submitted that on the face of the pleadings and the original reliefs claimed, i.e. declaration of right, title and interest, a decree declaring fishery right in favour of the plaintiff cannot be passed in exercise of power under order -7 rule-7 of the Code.

10. Considering the submissions made, this Court has framed two more substantial questions of law in the light of the submissions of the learned counsel for the appellant at the time of hearing which are as follows:-

> (iv) Whether the findings of the courts below that the suit tanks are not the personal property of Krushna Chandra Singh Madhanta and thus have not devolved upon the plaintiff and other legal representatives suffers from the vice of perversity being the outcome of perverse appreciation of evidence?
>
> (v) Whether, in view of noting of fishery right in respect of the tanks in favour of the father of the plaintiff, the courts below ought to have been passed a decree by declaring said right in exercise of power under order-7 rule-7 of the Code?

The above substantial questions of law since touch the very foundation of the suit as laid, in my considered view those have to be answered first, since said answers would go to decide the survival of other substantial questions of law for consideration.

I have heard learned counsel for the appellant and the learned counsel for the State on above substantial questions of law under (iv) and (v).

Let us now proceed to answer those since in case the answers to the same is recorded against the plaintiff, the exercise of searching answers for other substantial questions of law would no more stand as the necessity and those may simply be of academic importance.

11. At the risk of repeatation, for proper appreciation at this stage, it is felt necessary to place the salient features of the plaintiff's case.

It is stated that the suit tanks belong to his ancestor, as such stood recorded in the name of Raja Krushna Chandra Singh Mandhata, in the record of the settlement of the year 1932-33. The plaintiff upon the death of Raja Krushna Chandra Singh Mandhata claims to have succeeded to the same and thus has the right, title and interest over the same.

The relief, in the suit is for declaration of right, title, interest and possession in favour of the plaintiff over the suit tanks. So the burden of proof squarely rests on him to establish the same. In a suit of this nature, the plaintiff is either to stand or fall on his own and he, for the purpose cannot take advantage of either the failure of the defendant to prove their case or the weakness in the defence.

12. The plaintiff has examined six witnesses. The plaintiff himself instead of coming to the witness box has preferred to examine his power of attorney

holder as P.W. 6. Other witnesses, P.Ws. 1 to 5 have stated on oath that they were taking the suit tanks on bhag basis from Raja Krushna Chandra Singh Mandhata and the plaintiff for pisciculture and used to pay bhag dues to them. This has been also the evidence of P.W. 6. Admittedly, soon after the Merger of the Ex-State of Nayagarh and forming part of the State of Orissa, the suit tanks stood recorded in favour of the Provincial Government in the year 1949-50 by an order in Mutation Case No. 920 of 1949-50. It has again been repeated in the hal settlement, long after the Merger of Ex-Princely State with the Union of India and the first mutation as above.

This P.W. 6 has come to picture only in the year, 1986 to look after the properties affairs of the plaintiff and obviously no evidence has come from his lips as regards the position of the record in the year 1949-50 and about any such explanation as to under what circumstance, it was so made, and, if so, why that those were not challenged during this long period. The evidence of P.W.6 with regard to the dealing of the tanks by the plaintiff and his father have been rightly rejected since nothing is there in his evidence to suggest that either prior to 1986, he was looking after the affairs of properties of the Royal family of Nayagarh even in any other capacity being attached to said management of the immovable property or to have been in visiting terms to the house of the plaintiff, in deriving the means to know about the property affairs of the plaintiff prior to the year 1986. I do not find anything wrong with said view of the lower appellate court that the evidence of P.Ws. 1 to 5 do not go to establish the claim of absolute title of Raja Krushna Chandra Singh Mandhata and after him the plaintiff in so far as the suit tanks are concerned and so also with the view taken on the evidence of P.W.6 as discussed above.

13. Proceeding to the position of record, it is seen that in the record of right of the year 1932-33 settlement, the tanks were in the name of Raja Krushna Chandra Singh Mandhata of Nayagarh who was admittedly the then Ruler in Chief of the State of Nayagarh. The plaintiff claims that these tanks are the personal property of Raja Krushna Chandra Singh Mandhata whereas the defendant denies the same. It's the further case of the plaintiff that the said tanks were recorded in the name of Raja Krushna Chandra Singh Mandhata because of the fact that he was then very much the Ruler-in-Chief of the State of Nayagarh. In view of above clear pleading, the presumption though rebuttable, stands that the property was of the Ex-State of Nayagarh. The lower appellate court has very well gone to examine said crucial point as to whether the suit tanks were the personal properties of the Raja Krushna

Chandra Singh Mandhata. No document has been produced and proved to show that the suit tanks were held by the father of the plaintiff in his personal capacity but not as, the then Ruler in Chief of the State of Nayagarh. These record of rights marked as Ext. 4 and 4/a have been prepared soon after the Merger of the Ex-State of Nayagarh by order in Mutation Case No. 920 of 1949/1950 and the record has came out in the name of the Provincial Government. The name of Raja Krushna Chandra Singh Mandhata has been deleted as per the order in the mutation case and Provincial Government has been substituted as the owner thereof which is very important. In the hal settlement, the same status has been maintained with the suit tanks having been recorded in the name of the State Government. Both these records have also not been challenged till the suit. Raja Krushna Chandra Singh Mandhata had never objected to the above correction and recording of the suit tanks during his lifetime. The lower appellate court under the circumstances and on the face of the fact that the records of right having held the field for such long period and in the absence of any evidence to show those entries to be the incorrect or even any challenge to it for the period is found to have committed no fault in presuming the correctness of the same.

14. The very case of the plaintiff is that during Durbar Administration, late Raja Krushna Chandra Singh Mandhata possessed the suit tanks in his independent/ personal capacity unconnected with his position and discharge of power as Rule and thus has the right over those tanks. It is not stated from the side of the plaintiff that after such Merger in case of all his personal properties, also the same type of wrong recordings have been made which still continues to be enjoyed as such after Merger till now. All these facts are not clearly stated. So the inference has to be drawn that the personal properties of the Ruler-in-Chief have accordingly been recorded in his name and in so far as those personal properties are concerned, there remains no dispute as to ownership or enjoyment. The courts below have gone through the evidence both oral and documentary in coming to the conclusion that it has not been proved that Raja Krushna Chandra Singh Mandhata was the owner in possession of the suit tanks in his personal capacity during Durbar Administration and that state of affairs to have so continued after Merger till his death and thereafter. The property thus cannot be said to be his own property having no nexus with the Rulership. Except that premerger record of right of the year 1932-33, no other documentary evidence is forthcoming and that again, immediately after merger, the record of right having been corrected by an order in the mutation case, the same has gone unchallenged

although for more than five and half decades till this suit. A Ruler's possession and enjoyment of the property situating within the ruled State is ordinarily to be presumed for and on behalf of the State and the subjects. In order to establish that it is the personal property of the Ruler, clear, cogent and clinching documentary evidence stand as the need which is very much wanting here. It is neither stated nor shown that after merger, no property situated in the State of Nayagarh has been recorded in the name of the Ruler clothing exclusive ownership enabling the Court to take a view accordingly. Moreover, when the plaintiff himself claims to be the owner of the suit tanks and to be in possession as such exercising all the rights of ownership including exercising the right of pisciculture, the alternative claim of acquisition of title over those tanks by adverse possession has no leg to stand as the same here runs fundamentally in opposition to the original claim of title in the manner and way as have been pleaded. The fourth substantial question of law is answered accordingly.

15. The lower appellate court has gone to discuss about the fishery right of the plaintiff over the suit tanks. Basing upon the remark given in the record of right of the suit tanks prepared in the year 1949-50 as to the fishery right of Raja Krushna Chandra Singh Mandhata and referring to the order of this Court passed in OJC NO. 6695 and 6696 of 1993, it has been so found.

In that view of the matter, learned counsel for the appellants submitted that here in the case while declining to grant the reliefs as have been prayed for in the suit filed by the plaintiff, moulding the same as permissible under order-7 rule-7 of the Code, there remains every justification to pass a decree declaring the fishery right of the plaintiff in respect of the suit tanks. He further submitted that the courts below on the face of their finding, committed error in law by not passing a decree in that light which is rather a lesser relief than the claimed one and there is no point in driving the plaintiff for another suit when he could have set up that relief in the suit but merely because he has not so advanced. In support of said contention, reliance has been placed on the decision of the Apex Court in case of ***Mrs. Fatma Haji Ali Mohammed Hajee and Others Vrs. State of Bihar***; AIR (38) 1951 of SC 180. His next submission was that even in the absence of other legal representatives of the plaintiff, there is no obstacle on the part of the court to declare the said right as the same would obviously enure in favour of the plaintiff as also all other legal representatives.

16. Learned counsel for the State submitted that the findings recorded by the courts below on the question of right of fishery merely on the basis of the

remark given in the record of right of the year 1949-50 is not legally correct. According to him, the same appears to be a general remark with the situation then prevailing in the field which is just after the Merger. He further submitted that there is no other documentary evidence as required under law in support of the claim of said right of fishery and also with regard to such other terms and conditions. He submitted that the noting in the remark column of the record of right cannot be so taken to have clothed the right of fishery over the tanks in favour of the father of the plaintiff and that is required to be by/through a document from the side of the State as per law with the terms and conditions attached to said grant of right. He further submitted that this Court in OJC No. 9995 and 9996 of 1993 has not declared said rights. He, therefore, urged that said remark cannot form the basis of the finding in favour of the plaintiff as regards the fishery right over the suit tanks so as to be declared as such in the present suit. He further submitted that in the suit as laid, the provision of order -7 rule-7 of the Code cannot come to the aid of the plaintiff for being favoured with a decree declaring said right of fishery.

17. The plaintiff in support of his claim relied upon the remark in the record of right in the year 1949-50 indicating the fishery right over the tanks in favour of the Raja Krushna Chandra Singh Mandhata. However, there remains no such document in support of grant or conferment of said right. At one stage, it has been stated in plaint, as also during evidence that the father of the plaintiff and after him, the plaintiff have been carrying out the pisciculture activities over the suit tanks. As per the plaintiff's case either directly or through others they were rearing fishes in the tanks and enjoying the benefits. The position has been set at rest by the Apex Court since long in case of ***Ananda Behera Vrs. State of Orissa***; AIR 1956 SC 17. It has been held that the right to catch and carry away fish in specific section of the lake over a specified period amounts to a licence to enter on land coupled with a grant to catch and carry away the fish, that is to say, it is a 'profit a prendre':- Sec 11 Halsbury's Laws of England (Hailsham Edition) page 382 and 382.

> "In England, this is regarded as an interest in land (11 Halsbury's Laws of England page 387) because it is a right to take some profit of the soil for the use of the owner of the right (page 382). In India, it is regarded as a benefit that arises out of the land and as such is immovable property.
>
> (10) Section 3(26), General, Clauses Act, defines "immovable property" as including benefits that arise out of the land. The Transfer of Property Act does not define the terms except to say that immovable property does not include standing timber, growing crops of grass.

> As fishes do not come under the category the definition in the General Clauses Act applied and as a 'profit a prendre' is regarded as a benefit arising out of land, it follows that it is immovable property within the meaning of the Transfer of Property Act."

This right over the tanks in question is claimed in perpetuity to be resting with the person so noted as the right holder in the record of right and heritable. In that event, the grant or conferment can never be through mere noting as in the remark column of the record of right which may at best go to reflect the position as on that date of preparation of record of right and nothing more than that to say that it is legally so recognizable. The plaintiff in order to succeed in getting such a declaration as to his fishery right having not proved any registered document as to its conferment or grant in perpetuity, it cannot be so recognized and said to have been there in favour of the father of the plaintiff so as to further say that the plaintiff has inherited said fishery right over the tanks. The courts below appear to have completely overlooked this important legal position and the conclusion thus is legally unsustainable being fundamentally incorrect and opposed to law. For all the aforesaid, declaration of fishery right of the plaintiff over the suit tanks cannot be made.

18. Be that as it may, even applying the principles set out in case of ***Mrs. Fatma Haji Ali Mohammed Hajee and Others*** (supra) here it is not a case where it can be said that no injustice can possibly result to the defendant who have denied that right. The relief as is now prayed for cannot also be said to be in any way lesser than what has been claimed in the suit. Thus the provision of order-7 rule-7 of the Code cannot come to the aid of the plaintiff for grant of the right of fishery over the suit tanks.

For the aforesaid discussion and reasons, the answer to the framed substantial questions of law under (v) is accordingly returned against the plaintiff.

In view of the answers recorded in respect of the two newly framed substantial questions of law at the time of hearing under (iv) and (v); the other substantial question of law, mainly concerned with the non-joinder of necessary party do not survive for consideration so as to be answered. The dismissal of the suit which has been the result in the trial court as well as the lower appellate court hereby stands confirmed. The plaintiff is thus non-suited.

19. In the result, the appeal is dismissed. In the facts and circumstances, no order as to cost is passed.

2018 (II) ILR - CUT- 771

D.DASH, J.

R.S.A. NO. 224 OF 2016

SMT. NAMITARANI @ PRATIMARANI KHUNTIA ……..Appellant

.Vs.

STATE OF ODISHA, REPRESENTED THROUGH THE COLLECTOR, CUTTACK & ORS. ……..Respondents

(A) CIVIL SUIT – Claim for right to pathway over Govt. Land – Difference between 'natural right' and 'right of easement' – Indicated.

(B) CIVIL SUIT – Claim for right to pathway over other person's land – Appellant plaintiff purchased the adjacent land in 1988 – No recital in the sale deed nor in the map that there was any mention regarding existence of any path way over Schedule-'B' property – This leads to infer and show that at the relevant point of time of purchase of Schedule-'A' land by the plaintiff, there was no such user of any part of the land under Schedule-'B' property situated towards the north-west side of Schedule-'A' land – Appellant/Plaintiff has alternative road – Held, this Court finds that such a natural right of way over the land under Schedule-'B' land is not available to the plaintiff and, therefore, the owner of said Schedule-'B' land cannot be put to restrictive user of the same in any such manner.

Case Laws Relied on and Referred to :-

1. AIR 1987 Madras 183 : Bharathamatha Desiya Sangam, Madhavaram & Anr .Vs. Roja Sundaram & Ors,
2. AIR 1939 Pat 683 : Patna Municipality Vs.. Dwarka Prasad.
3. AIR 1972 Mad 386 : Damodara Naidu .Vs. Thirupurasundari Ammal.

For Appellant : M/s.Shabasis Das, S.Das, P.Sahoo & P.Das
For Respondent : Addl. Govt. Advocate

JUDGMENT Date of Hearing :21.08.2018 Date of Judgment: 19.11.2018

D.DASH,J.

In this appeal under section 100 of the Code of Civil Procedure (for short, called as "Code"), the appellant has called in question the judgment passed by the 1st Additional District Judge, Cuttack in R.F.A. No.133 of 2010 followed by the decree, confirming the judgment and decree passed by the learned Civil Judge, Junior Division, First Court, Cuttack in C.S. No.13 of 2007.

The appellant, as plaintiff, had filed the suit, for declaration of right of use of the land described in Scheduel-'B' of the plaint as the pathway in

coming over the land described in Schedule-'A' of the plaint and for permanent injunction. The suit having been dismissed, she had carried the appeal under section 96 of the code, which has come to be heard and decided by the 1st Additional District Judge, Cuttack. Since no such fruitful result has yielded in the said first appeal in favour of the appellant, this appeal has been filed.

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

3. The plaintiff's case is that she is the owner in possession of the landed property described in Schedule-'A' of the plaint. This land had been purchased by the plaintiff from one Nrusingha Pradhan by registered sale deed dated 30.08.1988 for valuable consideration. It is asserted that since the time of purchase, she has been in possession of the same being so delivered by her vendor, namely, Nrusingha Pradhan. The land having been so mutated in her name, she has been paying the revenue to the State. It has been further pleaded that after purchase, the plaintiff has constructed a house over said Schedule-'A' land and is in occupation of the same.

It is the plaintiff's specific case that her vendor and after him, she has been using both the pathway as available over the land assigned with plot nos.91 and 92 under Khata No.511, the property described in Schedule-'B' of the plaint. It is her case that said way is being used by the plaintiff to bring agricultural produce and other materials to her land over Schedule-'A' through carts and tractors. It is her further case that except the said pathway lying over the land under Schedule-'B', she has no other alternative land to have ingress and egress to her own land in Schedule-'A'.

When on a fine morning towards the end of the month of January, 2007, some measurement works over the land under Schedule-'B' was undertake by the Government Officials with an intention to construct boundary wall closing the said pathway used by the plaintiff, she filed the suit.

For proper appreciation, description of the suit land in Schedule-'B' of the plaint, is shown hereunder:

"S C H E D U L E 'B'

District Cuttack, Mouza Nuahat, Tahasil Cuttack Sadar, Thana Cuttack Sadar, Khata No.511 Plot No.91 Ac.1.23 decimals and plot no.92 Ac.0.16 decimals from out of both the plot a pathway exists towards the northern side of plot no.87

stretching from west to east towards the southern side of plot no.91 and 92 measuring 50 feet in length X 10 feet in breadth, approximately."

4. The prayers made in the plaint are as under:

13. xx xx xx

(a) Let a decree be passed by declaring the right of the plaintiff to sue the pathway as described in Schedule-'B' land to come to the Schedule-'A' land;

(b) Let a decree be passed by restraining the defendants permanently not to obstruct the pathway as described in Schedule-'B' land in any manner.

xx xx xx xx"

The first prayer relating to the declaration of right of the plaintiff to use the pathway as described in Schedule-'B' of the plaint concerns with a stretch of land towards the northern side of land under plot no.87 stretching from west to east towards the southern side of land under plot nos.91 and 92, measuring 50 feet (L) X 10 feet (B).

5. The State-defendant no.1 and its officials (defendant nos.2 and 3), without filing the written statement, contested the suit.

6. The trial court, in order to render the decision as to the plaintiff's entitlement of the claim of right of way over the land described in Schedule-'B' to come over to her land in Schedule-'A', having examined the evidence on record, both oral and documentary in the backdrop of the case projected in the plaint, has gone to negate the claim of the plaintiff as to be having the said right of pathway over Schedule-'B' land to come over her own land described in Schedule-'A' of the plaint. It has been said that the plaintiff has no easementary right over the land in Schedule-'B'. In view of the said conclusion, the trial court has dismissed the suit.

7. The lower appellate court having gone to judge the sustainability of the above conclusion, having undertaken the exercise of reappreciation of evidence at its level, has ultimately found no justifiable reason to take a view contrary to what has been taken by the trial court. Thus finding the trial court to have committed no error either on fact or on law in dismissing the suit, the lower appellate court has upheld the said result of the suit; non-suiting the plaintiff.

8. The appeal has been heard on the following substantial question of law:

"Whether the courts below, while refusing to record the findings that the plaintiff-appellant, the appellant has the right of easement of way over the suit land still in view of the peladings and evidence on record ought to have bestowed due attention

in finding out as to whether the plaintiff-appellant has the natural right of way so as to exercise the same in order to approach the public road without any obstruction from any quarter including the owner of the said land?

9. Learned counsel for the appellant submitted that here it was not a case of claim of right of easement of way over the suit land by the plaintiff and the courts below have committed error being swayed away in that direction from the very beginning till finally holding the plaintiff to have failed to establish a case of easementary right in so far as that stretch of land over Schedule-'B' is concerned. His submission was that in view of the situation of the land of the plaintiff described in Schedule-'A', the suit land in schedule-'B' and the public road as per the map as also now in existence in the field, it is a natural right of way remaining in favour of the plaintiff over that stretch of land in Schedule-'B' so as to have ingress and egress to her land in Schedule-'A' with the house standing over there. Therefore, he submitted that simply taking that into consideration, which in fact is not denied either through pleading or by leading evidence from the side of the defendants, the plaintiff's suit ought to have decreed holding that she has a right of way over a reasonable portion of the land under Schedule-'B' in order to approach and return from her land and house standing over the land described in Schedule-'A' of the plaint and thus there can be no obstruction to that exercise of right.

10. Learned Additional Government Advocate, referring to the discussion of evidence, as made by the lower appellate court, submitted that it being clearly there in evidence that the plaintiff's purchase land under Schedule-'A' at its eastern side directly adjoins the public road and therefore, when the purchased land is of the plaintiff is not going without having any approach to the public road, the claim of natural right of way over a portion of described land in Schedule-'B' sans foundation. According to him, if a piece of land of a person adjoins the public road at one place and thus is not going without any approach so as to have ingress and egress, the very claim of natural right of way on the land of another touching at another point of the land of that person so as to approach the public road is not available in law. He further submitted that the natural right of way always concerns with the situation of the land of the party-claimant and the public road intervened by the land of another over which such right is claimed and the geographical situation has to be such that save and except using the intervened land of another, the party-claimant would have no right of entry and exit to his own land which is not the case here. He also submitted that the owner of a piece of land does not have the natural right of way so as to approach from all points of the entire

boundary of his own land, be it of a rectangular size or squarish or in whatever other shape as it be. He further strenuously submitted that even if a natural right of way is said to have been existing over a portion of land at some point of time, the party having such natural right of way by his own conduct of non-user of the same in having its entry and exist to his own land to approach the public road for a continuous period time, can said to have abandoned such right of natural way and that he cannot again come to claim later unless of course, it is shown that such non-user for that period was for some compelling reasons beyond his case and control. He, therefore, submitted that answer to the substantial question of law, as has been framed, while admitting the appeal in any event has to be returned against the plaintiff's claim.

11. The difference between 'natural right' and 'right of easement' before stated for proper appreciation.

In Peacock on Easements it was stated:-

> *"Natural rights are by law annexed to, and are inherent in a land exjure naturo, of natural right, and exist prima facie in all cases as between a landowner and his neighbour, otherwise, as Mr. Goddard says in his work on Easements (7th Edn. p.3) no man would be assured that his land would not at any moment be rendered useless by a neighbour's act otherwise lawful or a neighbour might deprive a landowner of the benefit of certain things which in the course of nature have been provided for the common good of mankind.''*

The Division Bench in Girish Chandra Sahu and others –V- Nagendranath Mitra and others; 1978 (1) CWR, 348, case held:

> *"Natural rights though resembling easements in some respects, are clearly distinguishable from them.*
>
> *The essential distinction between easements and natural rights appears to lie in this that easements are acquired restrictions of the complete rights of property, or, to put it in another way, acquired rights abstracted from the ownership of one man and added to the ownership of another, whereas natural rights are themselves part of the complete rights of ownership, belonging to the ordinary incidents of property and are ipso facto enforceable in law.''*

12. The Madras High Court in the case of **Bharathamatha Desiya Sangam, Madhavaram & Anr v. Roja Sundaram & Ors, AIR 1987 Madras 183,** while dealing with right to access to highways held that owner of land abutting road is entitled to access to it from every point of his boundary. He is entitled to enforce his right notwithstanding the fact that there is some space available between the offending constructions. The Court further observed that the offending constructions would constitute a

continuing wrong and though suit is filed after construction, it would be maintainable.

The Court in the foregoing decision referred to the case of Municipal Committee, Delhi v. Mohammed Ibrahim, AIR 1935 Lah 196, wherein it was laid down that to the owners of houses abutting a public highway, the question of frontage means a great deal and if anything is done by those in whom the highway vests which interferes with the rights of the owners with regard to the highway and which tends to diminish the comforts of the owners, they will undoubtedly have an actionable claim against the encroachers.

In the case of **Patna Municipality v. Dwarka Prasad, AIR 1939 Pat 683**, it was held that the owner of the land abutting a roadway is entitled to access to that roadway at all points on his boundary.

In the case of **Damodara Naidu v. Thirupurasundari Ammal, AIR 1972 Mad 386,** it was held that where there is a public highway, the owners of land adjoining the highway have a right to go upon the highway from any point of their land and if that right is obstructed by anyone the owner of the land abutting the highway is entitled to maintain an action for the injury, whether the obstruction does or does not constitute a public nuisance.

13. Adverting to the case in hand, it is seen that the claim of right of way is connected with the land of the plaintiff as described in Schedule-'A' of the plaint, which she has purchased on 30.3.1988 by registered sale deed from one Nrusingha Panda admitted in evidence and marked as Ext.1. The courts below have very rightly gone to examine the land description given under that sale deed which also finds appended with a map showing the existence of the land assigned with plot nos.91 and 92, which is the land described in Schedule-'B' and over which a right of way is claimed in this suit. This Scheduel-'B' land is situated on the north west side of Schedue-'A' land of the plaintiff. It has been found by the courts below that neither in the recital of Ext.1 nor in the map appended to it, there is any mention regarding existence of any path way over Schedule-'B' property which is not disputed by the learned counsel for the appellant in course of hearing of this appeal. This leads to infer and show that at the relevant point of time of purchase of Schedule-'A' land by the plaintiff, there was no such user of any part of the land under plot nos.91 and 92 situated towards the north-west side of Schedule-'A' land which came to the hands of the plaintiff by virtue of her purchase. Normally had such user been by the vendor of the plaintiff, such an

important matter very much touching the user of the land under transaction that to concerning entry and exit to it, would not have been omitted to be so indicated. Nowhere in Ext.1, it has been recited that Nrusingha Pradhan, the vendor of the plaintiff had been exercising such right of way nor even during the trial, said vendor has come to the witness box to depose in that light to fill up the gap providing any explanation to the vital omission.

14. When it has been pleaded in paragraph-4 of the plaint that Schedule-'A' property belonging to the pleadings is placed/situated in such fashion that there is no way to come to the suit land except using the pathway running over the land under plot nos.91 and 92 in Khata No.511; the record of right as well as the village map proved from the side of the plaintiff under Ext.5 do not support it and rather falsify the said projected factual aspect. The map clearly shows that the public road runs abutting the land under plot nos.85, 88, 89, 91 and 92. The plaintiff's purchase is of the entire land covered under plot no.87, which very much adjoins the public road at its eastern side. So, here it is not a case that the plaintiff has no entry or exit to her own purchased land from any other part except through the purported pathway over Schedule-'B' that she now claims, running over the land under plot nos.91 and 92 and that the land of the plaintiff without attached to the right of way over the land under plot nos.91 and 92 as is now claimed is rendered useless and thus becoming a no man's land.

15. Let us assume a case where the land of a person when one side completely adjoins the public road and all other three sides, it has the public road intervened by the land of other persons. The natural right of way certainly in that situation cannot be extended on the lands of all such owners on the other three sides so as to provide luxury and comfort to the person concerned to have entry to the public road from all the four sides of his land. A person who is the owner of a piece of land situated beyond the public road being intervened by the land of another person, although has the natural right of way over the land of that person abutting the public road, yet he has to further establish its exercise by showing its user as such for the court to declare the said right of natural way. It has to be shown first that the claimants either the owner or occupier of the land, has no other way of entry and exit to have the access to the public way from the land owned or occupied by him. Secondly, that he never at any point of time has abandoned such user even if a natural right of way existed over the land of another situated in between his land and the public road in his favour and despite the availability of any other way for the access to the public road at a later point

of time, the natural right of way having been continuously exercised, it has never so ceased as such. The exception to this remains that suppose a person's land is lying vacant and the user of exercise of natural right of way over the land of other is occasional but then if the land of that owner is having no other way to have the access to the public road other than by coming over the land of another which adjoins the public road, even for that non-continuous use or occasional user, the abandonment of right of natural way cannot be inferred, which is not so in the given case.

For the aforesaid discussion and reasons although it is found that the courts below have not bestowed due attention to find out as to if the plaintiff has the natural right of way over any portion of Schedule-'B' land so as to approach the public road, this Court finds that such a natural right of way over the land under Schedule-'B' land is not available to the plaintiff and, therefore, the owner of said Schedule-'B' land cannot be put to restrictive user of the same in any such manner.

The substantial questions of law stand answered accordingly against the claim of the plaintiff.

16. In the wake of aforesaid, appeal stands dismissed and in the facts and circumstances without cost.

2018 (II) ILR - CUT- 778

B. RATH, J.

O.J.C. NO. 3116 OF 2000

BENU SETHI & ORS. ……..Petitioners

.Vs.

COMMISSIONER OF CONSOLIDATION, ORISSA, CUTTACK & ORS. ……Opp.Parties

CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 36 – Revisional jurisdiction – Revision Case No.799 of 1987 filed and the Commissioner, Consolidation finally dismissed the revision as not maintainable by his order dated 26.05.1988 – Subsequently the Commissioner Consolidation sitting over his own order, on 26.11.1999 reviewed the order dated 26.05.1988 – Whether the Commissioner has jurisdiction for review of his own order – Held, No.

The Act, 1972 nowhere gives any power to the Revisional authority for review or recall of his own order. It is at this stage of the matter taking into account a decision of this Court in the case of Balaram Swain & Anr. Versus Rabindra Swain & Ors. as reported in 2009(Supp.-I)OLR-534, this Court finds, this question having been considered by this Court on previous occasion, this Court in clear terms held, there is no provision under the Act for review/recall of the revisional order by the revisional authority. It is for the legal position settled through the above decision and in absence of any power of review, this Court finds, further entertainment of the revision by the same authority after the order dated 26.05.1988 is not permissible, for there being no challenge to the order dated 26.05.1985 in higher forum, this Court thus observes, the impugned order at Annexure-4 remains without jurisdiction of the authority and therefore, the same is set aside. (Para 8)

Case Laws Relied on and Referred to :-

1. 2009(Supp.-I)OLR-534 : Balaram Swain & Anr. .Vs. Rabindra Swain & Ors.

For Petitioners : M/s. A.K. Nayak, M.K. Panda, N. Panda-1
K.K. Mishra,Addl. Gov. Adv.
M/s. S.K. Mohanty, S. Mohanty, G. Bhol

JUDGMENT Date of Hearing :25.06.2018 Date of Judgment : 5.07.2018

B. RATH, J.

This writ petition involves a challenge to the order at Annexure-4 passed by the Commissioner Consolidation in Consolidation Revision Case No.799 of 1987, a proceeding under Section 36 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972, thereby the revisional authority while allowing the revision set aside the impugned order therein with a direction to record the disputed land in favour of the petitioners therein, namely, Smt. Sakhi Dei and Smt. Mali Dei by excluding the name of the opposite parties therein i.e. the present petitioners herein.

2. Short background involving the case is that the land in question bearing Hal Plot No.4509, Hal Khata No.642 extending Ac.0.16 Dec. corresponding to C.S. Plot No.3523 in C.S. Khata No.210 of 1930, settlement extending Ac.0.14 decimals of land was purchased from the landlord, Pramod Kumar Ghosh, in R.S.D. No.202 dated 16.01.1946 by Pahali Sethi, the father of the petitioners, who was possessing the land since then and after his death the petitioners are in peaceful possession of the same. During 1977 Settlement the names of the opposite parties being the niece of Pahali Sethi were wrongly recorded in respect of this plot. Petitioner as objector filed objection case before the Consolidation Officer in the year 1985. The Consolidation Officer disallowed their claim without taking any evidence and deciding to the contrary to the materials available on record. Accordingly, the

petitioners filed Appeal Case No.115 of 1984 before the Deputy Director of Consolidation under Section 12 of Act. The Deputy Director of Consolidation remanded the matter to the Consolidation officer for fresh hearing and disposal of the objection case. The Consolidation Officer in fresh disposal of the matter allowed the claim of the Objector-petitioners.

Being aggrieved by the fresh order of the Consolidation Officer, the opposite party nos.4 & 5 preferred Revision Case No.799 of 1987 under Section 36 of the Act. The Commissioner, Consolidation finally dismissed the revision as not maintainable by his order dated 26.05.1988. Petitioners further submitted that when the matter stood thus, the Commissioner Consolidation sitting over his own order, on 26.11.1999 reviewed the order dated 26.05.1988, even though there was no challenge to the order dated 26.05.1988 by any concern thereby accepting the direction to delete the name of the petitioners from the records involving the disputed land at Annexure-4.

3. Challenging the impugned order, learned counsel for the petitioner contended that Mahani, Banchhu & Uchhab were three sons of Bisi and were in joint family. As per the evidence available, Uchhab remained issueless and Mahani was karta of the family and died prior to 1964 and his wife predeceased him. The opposite party nos.4 & 5 married prior to death of Mahani and were all staying in their husband's house. For the opposite party no.4 marrying during lifetime of Mahani and before the Hindu Succession Act, 1956 came into force, question raised on succession of opposite party nos.4 & 5 through Mahani. It is also further contended that the Commissioner, holding that after death of Mahani the property should have been recorded in the name of Ali Bewa as per Yadast record becomes contrary to the material available on record. Ali Bewa already predeceased. It is also alleged that the Commissioner of Consolidation has passed the order vide Annexure-4 without taking into account the evidence available on record. There is no consideration of the fact that the petitioners became the owner of the land for their father having purchased the disputed property as back as in the year 1946 and the petitioners are all residing thereon by constructing a house.

4. It is also further urged that since the revision was already concluded with an order of dismissal on 26.05.1988, Misc. Case No.106/1991 filed for rehearing of the R.P. Case after three years was not permissible in the eye of law. It is also further urged that even assuming that the misc. case no.106 of 1991 was maintainable, then also for no service of notice in the misc. case

and further for the dismissal of the misc. case for default on 1.05.1992 whereafter the opposite party nos.4 & 5 filed Misc. Case No.74 of 1994 with a prayer to restore the Misc. Case no.106 of 1991, which misc. case was also heard without affording opportunity to the present petitioners.

It is in the above premises, learned counsel for the petitioners contended that the impugned order is passed not only without jurisdiction but also behind back of the petitioners, thus, remains otherwise not sustainable in the eye of law.

5. Taking this Court to the evidence aspect, the petitioners also contended that though the present petitioners appeared through a fresh set of lawyers on 4.08.1999 involving the misc. case for restoration, the matter was adjourned to a subsequent date of hearing, but surprisingly the order sheet reveals that on the same day, the Commissioner heard the matter on merit and directed the parties to file the written note by 18.08.1999 and finally delivered the judgment on 26.11.1999 without actually giving opportunity of hearing to the petitioners. Challenging the review of his own order by the revisional authority, learned counsel for the petitioner also contended that the revisional authority reviewing his own order after 11 years was also improper. It is in the above premises, learned counsel for the petitioners prayed this Court for interfering in the impugned order and setting aside the same.

6. In spite of service of notice on the private opposite party nos.4 & 5 and appearance of a set of counsel on behalf of them, nobody appeared on behalf of them at the time of hearing.

7. Shri K.K. Mishra, learned Additional Government Advocate taking support of the findings and conclusion thereof involving the revisional order while strongly disputing the grounds raised by the petitioners and further producing the order-sheet of the revisional authority contended that there has been appropriate consideration of the case and for the findings therein contended that there remains no scope for interfering in the impugned order. Before proceeding to consider the validity of the impugned order looking to the allegation of the petitioner to the effect that when the revision was already dismissed by the revisional authority by his order dated 26.05.1988, the revisional authority was not justified in reviewing his own order, this Court looking to the order sheet produced finds, in fact the Consolidation Revision No.799 of 1987 at the instance of the opposite party nos.4 & 5 was dismissed by the revisional authority by his order dated 26.05.1988 with the followings:

> "The case called. Counsel for the petitioner present. Counsel filed 'Vakalatnama' for opposite party nos.1 & 5 and states that the area is non-consolidable. Hence, in view of 65(1988)CLT 440, the case is struck off as not maintainable".

There appears, there is no denial to this decision of the revisional authority. It is at this stage of the matter, looking to the background involving the case, this Court finds, there remains no dispute between the parties that the Consolidation Revision No.799/1987 was preferred by the opposite party nos.4 & 5 and was long disposed of coming to the question of maintainability of the subsequent proceeding by the revisional authority, the provision under Section 36 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 reads as follows:

> "**36. Revision –** (1) The Consolidation Commissioner may, on an application by any person aggrieved by any decision of the Director of Consolidation within ninety days from the date of the decision, revise such decision and for the said purpose, he may call for and examine the records:
>
> Provided that no such order shall be passed without giving the parties concerned a reasonable opportunity of being heard.
>
> (2) All orders passed under this section shall be final and shall not be void in question in any Court of law."

8. The Act, 1972 nowhere gives any power to the Revisional authority for review or recall of his own order. It is at this stage of the matter taking into account a decision of this Court in the case of ***Balaram Swain & Anr.*** *Versus* ***Rabindra Swain & Ors.*** as reported in **2009(Supp.-I)OLR-534,** this Court finds, this question having been considered by this Court on previous occasion, this Court in clear terms held, there is no provision under the Act for review/recall of the revisional order by the revisional authority. It is for the legal position settled through the above decision and in absence of any power of review, this Court finds, further entertainment of the revision by the same authority after the order dated 26.05.1988 is not permissible, for there being no challenge to the order dated 26.05.1985 in higher forum, this Court thus observes, the impugned order at Annexure-4 remains without jurisdiction of the authority and therefore, the same is set aside.

9. The writ petition succeeds. However, there is no order as to cost.

2018 (II) ILR - CUT- 783

B RATH, J.

W.P.(C) No.3686 of 2004

MANAS RANJAN NATH ……..Petitioner

.Vs.

N.T.P.C. LTD. REPRESENTED BY ITS GENERAL MANAGER, N.T.P.C., KANIHA, ANGUL & ANR. ……..Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition seeking direction to the opposite parties to sponsor the name of the petitioner to undergo I.T.I. training as a nominee of the land oustee and on completion of the training, the petitioner be provided with a job in any Class-III post in the N.T.P.C. – Petitioner's father a land oustee along with other Co-sharers – Policy for rehabilitation – Nowhere there is guarantee of job to everybody – Job is available for consideration to project affected persons, who have lost entire land – Petitioner's father does not fall in this category – Compensation and other benefits provided – Petitioner is not entitled to anything further. (Paras 7 & 8)

For Petitioner : Mr. Srikar Kumar Rath-1.
For Opp.Party: M/s. K.P.Nanda, S.K.Padhi & R.C.Panigrahi.

JUDGMENT Date of Hearing: 25.07.2018 Date of Judgment: 08.08.2018

B RATH, J.

By filing this writ petition, the petitioner has sought for a direction to the opposite parties to sponsor the name of the petitioner to undergo I.T.I. training as a nominee of the land oustee and on completion of the training, the petitioner be provided a job in any Class-III post in the N.T.P.C. at Kaniha.

2. Short background involved in the case is that petitioner's father's landed properties were acquired for the purpose of establishment of plant and machinery following the Land Acquisition Act. While certificate bearing No.50/2 on 5.6.1989 clearly establishing the same also discloses that the land in question was recorded in the name of common ancestor, namely, Susama Nath. Petitioner claimed that in the process of acquisition, 70% of the landed properties were acquired. It is further disclosed that the State Government constituted a Committee to consider different cases of land oustees in the matter of affording rehabilitation package. It is also pleaded that the Committee duly made a panel for consideration of the name of th e land

oustees with a purpose to provide employment. It is asserted that name of Bhuban Mohan Nath, the father of the petitioner was accordingly duly empanelled to get employment under the N.T.P.C. Petitioner's father appeared in the interview test but he could not succeed. It is further claimed that as per the scheme formulated by N.T.P.C., petitioner's father was kept in the category of Substantial Affected Person (for short "SAP") and his name was accordingly found in Sl.No.209 of the SAP category. It is clarified that for the provision in the scheme, persons enlisted in the SAP category were entitled to get job in the N.T.P.C. It is, thus, alleged that when the N.T.P.C. has accommodated other similarly situated persons, illegally declined to accommodate either the father of the petitioner or his legal heirs in the matter of providing employment opportunity. The petitioner submitted a representation before the opposite party no.1 on 7.8.2001 requesting them to sponsor the name of the petitioner to undergo Artisan training under I.T.I. for the session 2001. In the process, the petitioner's father also filed an affidavit nominating the name of the petitioner indicating therein that his son is qualified to be sponsored for I.T.I. training and consequently also could be employed in N.T.P.C. In the premises of discrimination and violation of provision at Article 14 of the Constitution of India, petitioner alleged that the N.T.P.C. has given unfair treatment to the father of the petitioner as well as to the petitioner. Petitioner accordingly prayed for the relief, as indicated hereinabove.

3. Filing counter affidavit, the opposite party no.2, the Land Acquisition Officer while disputing the claim of the petitioner contended that father of the petitioner had not lost all his landed properties in the acquisition process. Further, his father was also having land in several other villages such as Bijigol and Baradangua. So far as acquisition of land in the village Bhimkund is concerned, the opposite party no.2 submitted that from and out of Khata No.45 measuring Ac.1.33 decimals, Ac.0.34 decimals and from Khata No.116, out of Ac.1.65 decimals, Ac.1.57 decimals of land has been acquired and his father is a co-awardee for the joint family holding of the property. Opposite party no.2 further contended that total percentage of loss of land of the petitioner's father comes to 47% of land. In the premises that the Substantial Affected Persons are those, who have lost 1/3rd or more than that of his total land and the scheme provides several rehabilitation benefits apart from the land acquisition benefit, opposite party no.2 contended that father of the petitioner was initially opted for shop, which was allowed by the competent authority. Subsequently, the father of the petitioner changed his

option from shop to land, which was also been allowed vide order No.09/22/01.2001 of Rehabilitation Officer, MCL/NTPC, Talcher. Further, a sum of Rs.50,000/- was also paid to the father of the petitioner towards additional compensation. It is on the premises that father of the petitioner has already availed the benefits under the scheme, opposite party no.2 contended that neither the father of the petitioner nor the petitioner is entitled to any further benefit.

4. Filing an affidavit pursuant to the direction of this Court dated 31.10.2017, the opposite party no.2 stated that the father of the petitioner had not taken the benefit of allotment of land in spite of several notices issued to him by R.O., Talcher. The family of the petitioner has lost in total Ac.1.91 decimals out of Ac.4.04 decimals of land and the compensation amount of Rs.50,000/- kept in F.D.R. on being refused the present value of the F.D.R. becomes Rs.1,07,942/- .

5. Advancing his submission, learned counsel for the petitioner apart from reiterating the factual aspects, indicated hereinabove also submitted that for the father of the petitioner loosing valuable land, petitioner is entitled to employment. In filing additional affidavit, petitioner brought to the notice of this Court that in the meantime, the petitioner has already undertaken I.T.I. training in Fitter Trade on his own and, therefore, the petitioner restricted his prayer only to employment.

Similarly, opposite party no.2 reiteration of its stand in the counter as well as the affidavit, contended that for the benefits already given, the petitioner is not entitled to employment.

6. Considering the rival contentions of the parties, this Court finds there remains no dispute that almost 50% of the land of the petitioner's father along with other co-sharers has been acquired for the purpose of construction of N.T.P.C. There is also no denial to the fact that the father of the petitioner apart from receiving compensation for loss of his land on account of the joint family land, was also offered for a shop premises following the assurance vide packages in the rehabilitation scheme. Materials also go to show that the father of the petitioner has also changed his option from shop room to land. It further appears, land though offered to the petitioner's father, as clearly stated vide Order No.09/22/01-2001, the petitioner's father was also offered with a sum of Rs.50,000/-. For petitioner's father not receiving the same, the amount is being kept in fixed deposit. Presently, the compensation with interest amount being kept in fixed deposit, the present entitlement through the F.D.R. comes to Rs.1,07,942/-.

7. Now coming to look to the rehabilitation policy, as appended at Annexure-4, this Court finds there is no denial to the existence of a rehabilitation policy by the management. In Clause 3.6 of the scheme, this Court finds for the purpose of rehabilitation measures, the company has provided the following :

> "3.6 REHABILITATION MEASURES;
>
> Rehabilitation of PAPs involves two distinct aspects:
>
> (i) compensation for losses in terms of land, cash and other forms; and
>
> (ii) assistance to start a new life in terms of opportunities, training, credit and community services for schooling and health and new employment opportunities. Measures to be undertaken by NTPC are set out below."
>
> Under Clause 3.15, the scheme also provides provision for jobs which reads as follows:
>
> "3.15 JOBS
>
> Jobs will be given to some eligible PAPS on preferential basis as under:
>
> (a) Jobs with NTPC: NTPC projects do not envisage significant job opportunities to the local residents. However, some jobs will be earmarked for the PAPs in the un-skilled and semi-skilled category. However, preference will be given to eligible PAPs if they meet the job requirements in the skilled categories."
>
> (b) Jobs with contractors: Contractors will be persuaded to give jobs to eligible PAPs on a preferential basis where reasible.

Reading of both the aforesaid clauses, this Court nowhere finds there is guarantee of job to everybody. So far as job facility is concerned, the job is available for consideration to project affected persons, who have lost entire land in the acquisition process. Petitioner's father does not fall to this category.

8. From the submission of the petitioner as well as counter of the opposite party no.2, it becomes clear that petitioner's father has not lost all his land. Further, for the providing of compensation of Rs.50,000/-, apart from acceptance of the offer of the option rendered by the father of the petitioner for land in place of shop room in addition to the compensation for acquisition of land, this Court finds, the petitioner is not entitled to anything further. Accordingly, while declining to grant the relief of employment, claimed by the petitioner, this Court directs the petitioner's father to receive the compensation amount along with interest lying with the N.T.P.C. on proper identification.

9. In the result, the writ petition stands disposed of with the aforesaid observation and by refusing to accept the prayer of the petitioner for employment. No cost.

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S. K. SAHOO, J.

CRLA NO. 504 OF 2017

AHALYA PADHI ……..Appellant

.Vs.

STATE OF ORISSA & ORS. ……Respondents

ORISSA SPECIAL COURTS ACT, 2006 – Section 17 – Appeal under – Challenge is made to the order rejecting a petition filed by the mother-in-law of the accused in which prayer was made to return some documents and to delete some properties from the schedule of the confiscation application – Vigilance Case instituted against one Benudhar Dash, Ex-Director, Secondary Education, Govt. of Odisha, Bhubaneswar who is the son-in-law of the appellant – Charge sheet was filed against the accused and his wife Smt. Bishnupriya Dash for commission of offences under section 13(2) read with section 13(1)(e) of the Prevention of Corruption Act, 1988 read with section 109 of the Indian Penal Code – Confiscation petition filed by the Public prosecutor – In the said Confiscation proceeding the appellant who is the mother in law of the accused filed a petition with a prayer to exclude certain properties from the confiscation – Whether such a petition can be entertained – Held, No. – Reasons indicated.

"Since none of the properties as per the schedule appended to the confiscation application stand recorded in the name of the appellant and those properties, according to the prosecution are very much material to be referred to in the confiscation proceeding as well as in the trial of the respondents nos. 2 and 3 in the disproportionate assets case, at this stage, it cannot be said that any of the properties as per the schedule of the confiscation application has got any link with the appellant or her late husband and the documents in connection with such properties are to be released in favour of the appellant. It is also not the stage to decide whether there is any perfunctory investigation or perversity and defective investigation. It is needless to say that if any such plea taken by the appellant is taken by the respondents and the same is found to be correct by the learned Authorised Officer after considering the relevant materials available on record then such properties can be excluded from the zone of confiscation. Since section 15 of the 2006 Act provides for reasonable opportunity of being heard to the concerned parties, it is excepted that the learned Authorised Officer shall afford such

opportunities to the respondents and then record any finding. The learned Authorised Officer can also take a decision as to whether the seizure of documents as per the schedule of the confiscation application was proper and justified or not and make declaration as envisaged under that section." (Paras 10 & 11)

Case Laws Relied on and Referred to :-

1. (2006) 1 SCC 420 : D.S.P., Chennai .Vs. K. Inbasgaran.
2. (1992) 4 SCC 45 : M. Krishna Reddy .Vs. State Deupty Superintendent of Police.
3. (1991) 3 SCC 655 : K. Veeraswami .Vs. Union of India.
4. (1977) 1 SCC 816 : Krishnanand .Vs. The State of Madhya Pradesh
5. (2017) 67 OCR (SC) 796 : State of Karnataka .Vs. Selvi J. Jayalalitha.
6. (2016) 63 OCR (SC) 426 : Yogendra Kumar Jaiswal .Vs. State of Bihar
7. (1991) 3 SCC 655 : K. Veeraswami .Vs. Union of India.

For Appellant :Mr. Pitambar Acharya (Sr. Advocate)
Mr. Dhirendra Kr. Mohapatra
For State: Mr. Sanjay Kumar Das, Standing Counsel (Vig.)

JUDGMENT Date of Judgment: 05.09.2018

S. K. SAHOO, J.

The appellant Ahalya Padhi has preferred this appeal under section 17 of the Orissa Special Courts Act, 2006 (hereafter '2006 Act') challenging the impugned order dated 06.04.2017 passed by the learned Authorised Officer, Special Court, Bhubaneswar in Confiscation Case No. 02 of 2016 whereby the learned Court rejected her petition dated 08.03.2017 in which prayer was made to return some documents seized from the residential house of her late husband late Anam Charan Padhi at Ganeswarpur and from the official quarters of her son-in-law Benudhar Dash (respondent no.2) and to delete some properties from the schedule of the confiscation application and also to exclude the education and upbringing expenditure of her adopted son Subrata Kumar Padhi (respondent no.4) from the charge sheet filed against the respondents nos.2 and 3 in Bhubaneswar Vigilance P.S. Case No.48 of 2008 with consequential changes in the application filed by the State in the confiscation proceeding

2. On 16.12.2008 Bhubaneswar Vigilance P.S. Case No.48 of 2008 was instituted against respondent no.2 Benudhar Dash, Ex-Director, Secondary Education, Govt. of Odisha, Bhubaneswar who is the son-in-law of the appellant and on completion of investigation, charge sheet was placed on 29.03.2014 against the respondent no.2 and his wife Smt. Bishnupriya Dash (respondent no.3) for commission of offences under section 13(2) read with

section 13(1)(e) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') read with section 109 of the Indian Penal Code on the accusation that the respondent no.2 being a public servant was having disproportionate assets to the tune of Rs.62,38,993.66 paisa during the check period from 28.10.1978 to 29.11.2008 i.e. the date of search, which he could not account for satisfactorily.

As per the charge sheet, the respondent no.2 hails from village Chadheiya under Bhadrak Rural police station. His father late Muralidhar Dash was basically a marginal farmer having only five to seven acres of rain-fed single-cropped land which is being utilized in 'Bhaga Chasa' basis and besides that he was earning a little through 'Yajamaani' as he was Purohit. He was blessed with four sons and five daughters. The respondent no.2 was the eldest among them. With the scanty agricultural income through 'Bhaga Chasa' and 'Yajamaani', late Muralidhar Dash had to mange a big family and education of his children leaving no scope for any savings. Therefore, the respondent no.2 who was born on 10.01.1954 had no affluent family background but he came from a lower middle class family.

Prior to his joining as OAS Officer on 19.10.1978, the respondent no.2 worked as a lecturer in Chemistry in Khalikote College, Berhampur, Bhadrak College, Bhadrak and as a Laboratory Assistant in the office of Dy. Director, Chemical Analysis, Govt. Laboratory, Jajpur Road, Dist-Jajpur. During his OAS tenure, he worked in various capacities as an OAS Officer till the date of search when he was continuing as Addl. Commissioner -cum-Ex-Officio, Addl. Secretary of Govt., Revenue & Disaster Management, Bhubaneswar, Orissa in the office of SRC.

On 08.03.1979 the respondent no.2 married to respondent no.3 Bishnupriya Dash, who was the only daughter late Anam Charan Padhi and the appellant Ahlaya Padhi of village-Dahi in the district of Balasore. Late Anam Charan Padhi had only seven to eight acres of cultivable land. The respondents nos. 2 and 3 were blessed with two sons namely Subrata Kumar Padhi (respondent no.4) and Haragouri Prasad Dash (respondent no.5) and one daughter namely Sanghamitra Dash (respondent no.6). Both the sons studied in KIIT Engineering College and the daughter Sanghamitra Dash studied in Orissa College of Engineering, Bhubaneswar. Subrat Kumar Padhi and Sanghamitra Dash completed their M.B.A. from Xavier Institute of Management, Bangalore and Institute of Cooperative Management, CRP Square, Bhubaneswar. Subrat Kumar Padhi and Haragouri Prasad Dash

joined in 'Infosys' during the year 2007 and 2008 respectively. The respondents nos. 2 and 3 solemnized the marriage ceremony of their daughter Sanghamitra Dash on 27.04.2008 at Hotel Swosti Plaza, Bhubaneswar pompously. In this manner, the respondent no.2 spent a lot for the education of his children besides taking care of his parents, brothers and sister on all accounts i.e. education, marriage, etc. being the eldest son of the family.

The charge sheet further reveals that the property statement of respondent no.2 was opened on 20.10.2009 in the official chamber of Dr. Gopinath Bisoi, OAS (S), Jt. Secy to Govt. G.A. (SE) Department and it was found that he had submitted property statement only once during his career upto 31.12.2007 which has been received in G.A. (SE) Department on 27.12.2008 by hand. It is evident that the respondent no.2 had submitted the property statement after his house was searched and the Investigating Officer thought it proper not to take into account such property statement.

From the Income tax returns filed by the respondent no.2, it is evident that he had shown salary income from Assessment year 1999-2000 to 2008-2009. Hence the income of the respondent no.2 from the salary income was accepted. During the said period, the respondent no.2 paid income tax of Rs.1,83,560/- from which he had paid Rs.42,022/- directly as evident from Form No.16 which was computed towards expenditure.

The respondent no.3 Smt. Bishnupriya Dash filed her income tax returns by showing income from diary farming and tuition. She has paid income tax of Rs.19,054/-. The respondent no.2 had not obtained any permission from the Govt. under section 17 of Orissa Govt. Servants Conduct Rules, 1959 for doing business by his wife and therefore, the Investigating Officer thought it proper not to accept the benefit from the income towards diary farming and tuition by the respondent no.3.

During course of investigation, different persons/witnesses acquainted with the facts and circumstances of the case were examined and documents relating to the assets, income and expenditure were collected/seized. From the documents collected and statements of witnesses recorded during investigation, it was found that during the check period, the total assets of the respondent no.2 was Rs.47,56,480.45 paisa, the expenditure was Rs.37,51,876.95 paisa, the total income was Rs.22,69,363.74 paisa and therefore, the disproportionate assets was calculated to be Rs.62,38,993.66 paisa.

3. The Govt. of Orissa, Home Department, Bhubaneswar as per order dated 17.12.2015 in exercise of powers conferred under sub-section (1) of section 13 of the 2006 Act authorized the Public Prosecutor concerned for making an application to the Authorized Officer, Bhubaneswar for confiscation of properties/pecuniary resources which were mentioned under the heading of immovable properties and moveable properties in total to the tune of Rs.47,56,480.45 paisa.

On the basis of such authorization, Public Prosecutor, Vigilance in the Court of Authorized Officer, Special Court, Bhubaneswar filed an application under section 13(1) of the 2006 Act which is supported by an affidavit sworn by the Investigating Officer and registered as Confiscation Case No.02 of 2016 to declare the properties mentioned in Schedule-A and B of the application to have been acquired by means of the offence under section 13(2) read with section 13(1)(e) of 1988 Act read with section 109 of the Indian Penal Code and for confiscation of such properties to the State Govt. in accordance with the provisions of the 2006 Act and the Orissa Special Courts Rules, 2007 (hereafter '2007 Rules').

4. While the matter was pending before the learned Authorized Officer, Special Court, Bhubaneswar in Confiscation Case No.02 of 2016, the appellant Ahalya Padhi filed a petition on 08.03.2017 before the said Court with a prayer to return some of the seized documents and delete some of the properties mentioned in the confiscation application and also to exclude educational upbringing expenditure of her adopted son from the charge sheet filed against the respondents nos.2 and 3 with consequential changes in the application filed by the State.

It is the case of the appellant that her deceased husband Anam Charan Padhi was an affluent cultivator having about more than 16 acres of highly productive double crop agricultural land, apart from ponds for pisciculture and land for horticulture and a big double storied ancestral farm house -cum-residential building at his native village-Dahi, costing around Rs.20.00 lakhs. It is stated that the husband of the appellant was having substantial income and he was also an income tax assessee since 1993-94 (when his income from agriculture, pisciculture, horticulture, house rent and interest on savings exceeded non-taxable limit) to 2008 (when his income became below non-taxable limit on account of attaining 80 years of age). The cumulative income of the husband of the appellant before and during the period 1978-2008 was more than 40 lakhs as had been shown in the I.T. returns filed. That apart their adopted son working in I.T. sector was getting

salary of about Rs.12.70 lakhs till 29.11.2008 and income from agriculture property owned by him exclusively. The aforesaid income of the husband of the appellant and seized four sale deeds were accepted by I.T. authorities in two scrutiny assessments once in 1994-95 assessment and again in 2009-10 assessment, to have been purchased from out his own resources after calculating his maintenance, food & clothing and the education of his adopted son. The copies of the I.T. returns as accepted by I.T. Authorities during the scrutiny proceedings of the respondent no.2 were enclosed for reference and perusal by the learned Authorized Officer.

It is the further case of the appellant that her husband had purchased four landed properties including two contiguous plots covered under two registered sale deeds bearing nos. 5646 and 5647 dated 12.12.2000 jointly in the name of his teenaged adopted son and minor grandson vide plot nos.2499 and 2500 of Village-Ganeswarpur, Balasore under the intimation to I.T. Authorities. The said residential properties over the two contiguous plots were having one half-constructed building and an old building constructed in 1984 by the vendor which was completely damaged in the year 1999 during super cyclone. At the time of said purchase, her husband was staying in his native village. Due to old age, the appellant and her husband were suffering from various ailments for which local doctors advised them to stay in nearby areas of the District Headquarters Hospital. The husband of the appellant arranged money from several persons/intended purchasers and ultimately sold eight plots to those persons who had lent him money for repair of the damaged old house and new construction.

It is the further case of the appellant that since 2001-2002, she and her husband started staying at Balasore in the house purchased by her husband on 12.12.2000 from out the portion of the consideration money borrowed by him as aforesaid as advance payment and as indicated in recital of the respective sale deeds executed. Subsequently they started renovation/ repair of the residential building by spending a portion of the consideration money (1.40 lakh) so received in advance. After renovation, since the husband of the appellant was ailing and his only adopted son (respondent no.4) was staying outside for his service and higher studies, he was advised to have company of persons. The husband of the appellant rented a portion of the said building to different persons successively at different times by different rent agreements and was paying the land revenue and different Government dues like telephone, electricity charges and water connection etc. raised in the name of her husband. It is stated that the super cyclone

affected the old house constructed in the year 1984 by the vendor and not 2001-02 as calculated by the vigilance authorities.

It is the further case of the appellant that her late husband was the only issue of his father and he was having only one daughter and therefore, she and her late husband adopted eldest son of their daughter Smt. Bishnupriya Das (respondent no.2) namely Subrata Kumar Padhi (respondent no.4) on 10.02.1989 for protection and security of their huge properties and to offer Pinda after their demise. The husband of the appellant performed Chari Karma, Bratopanayana, education and marriage of the respondent no.4. Subsequently the husband of the appellant wanted to reduce the said adoption into writing for future reference and requested his daughter (respondent no.3) and son-in-law (respondent no.2) in that connection and accordingly, they executed a deed of adoption and registered the same vide Regd. Adoption Deed No.2 dated 06.03.1990. It is stated that since the date of said adoption till his death, the husband of the appellant was taking social, educational and financial care of the respondent no.4 and also bearing the expenses of his education and other requirements and brought up of his son. He also performed the marriage ceremony of the respondent no.4 & the respondent no.4 in turn performed the Sudhikriya of the husband of the appellant.

It is the further case of the appellant that out of love and affection, late Anam Charan Padhi purchased four pieces of lands including one partly constructed and one old cyclone affected damaged house with land (jointly) in the names of his adopted son (respondent no.4) and grandson Haragouri Prasad Dash (respondent no. 5), the other son of his daughter by paying the consideration money as narrated in recitals of the sale deeds and miscellaneous expenses for registration exclusively from his own income/resources and executed four registered sale deeds viz. No.5646 & 5647 dated 12.12.2000, No.2670 dated 11.06.1997 & No.2326 dated 06.06.1994 and paying land revenue and other Government dues on behalf of his teenaged son and minor grandson by him and after him, the appellant is looking after and possessing the said properties on their behalf and staying in the same house so purchased in Plot Nos. 2499 & 2500 of Ganeswarpur and took up additional construction work on the land. It is stated that the fact of the above purchases were duly intimated to the I.T. authorities by the husband of the appellant in the respective I.T. Returns of concerned assessment year 2001-02 and 2002-03.

The appellant in order to establish the financial status of her husband, filed I.T. returns & income certificate issued by the Tahasildar, Khaira dated 03.06.2009 depicting income for 2007-08 disclosing his annual income to be about Rs. 4.5 lakhs.

It is the further case of the appellant that during early part of November 2008, late Anam Charan Padhi had been to Bhubaneswar for the health check up of the appellant and took some original documents including above described RSD No.2670 dated 11.06.1997 for lamination purpose with him but due to other engagements, the lamination could not be done and while returning, he had left the RSD No.2670 at his son-in-law's house at Bhubaneswar due to oversight.

It is the further case of the appellant that on 29.11.2008 the ancestral house of the husband of the appellant at village-Dahi, his residential house at Ganeswarpur and the Govt. Quarters of his son-in-law (respondent no.2) were searched by Vigilance Officers in Vigilance Misc. Case No.13/2008. While no document was seized from the ancestral house of the husband of the appellant at village-Dahi, RSD Nos. 5646 and 5647 dated 12.12.2000 along with Khatian No. 1322/270 in the names of his adopted son (respondent no.4) and grandson (respondent no.5) were illegally seized from his residential house at Ganeswarpur.

It is stated that during the search, six passbooks, three bank instruments, four other RSDs, rent receipts of his son, six Khatians, one building plan and other documents were also illegally seized. From the official quarter of his son-in-law, RSD No. 2670 dated 11.06.1997 were also seized.

However, Regd. Deed of Adoption dated 06.03.1990 and RSD No. 2326 dated 06.06.1994 under the custody of petitioner's husband were not seized since those two documents were sent for lamination locally by him prior to the date of seizure.

It is stated that during investigation of the aforesaid Vigilance Case, late Anam Charan Padhi had submitted two representations to the Vigilance authorities on 10.02.2009 and 22.07.2013 explaining the plight of an old man like him and praying for releasing his properties and the properties of his adopted son (respondent no.4) and grandson (respondent no.5) which was under his lawful custody as their guardian, but his representations were totally ignored. It is stated that neither late Anam Charan Padhi nor the appellant had ever been examined by the I.O. during course of investigation.

It is the further case of the appellant that the properties were purchased by her husband in the names of their adopted son (respondent no.4) and grandson (respondent no.5) paying the entire consideration money and registration expenses from out of his own resources for which he had financial capabilities and he had disclosed the same to Income Tax Authorities and the documents and the properties were seized from his lawful custody and those were in no way related to the charges leveled against the respondents nos.2 and 3 and seized to his detriment in violation of the constitutional guarantee enumerated under Article 21 of the Constitution of India.

It is the further case of the appellant that the above described properties of her husband and the bank documents under his custody should not have been seized as those documents had got no nexus or connection with the allegations leveled against the respondent no.2.

It is stated that those documents are urgently required for availing loan from the banks for reconstruction of house over the land and the appellant is aged 84 years and therefore, she intends to complete the work before taking leave of this world.

5. The State of Odisha through learned Public Prosecution filed its objection to the petition dated 08.03.2017 filed by the appellant indicating therein that the petition is not maintainable and after charge sheet was submitted against respondents nos. 2 and 3 in connection with Bhubaneswar Vigilance P.S. Case No.48 of 2008, basing on the notification no.400 dated 12.03.2015 under section 5 of the 2006 Act and authorization no.3415 dated 17.12.2015 of the State Government, the Public Prosecutor duly authorized in that behalf filed the confiscation case against the respondents nos. 2 and 3 as well as their two natural born sons Subrat Kumar Padhi (respondent no.4) and Haragouri Prasad Dash (respondent no.5) so also daughter Sangamitra Dash (respondent no.6), sighting them as opposite parties on the ground that respondent no.2 had acquired the disproportionate assets in their names during the check period by committing the offence particularly in the absence of their sources of income except income of respondent no.3 for the period from 21.07.1980 to 24.04.1985. It is further stated in the objection that during investigation, neither the accused persons i.e. respondents nos. 2 and 3 placed any materials before the Investigating Officer nor the Investigating Officer found any materials in support of claim advanced by the appellant. It is further stated that the respondent no.2 is the sole perpetrator of acquisition of disproportionate assets in the name of his family

members. The claim of the appellant as regards the acquisition of assets by her husband is palpably false, concocted and created by the respondent no.2 to save himself from the rigours of the proceedings. It is further stated that there is no such provision in the 2006 Act or any other law either to return the documents/properties and that to at the instance of a stranger like the appellant who is having no right, title or interest in respect of such documents/properties and that the bald claims without any believable and acceptable materials is not maintainable.

6. The learned Authorized Officer, Special Court, Bhubaneswar in its impugned order dated 06.04.2017, after considering the petition dated 08.03.2017 filed by the appellant, the objection filed by the learned Public Prosecutor and taking into account the submissions advanced by the learned counsels for the respective parties has been pleased to hold that the investigation of Bhubaneswar Vigilance P.S. Case No.48 of 2008 revealed that the respondent no.2 acquired the properties in his name as well as in the name of other respondents i.e. Smt. Bishnupriya Das, Subrat Kumar Padhi, Haragouri Prasad Das, Sangamitra Das and Madhusudan Samantray and they have been arrayed as opposite parties in the confiscation proceeding. It is further held that by mere filing of income tax returns by late Anam Charan Padhi being an assessee, it cannot be conclusively said that the husband of the appellant had acquired the properties involved in the case unless the same is proved during trial of the proceeding. It is further held that before commencement of the trial, it cannot be conclusively held that those properties in connection with which the appellant is seeking relief, are not involved in the vigilance case pending against the respondents nos.2 and 3. It is further held that the seized documents are relevant materials to be proved during trial of the confiscation proceeding as well as during trial of the vigilance case against the respondents no.2 and 3 and release of such documents at the pre-trial period would cause prejudice to the prosecution and accordingly, the petition filed by the appellant was rejected.

7. Mr. Pitambar Acharya, learned Senior Advocate and Mr. Dhirendra Kumar Mohapatra, learned counsel appearing for the appellant while challenging the impugned order contended that the entire allegations are based on benami transaction but the prosecution has miserably failed to establish its allegation by not examining the title holders of the seized title deeds and not examining the alleged benamidars. The prosecution has also not considered the two representations submitted by late Anam Charan Padhi, husband of the appellant after search and therefore, the charge sheet is

perverse and defective. It is further contended that the prosecution attempted to include the properties purchased by late Anam Charan Padhi without examining him or his adopted son (respondent no.4) during course of investigation and submitted charge sheet in a casual manner. It is highlighted that some of the documents which were seized during course of investigation, in respect of which the appellant has prayed for its release have not been included in the charge sheet and therefore, the seizure of such documents is illegal. Learned counsel for the appellant placed reliance on the show cause replies dated 08.01.2018 filed by respondent no.4 Subrat Kumar Padhi and respondent no.5 Haragouri Prasad Dash which were filed before the Authorised Officer in the Confiscation Proceeding along with an affidavit filed by the appellant on 12.02.2018 before this Court. It is further submitted that the consecutive I.T. scrutiny orders made during 1994 (accepting the source of income of late Anam Charan Padhi to purchase the property in the names of his son and grandson vide RSD No.2326 dated 06.06.1994 and the educational expenses of his son) and the second scrutiny order made during 2009 (on the reference of the vigilance authority after search) made by three IT Appellate Commissioners, indicates the lawful source of late Anam Charan Padhi and the respondent no.2 has no contribution for the same. The rigorous scrutiny and investigation by I.T. Department took nearly three years to which the appellant, the respondents nos.2 and 3 were subjected to. It is contended that the quasi-judicial/statutory orders under section 143 of the I.T. Act (filed in additional affidavit dated 07.11.2017) have been concealed by the prosecution with malafide intention only to suppress the lawful income of the appellant and therefore, the charge sheet is defective. It is contended that malafideness of prosecution is further evident from the fact that the respondent no.2 is a signatory in the 1994 sale deed, in which properties have been purchased in the names of the adopted son and grandson of appellant, through the respondent no.2 has put his signature there as the father of his minor son (grandson of the appellant).

It is further contended that since the adopted son (respondent no.4) and grandson (respondent no.5) of the appellant were staying abroad, late Anam Charan Padhi and after him, the appellant is the lawful custodian of their properties and the property documents, which were seized by the vigilance police during course of investigation of Vigilance P.S. Case No. 48 of 2008. It is argued that in their respective show cause replies, the respondents nos. 4 and 5 have stated that they desire that the documents concerning their properties be returned to appellant.

It is further contended that the defective charge is the outcome of a defective investigation in which the plea of late Anam Charan Padhi taken in his representations indicating that he had earned rupees seven lakhs from his postal certificates (copies obtained under I.T. Act is enclosed as document no.4) apart from all other incomes as house rent, agriculture, etc. have been ignored though the same were accepted by I.T. authorities on reference by vigilance after detailed scrutiny. It is contended that the during the house search at village-Dahi, different documents indicating the financial status and the lawful income of late Anam Chandra Padhi were seen by the Investigating Officer but those were deliberately ignored. It is contended that the action of the investigating agency was not bonafide or diligent and as such the charge sheet is vulnerable. The learned counsel for the appellant placed reliance in the cases of **D.S.P., Chennai -Vrs.- K. Inbasgaran reported in (2006) 1 Supreme Court Cases 420, M. Krishna Reddy -Vrs.- State Deupty Superintendent of Police reported in (1992) 4 Supreme Court Cases 45, K. Veeraswami -Vrs.- Union of India reported in (1991) 3 Supreme Court Cases 655** and **Krishnanand -Vrs.- The State of Madhya Pradesh reported in (1977) 1 Supreme Court Cases 816**.

8. Mr. Sanjay Kumar Das, learned Standing Counsel for the Vigilance Department on the other hand contended that prior to this criminal appeal, the husband of the appellant filed CRLMC No.970 of 2015 which was dismissed by a Division Bench of this Court as per order dated 17.10.2016 on the ground of its maintainability in that form. According to him, the appellant is not one of the delinquents or persons affected in the confiscation proceeding and the persons in whose names either the immovable or moveable properties stand, were arrayed as delinquents being the persons to be affected, enabling them to indicate their respective sources of income, earnings or assets, out of which or by means of which, each of the delinquents acquired such money or property, the evidence on which each of them relies and other relevant information and particulars and also to show cause as to why the properties standing in their respective names should not be declared to have been acquired by the respondent no.2 by committing the offence under section 13(2) read with section 13(1)(e) of 1988 Act and should not be confiscated to the State. The learned counsel strenuously and emphatically contended that the appellant is a stranger to Confiscation Case No.02 of 2016 and in the authorization letter accorded to the learned Special Public Prosecutor, none of the properties either immovable or movable standing recorded in the name of the appellant or her husband were included

but all the same, she filed an application for return of certain documents which were seized in course of investigation by the Vigilance Officers from different accommodations of the respondent no.2 and his nears and dears while searching in pursuance of the search warrant given by the competent Judicial Officer. It is argued that though charge sheet has been filed relating to acquisition of disproportionate assets by the respondent no.2 and respondent no.3 to the tune of Rs.62,38,993.66 paisa during the check period but the confiscation case has been filed against all the persons to be affected/delinquents, with a prayer for confiscation of both the immovable and moveable properties to the tune of Rs.47,56,480.45 paisa which is much less than the charge sheet amount. It is contended that the documents sought to be released by the appellant are very much material to be referred to, both by the trial Court as well as by the Authorized Officer in course of the trial and inquiry respectively and therefore, the release of any such document is likely to adversely affect the smooth progress of the respective proceedings. It is submitted that in the inquiry before the learned Authorized Officer, Bhubaneswar, the appellant can adduce her evidence on behalf of the delinquents-opposite parties to substantiate that the alleged properties standing jointly in the names of her adopted son (respondent no. 4) and grandson (respondent no.5) were purchased by her husband, which if proved, through oral as well documentary evidence may be beneficial to her and the learned Authorized Officer will not confiscate the same under section 15 of the 2006 Act. It is contended that the learned Authorized Officer has rightly rejected the petition filed by the appellant dated 08.03.2017 vide impugned order dated 06.04.2017 with the observation that the seized documents are relevant materials to be proved during the trial of the proceeding as well as during the trial of the Vigilance case before the trial Court and that the release of the documents as prayed for by the appellant at pre-trial period would cause prejudice to the prosecution. It is contended that while enacting the 2006 Act, the legislature has given wide scope to the delinquents/persons to be affected under section 14 of the Act to disprove the allegation of acquisition of disproportionate assets by the accused in order to evade confiscation application with reference to the authorization letter given by the Government. It is contended that submission of income tax returns is immaterial at the pre-trial stage, which is required to be proved through evidence at the time of trial and/or inquiry in accordance with law. It is contended that in course of the investigation of the case, the I.O. could able to ascertain that only seven to eight acres of cultivable lands were standing in the name of the husband of the appellant. He emphasized that the xerox

copies of the sale deeds and documents filed on behalf of the appellant at the time of hearing of this appeal indicate that in between 1994 and 2000, as both the natural born sons of the respondent no.2 were minors, the sale deeds were registered through their guardians late Anam Charan Padhi, husband of the appellant & Benudhar Dash (respondent no.2) and therefore, oral as well as documentary evidence are very much necessary in the trial and also inquiry before the learned Authorized Officer as to whether the husband of the appellant purchased the alleged properties through registered sale deeds out of his own income or the respondent no.2 purchased the same in the names of both of his sons jointly through corrupt means. It is argued that so far the documents pertaining to income tax returns are concerned, those are not final and binding on a criminal Court and at best those are relevant but subject to its independent appraisal on merits. Learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of **State Of Karnataka -Vrs.- Selvi J. Jayalalitha reported in (2017) 67 Orissa Criminal Reports (SC) 796**. It is contended that with the sole intention to delay the confiscation proceeding, at the instance of respondents nos. 2 and 3 who are the son-in-law and daughter respectively, the appellant and/or her deceased husband are filing frivolous applications and after being rejected, taking shelter of this Court in order to get an order of stay and therefore, the appeal should be dismissed and the learned Authorised Officer be directed to expedite the confiscation proceeding and conclude the same within a stipulated period.

9. Section 13 of the 2006 Act empowers the State Government to authorise the Public Prosecutor to make an application for confiscation before the Authorised Officer and further stipulates what the application shall accompany. The section states that only when on the basis of prima facie evidence, the State Government have reasons to believe that a person who held high public or political office has committed the 'offence' as enumerated under section 2(d) of the 2006 Act, authorisation to the Public Prosecutor for making such application can be given. The stage of filing of an application for confiscation before the Authorised Officer is not dependent upon whether the Special Court has taken cognizance of the offence or not. Section 14 of the 2016 Act deals with the service of notice by the Authorised Officer upon receipt of an application under section 13 upon the person in respect of whom the application is made (hereafter referred to as 'the person affected'). The purpose of service of notice is to enable such person to indicate the source of his income, earnings or assets, out of which

or by means of which he has acquired such money or property and to show cause as to why all or any of such money or property or both, should not be declared to have been acquired by means of the offence and be confiscated to the State Government. The person concerned has to indicate in the show cause the evidence on which he relies or other relevant information and particulars in support of his income, earnings or assets. Notice of an application for confiscation shall also be served upon such other person who holds any money or property or both on behalf of 'the person affected' who can participate in the confiscation proceeding by filing his show cause and may take such stand as permissible under law and adduce evidence that such money or property or both do not belong to 'the person affected' as stated in the confiscation application but he is the real owner of the same. Section 15(1) of the 2006 Act empowers the Authorized Officer to record a finding whether all or any other money or properties in question as mentioned in the application for confiscation filed under section 13 of the 2006 Act have been acquired illegally. Such a finding can be given only after considering the explanation, if any, to the show cause notice issued under section 14 and the materials available before it and that to after giving reasonable opportunity of hearing to 'the person affected' and to the person who holds any money or property as specified in the notice on behalf of 'the person affected'. After recording the finding as envisaged under section 15(1), the Authorized Officer shall declare such money or property or both to be confiscated to the State Government free from all encumbrances subject to the provisions of the Act. Therefore, the combined reading of sections 14 and 15 of the 2006 Act indicate as to who are to be noticed and given reasonable opportunity of hearing in a confiscation proceeding. If a person is neither 'the person affected' nor holds any money or property or both as specified in the notice on behalf of 'the person affected', there cannot be any necessity of either service of notice on him or giving him an opportunity of hearing in the proceeding.

In case of **Yogendra Kumar Jaiswal -Vrs.- State of Bihar reported in (2016) 63 Orissa Criminal Reports (SC) 426**, it is held that the Chapter III of the 2006 Act providing for confiscation of property or money or both neither violates Article 14 nor Article 20(1) nor Article 21 of the Constitution and that the procedure provided for confiscation and the proceedings before the Authorised Officer do not cause any discomfort either to Article 14 or to Article 20(3) of the Constitution. It is further held while interpreting section 5 of the 2006 Act that State Government is only to be prima facie satisfied that there is an offence under section 13(1)(e) of the

1988 Act and that the accused has held high public or political office in the State. Textually understanding, the legislation has not clothed the State Government with the authority to scrutinize the material for any other purpose. The State Government has no discretion except to see whether the offence comes under section 13(1)(e) of the 1988 Act or not. Such an interpretation flows when it is understood that in the entire texture provision turns around the words "offence alleged" and "prima facie". It can safely be held that the State Government before making a declaration is only required to see whether the person as understood in the context of the provision is involved in an offence under section 13(1)(e) of the 1988 Act and once that is seen, the concerned authority has no other option but to make a declaration. That is the command of the legislature and once the declaration is made, the prosecution has to be instituted in a Special Court and that is the mandate of section 6(1) of the Orissa Act. It is further held that the same principles relating to 'prima facie evidence' are applicable to section 13 of the 2006 Act. What is required to be scrutinized by the State Government that the offence exists under section 13(1)(e) of the 1988 Act and thereafter it has to authorise the Public Prosecutor to make an application. The application that is required to be filed in sub-section (1) of section 13 of the 2006 Act itself postulates the guidelines. The application has to be accompanied by an affidavit stating the grounds on which the belief as regards the commission of the offence and the amount of money and many other aspects. An application has to be filed by the Public Prosecutor. The Public Prosecutor before he files an application under sub-section (1) of section 13 of the 2006 Act, is required to be first satisfied with regard to the aspects enumerated in sub-section (2). Sub-section (2) obliges the Public Prosecutor that requirements are satisfied for filing the application. In view of the said position, it cannot be said that there is lack of guidance. It is not that the authority has the discretion to get an application filed through the Public Prosecutor or not. It is not that a mere discretion is left to the Public Prosecutor. The authority has only been authorised to scrutinize the offence and authorise the Public Prosecutor and thereafter the Public Prosecutor has been conferred the responsibility which is manifestly detailed, and definitely guided, to file the application. Thus scrutinized, the said provision does not offend Article 14 of the Constitution. It is further held that the word "may" used in section 13 has to be understood in its context. It does not really relate to authorization of filing. To clarify that the authority does not have the discretionary power to authorise for filing against some and refrain from authorizing in respect of the other, it has to be construed that the said word

relates to the purpose, that is, the application to be filed for the purpose of confiscation. This is in consonance with the legislative policy, the scheme of the Act and also the objects and reasons of the Act. The legislative policy, as declared, clearly indicates that there should not be any kind of discretion with the Government in these kinds of matters. The fulcrum of the policy, as is discernible, is that delinquent officers having disproportionate assets coming within the purview of section 13(1)(e) have to face the confiscation proceedings subject to judicial scrutiny as the rest of the provisions do unveil. It is further held that there is no discretion to pick and choose but to see the minimum requirement, that is, the offence and the status and nothing beyond that. It is further held by the Hon'ble Court that the State Government is only required to scrutinize the "offence" and authorise the Public Prosecutor for the purpose of filing an application for confiscation. The Public Prosecutor, as mandated under section 13(2) is required to file an application indicating the reasons on the basis of which the State Government believes that the delinquent officer has procured the property by means of the offence. Thus, reasons have to be stated in the application and it has to be clearly averred that the property has been acquired by means of the offence as defined under the Orissa Act. The Authorised Officer is a Judicial Officer and he is required to afford reasonable opportunity of hearing to the accused or any other person operating the property on his behalf. Discretion is also conferred on the Authorised Officer to record a finding whether all or any other money or property in question have been acquired illegally. The said authority can drop the proceedings or direct confiscation of all or some properties. Affording of a reasonable opportunity of hearing is not confined only to file affidavits. When the delinquent is entitled to furnish an explanation and also put forth his stand, he certainly can bring on record such material to sustain his explanation. Confiscation proceeding as provided under sub-section (3) of section 15 is subject to appeal. In view of the scheme of the Orissa Act, there can be no shadow of doubt that there is ample guidance in the procedure for confiscation. It is not a proceeding where on the basis of launching of prosecution, the properties are confiscated. Therefore, the proceedings relating to confiscation cannot be regarded as violative of Article 14 because conferment of unchecked power or lack of guidance.

10. In this case, though it is the case of the appellant that some of the properties shown in the schedule of the confiscation application belonged to her late husband which were purchased in the names of respondent nos.4 and

5, it is the prosecution case that the respondent no.2 purchased such properties in the names of his sons and it is a benami transaction.

'Benami property' literally means a property without any name. In a transaction, where the person who pays for the property does not buy it under his/her name, is called benami transaction. The person in whose name the property is purchased is called benamidar and the property so purchased is called the 'benami property'. The real owner of a benami property is the man who purchases it in the name of someone else. Directly or indirectly, the property is held for the benefit of the person paying the amount. A benamidar has no real title to the property, he is merely an ostensible owner thereof. The Benami Transactions (prohibition) Act, 1988, was enacted to prohibit benami transactions and right to recover property held benami. Section 4 of the said Act deals with prohibition of the right to recover property held benami.

It appears that the appellant Ahalya Padhi is not one of the delinquents/opposite parties in the confiscation application which was filed by the State of Odisha before the Authorised Officer. The immovable and movable properties lists which are mentioned in Schedule-A and Schedule-B of the application for confiscation respectively do not indicate any such properties stood recorded in the name of appellant. The persons in whose names either the immovable or moveable properties stand, have been arrayed as opposite parties in the confiscation proceeding and they have been served with notices as required under section 14 of the 2006 Act.

If it is the case of the appellant that she and her husband late Anam Charan Padhi adopted the eldest son of their daughter Smt. Bishnupriya Dash (respondent no.3) as their son by virtue of a registered deed of adoption and some of the properties as mentioned in the schedule of the confiscation application were purchased by her husband late Anam Charan Padhi in the names of their adopted son Subrat Kumar Padhi (respondent no.4) and grandson Haragouri Prasad Das (respondent no.5), then in the confiscation proceeding such evidence can be adduced on behalf of the respondents by examining the appellant as well as by proving the relevant documents which would be considered by the learned Authorized Officer in accordance with law before recording a finding whether any of such properties have been acquired illegally by the respondent no.2.

The learned counsel for the appellant placed reliance on the income tax scrutiny orders of late Anam Charan Padhi but in case of **Selvi J. Jayalalitha** (supra), it has been held that the income tax returns/orders

passed thereon are not binding on the criminal Court and the facts involved are to be proved on the basis of independent evidence and that the income tax returns/orders are only relevant and nothing further.

At this stage, it would be profitable to discuss the principles enunciated in the citations placed by the learned counsel for the appellant. In case of **D.S.P., Chennai -Vrs.- K. Inbasgaran reported in (2006) 1 Supreme Court Cases 420**, it is held as follows:-

> "17.....It is true that the prosecution in the present case has tried its best to lead the evidence to show that all these monies belonged to the accused but when the wife has fully owned the entire money and the other wealth earned by her by showing in the income tax returns and she has accepted the whole responsibility, in that case, it is very difficult to hold the accused guilty of the charge. It is very difficult to segregate that how much of wealth belonged to the husband and how much belonged to the wife. The prosecution has not been able to lead evidence to establish that some of the money could be held in the hands of the accused. In case of joint possession, it is very difficult when one of the persons accepted the entire responsibility. *The wife of the accused has not been prosecuted and it is only the husband who has been charged being the public servant*. In view of the explanation given by the husband and when it has been substantiated by the evidence of the wife, the other witnesses who have been produced on behalf of the accused, coupled with the fact that the entire money has been treated in the hands of the wife and she has owned it and she has been assessed by the Income Tax Department, it will not be proper to hold the accused guilty under the prevention of Corruption Act as his explanation appears to be plausible and justifiable. The burden is on the accused to offer plausible explanation and in the present case, he has satisfactorily explained that the whole money which has been recovered from his house does not belong to him and it belonged to his wife. Therefore, he has satisfactorily accounted for the recovery of the unaccounted money. Since the crucial question in this case was of the possession and the premises in question were jointly shared by the wife and the husband and the wife having accepted the entire recovery at her hand, it will not be proper to hold husband guilty."

The decision placed by the learned counsel for the appellant is in no way applicable to the present case in as much as in the case in hand, both the husband (respondent no.2) and wife (respondent no.3) have been charge sheeted and the appellant who is the mother-in-law of respondent no.2 and mother of respondent no.3 and her husband late Anam Charan Padhi were not jointly staying with them. Moreover in the reported case, the stage at which such observation was made by the Hon'ble Supreme Court has not arisen in the case and when the appellant is not a party to the confiscation proceeding, basing on some explanations given by her relating to acquirement of some of the properties shown in the schedule of the confiscation application, it would not be proper at this stage to release the

seized documents in connection with the properties in favour of the appellant or to delete the expenditures under certain headings from the purview of the case.

In the case of **M. Krishna Reddy -Vrs.- State Deupty Superintendent of Police reported in (1992) 4 Supreme Court Cases 45**, it is held as follows:-

> "11. In support of the above contentions, the appellant not only bases his claim upon the documentary evidence i.e. the income returns filed in 1982 before the search of the house of the appellant and registration of the case but also on the oral testimony of PW 27, the Income Tax Officer. PW 27 testifies that the appellant's wife Smt. Sulochana filed her Wealth Tax Returns for the assessment years 1980-81, 1981-82 and 1982-83 on 26.8.1982 under Exs. P-53 to P-55 with enclosures; that the appellant's daughter Smt. Indira, wife of Dr. Ravindra Reddy filed her wealth tax returns for the same assessment years 1980-83 on August 26, 1982 under Exs. P-56 to P-58 and that the appellant's son-in-law Dr. Ravindra Reddi filed his income tax returns for the assessment years 1980-1983 on 27.8.1982 under Exs.P-61 to P-63 showing the lending of Rs.20,000/- to his father-in-law. It is pertinent to note that the search in the house of the appellant was conducted on the strength of a search warrant issued on August 24, 1983, that is one year after the submission of all the above wealth tax returns and income tax returns for a consolidated period of three years in 1982.
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> 13. The Trial Court has brushed aside this piece of evidence on the ground that the daughter and son-in-law, Dr. Ravindra Reddi had only little experience during that period; that they had submitted their income tax returns for a consolidated period of three years in 1982 and therefore the case of the appellant that he got a loan of Rs. 20,000/- from Dr. Ravindra Reddi is not acceptable. This reasoning is based on mere conjectures or surmise. As repeatedly pointed out earlier, the raid was in 1983 and so, there could not be any conceivable reason even to entertain any suspicion or surmise.
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> 14. We are unable to appreciate that reasoning and hold that the prosecution has not satisfactorily discharged the expected burden of proof in disproving the claim of the appellant. Therefore, on the face of these unassailable documents i.e. the wealth tax and income tax returns, we hold that the appellant is entitled to have a deduction of Rs.56,240.00 from the disproportionate assets of Rs.2,37,842/-."

The factual scenario of the above cited case is distinguishable inasmuch as all the immovable and movable properties shown under the Schedule-A and B of the confiscation application are in the names of the respondents either individually or jointly and therefore, the income tax returns filed by the appellant's husband and the scrutiny orders of the Income Tax Authorities relating to acquirement of some of the properties shown in the list of disproportionate assets, cannot be a ground at this stage to release

the seized documents in connection with those properties in favour of the appellant. Clinching oral as well as documentary evidence are required to be adduced not only in the confiscation proceeding but also during trial of the respondents nos.2 and 3 before the competent Court relating to the acquirement of the properties by the husband of the appellant backed by the income tax returns filed by him, which are to be considered in accordance with law. Any observation made in that respect at this stage would have a serious repercussion on the confiscation proceeding as well as trial of the respondents nos.2 and 3 and therefore, this Court desists from making any roving enquiry on such aspects at this stage.

In the case of **K. Veeraswami -Vrs.- Union of India reported in (1991) 3 Supreme Court Cases 655**, it is held as follows:-

> "75. In the view that we have taken as to the nature of the offence created under clause (e), it may not be necessary to examine the contention relating to ingredient of the offence. But since the legality of the charge sheet has been impeached, we will deal with that contention also. Counsel laid great emphasis on the expression "for which he cannot satisfactorily account" used in clause (e) of Section 5(1) of the Act. He argued that that term means that the public servant is entitled to an opportunity before the Investigating Officer to explain the alleged disproportionality between assets and the known sources of income. The Investigating Officer is required to consider his explanation and the charge sheet filed by him must contain such averment. The failure to mention that requirement would vitiate the charge sheet and renders it invalid. This submission, if we may say so, completely overlooks the powers of the Investigating Officer. The Investigating Officer is only required to collect material to find out whether the offence alleged appears to have been committed. In the course of the investigation, he may examine the accused. He may seek his clarification and if necessary he may cross check with him about his known sources of income and assets possessed by him. Indeed, fair investigation requires as rightly stated by Mr. A.D. Giri, learned Solicitor General, that the accused should not be kept in darkness. He should be taken into confidence if he is willing to cooperate. But to state that after collection of all material the Investigating Officer must give an opportunity to the accused and call upon him to account for the excess of the assets over the known sources of income and then decide whether the accounting is satisfactory or not, would be elevating the Investigating Officer to the position of an enquiry officer or a judge. The investigating officer is not holding an enquiry against the conduct of the public servant or determining the disputed issues regarding the disproportionality between the assets and the income of the accused. He just collects material from all sides and prepares a report which he files in the Court as charge sheet."

This decision no way helps the appellant inasmuch as whether during course of investigation, the respondents nos.2 and 3 who were charge sheeted in the case, were given opportunities by the Investigating Officer to

account for the excess of the assets over the known sources of income and if not, in what way it has caused prejudice to those respondents, are the matters which may be taken into account if specific plea in that respect is taken by those respondents during trial. The appellant who is not a party to the confiscation proceeding is precluded from raising any such point at this stage nor this Court is expected to deal with such contention.

In the case of **Krishnanand -Vrs.- The State of Madhya Pradesh reported in (1977) 1 Supreme Court Cases 816**, it is held as follows:-

> "26.....It is well settled that the burden of showing that a particular transaction is benami and the appellant owner is not the real owner always rests on the person asserting it to be so and this burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of benami is the intention of the parties and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises as a substitute for proof (vide Jayadayal Poddar -Vrs.- Mst. Sibi Hazra : (1974) 1 SCC 3). It is not enough merely to show circumstances which might create suspicion, because the Court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence..."

In the case in hand, at the appropriate stage of the confiscation proceeding or trial, if evidence is adduced that even though the property in question stands recorded in the name of 'X' but it is 'Y' who has purchased the property in the name of 'X' or in other words, 'X' is not the actual owner of the property, the same has to be considered and decided in accordance with law and this is not the stage to give any finding in respect of benami transaction particularly on the basis of a petition filed by a person who is not a party to the confiscation proceeding.

11. Adverting to the contentions raised by the learned counsels for the respective parties, I am of the humble view that if the respondents take specific plea as taken by the appellant and adduce relevant oral evidence through the appellant as well as prove documentary evidence like income tax returns, registered deed of adoption of respondent no.4 by the appellant and her husband etc., the same shall be taken into account by the learned Authorised Officer in accordance with law. Whether some of the properties as mentioned in the schedule of the confiscation application were purchased by late Anam Charan Padhi can also be appreciated by the learned Court. Since none of the properties as per the schedule appended to the confiscation application stand recorded in the name of the appellant and those properties, according to the prosecution are

very much material to be referred to in the confiscation proceeding as well as in the trial of the respondents nos. 2 and 3 in the disproportionate assets case, at this stage, it cannot be said that any of the properties as per the schedule of the confiscation application has got any link with the appellant or her late husband and the documents in connection with such properties are to be released in favour of the appellant. It is also not the stage to decide whether there is any perfunctory investigation or perversity and defective investigation. It is needless to say that if any such plea taken by the appellant is taken by the respondents and the same is found to be correct by the learned Authorised Officer after considering the relevant materials available on record then such properties can be excluded from the zone of confiscation.

Even though the learned counsel for the appellant placed reliance on the show cause replies of the respondent nos. 4 and 5 where they have stated that they desire that the documents concerning their properties to be returned to the appellant but such show causes were filed on 08.01.2018 which were much after passing of the impugned order dated 06.04.2017. The stand taken by the respondent nos. 4 and 5 in their show cause replies supporting the plea taken by the appellant are to be meticulously examined by the Authorised Officer and thereafter, the truthfulness or otherwise of such plea taken can be assessed and finding can be recorded. Since section 15 of the 2006 Act provides for reasonable opportunity of being heard to the concerned parties, it is excepted that the learned Authorised Officer shall afford such opportunities to the respondents and then record any finding. The learned Authorised Officer can also take a decision as to whether the seizure of documents as per the schedule of the confiscation application was proper and justified or not and make declaration as envisaged under that section.

12. In view of the foregoing discussions, I am of the considered opinion that the learned Authorised Officer has not committed any illegality in rejecting the petition filed by the appellant on 08.03.2017 as per the impugned order dated 06.04.2017 and therefore, I find no merit in this criminal appeal which is accordingly dismissed.

13. It is made clear that anything said or any observation made in this judgment shall not influence the mind of the learned Authorised Officer to decide the confiscation proceeding on its own merits. If any plea is taken by the respondents during confiscation proceeding by filing show cause replies and the evidence are adduced in that respect, the learned Authorised Officer is free to decide the acceptability or otherwise of such plea in accordance with law.

2018 (II) ILR - CUT- 810

S.K. SAHOO, J.

CRLMC NO. 479 OF 2018

AMARENDRA BIHARI & ORS. .....Petitioners

.Vs.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Exercise of – Cognizance of offences under sections 420, 467, 468, 471, 294, 506 read with section 120-B of the Indian Penal Code – Parties have amicably settled the dispute and not interested to proceed with the case – Whether in view of the compromise between the parties, the impugned order of taking cognizance and the entire criminal proceeding which consists of non-compoundable offences can be quashed in exercise of inherent power of this Court under section 482 of Cr.P.C. in spite of the provision under section 320(9) of Cr.P.C. – Held, Yes, as no fruitful purpose would be served in allowing the proceeding to continue and it would be a sheer wastage of valuable time of the Court – Possibility of conviction being remote and bleak, the continuation of criminal case would tantamount to abuse of process of law – Entire criminal proceeding quashed.

Case Laws Relied on and Referred to :-

1. (2012) 53 OCR (SC) 891 : Gian Singh .Vs. State of Punjab and Another
2. (2014) 59 OCR (SC) 593 : Gold Quest International Private Limited .Vs. State of Tamil Nadu
3. OCR (SC) 202 : Narinder Singh and Ors. .Vs. State of Punjab (2014) 58
4. OCR (SC) 982 : Parbatbhai Aahir .Vs. State of Gujarat (2017) 68

For Petitioners : Mr. Ramani Kanta Pattanaik, Sabyasachi Jena, Bikash Ch. Parija , Rashmi Ranjan Rout, Arabinda Panda, Madhusnata Routray & Prasamita Mallik

For State : Addl. Govt. Adv.

For Opp. Party : Mr. Subodh Ku. Mohanty, Manoranjan Sahoo & P. Sahoo

JUDGMENT Date of Judgment: 12.11.2018

S. K. SAHOO, J.

In view of the cessation of the Court work of the High Court Bar Association, neither the learned counsel for the petitioners nor the learned counsels for the opp. parties are present in Court.

In this application under section 482 of Cr.P.C., the petitioners Amarendra Bihari and Kanhu Charan Moharana have knocked at the doors of

this Court challenging the order dated 09.01.2014 of the learned S.D.J.M., Kendrapara passed in G.R. Case No.1035 of 2013 in taking cognizance of offences punishable under sections 420, 467, 468, 471, 294, 506 read with section 120-B of the Indian Penal Code. The said case arises out of Kendrapara P.S. Case No. 98 of 2013.

Perused the F.I.R. dated 16.08.2013 lodged by the opposite party no.2 Smt. Menaka Sahoo. As per the F.I.R., the accused persons alleged to have sold some of the land in which the father of the informant had share during his life time without the knowledge of the informant by creating forged documents.

It is averred in the CRLMC petition that the petitioners and the opposite party no.2 Smt. Menaka Sahoo belong to one family and residing under the same roof and they have amicably settled the dispute among them with the intervention of their relatives and well-wishers and that the disputed land in question has already been transferred in the name of opposite party no.2 and she is not interested to proceed with the case as the petitioner no.1 is the nephew of opposite party no.2. The opposite party no.2 has entered appearance in this case through her counsel and filed a supporting affidavit indicating, inter alia, that due to intervention of the family members, relatives and well-wishers, the matter has been amicably settled between the parties and she is not interested to proceed against the petitioners.

To ascertain the truthfulness of the averments taken in the affidavit, xerox copy of the CRLMC petition along with copy of the affidavit filed by opposite party no.2 were sent to the Chairman, District Legal Services Authority, Kendrapara as per the order dated 01.10.2018 who on enquiry has submitted the report dated 03.11.2018 wherein it is indicated that he examined the opposite party no.2 and her husband and came to know that the matter has been settled between the parties and it was further ascertained from the opposite party no.2 along with her husband that they do not want to proceed further with the case. The report further indicates that the averments made in the affidavit of opposite no.2 are true. The statements of the opposite party no.2 and her husband recorded in separate sheets by the Chairman, District Legal Services Authority, Kendrapara have also been forwarded to this Court along with the report.

The seminal issues that emanate for consideration in this application is whether in view of the compromise between the parties, the impugned order of taking cognizance and the entire criminal proceeding which consists

of non-compoundable offences can be quashed in exercise of inherent power of this Court under section 482 of Cr.P.C. in spite of the provision under section 320(9) of Cr.P.C.

In case of **Gian Singh -Vrs.- State of Punjab and Another reported in (2012) 53 Orissa Criminal Reports (SC) 891**, the Hon'ble Supreme Court held as follows:-

> "57. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or F.I.R. or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal Court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime.
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> But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

In Case of **Gold Quest International Private Limited -Vrs.- State of Tamil Nadu reported in (2014) 59 Orissa Criminal Reports (SC) 593**, the Hon'ble Supreme Court held as follows:-

> "8. In view of the principle laid down by this Court in the aforesaid cases, we are of the view in the disputes which are substantially matrimonial in nature, of the civil

property disputes with criminal facets, if the parties have entered into settlement, and it has become clear that there are no chances of conviction, there is no illegality in quashing the proceedings under section 482 Cr.P.C. read with Article 226 of the Constitution."

In case of **Narinder Singh and Ors. -Vrs.- State of Punjab reported in (2014) 58 Orissa Criminal Cases (SC) 202**, the Hon'ble Supreme Court held as follows:-

"31. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

(i) Power conferred under section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under section 320 of the Code. No doubt, under section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

(ii) When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

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(iv) On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

(v) While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases".

In case of **Parbatbhai Aahir -Vrs.- State of Gujarat reported in (2017) 68 Orissa Criminal Reports (SC) 982**, the Hon'ble Supreme Court held as follows:-

"15. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the Court is governed by the provisions of section 320 of the Code of Criminal Procedure, 1973. The power to quash under section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice."

In view of the ratio laid down by the Hon'ble Supreme Court in the aforesaid decisions and since the parties are related to each other and case arises out of civil dispute between the parties which has already been settled amicably and the opposite party no.2 is no more interested to pursue the case, in my humble view no fruitful purpose would be served in allowing the proceeding to continue and it would be a sheer wastage of valuable time of the Court. I am further of the view that possibility of conviction is remote and bleak and continuation of criminal case would tantamount to abuse of process of law.

Therefore, in the facts and circumstances of the case, invoking my inherent powers under section 482 of Cr.P.C. and to prevent the abuse of process and in the interest of justice, I am inclined to accept the prayer made by the petitioners in this application and direct that the impugned order dated 09.01.2014 passed by the learned S.D.J.M., Kendrapara in G.R. Case No.1035 of 2013 and the entire criminal proceeding of the said case stands quashed. Accordingly, the CRLMC application is allowed.

2018 (II) ILR - CUT- 815

S.K. SAHOO, J.

JCRLA NO. 39 OF 2007

BISWANATH PATRA .....Appellant

.Vs.

STATE OF ORISSA .....Respondent

(A) CRIMINAL TRIAL – Framing of charge – Offence alleged under Narcotic Drugs and Psychotropic Substances Act, 1985 for possessing two kgs of Ganja – Trial Court framed charge under section 20(b)(i) of the N.D.P.S. Act for unlawful possession of 2 K.G. of Ganja whereas Section 20(b)(i) prescribes punishment for contravention relating to clause (a) of that section which deals with cultivation of cannabis plant – In the factual scenario the charge was framed erroneously under section 20(b)(i) instead of section 20(b)(ii) of the N.D.P.S. Act – Effect of – Held, framing of charge is not an empty formality and the object behind it is to make the accused aware of the nature and extent of the accusation against him –Trial Court should have been careful enough to mention the charge correctly. (Para 7)

(B) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 42 – Provisions under – Mandatory requirements – Non-compliance thereof – Held, the failure to comply with section 42(1), proviso to section 42(1) and section 42(2) would render the entire prosecution case suspect and cause prejudice to the accused.

"In view of the aforesaid discussions, it is apparent that there is non-compliance of the provisions under section 42 of the N.D.P.S. Act. Law is well settled that total non-compliance with the provisions under sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible and it vitiates the conviction and renders the entire prosecution case suspect and cause prejudice to the accused". *(Para 8)*

Case Laws Relied on and Referred to :-

1. (1994) 7 OCR (SC) 283 : State of Punjab .Vs. Balbir Singh.
2. 1999 (II) OLR (SC) 474 : State of Punjab .Vs. Baldev Singh.
3. (2004) 12 SCC 201 : State of West Bengal .Vs. Babu Chakraborthy
4. (2007) 36 OCR (SC) 170 : Dilip and another .Vs. State of M.P.
5. (2009) 44 OCR (SC) 183 : Karnail Singh .Vs. State of Haryana.
6. (2011) 50 OCR (SC) 217 : Rajender Singh .Vs. State of Haryana.
7. JT 2008 (7) SC 409 : Noor Aga .Vs. State of Punjab.
8. (2011) 49 OCR (SC) 225 : Ashok @ Dangra Jaiswal .Vs. State of M.P.
9. (2003) 26 OCR (SC) 783 : Jitendra .Vs. State of M.P.
10. (2013) 14 SCC 527 : Vijay Jain .Vs. State of M.P.

For Appellant : Mr. Nilamadhaba Praharaj
For Respondent : Mr. Anupama Rath (Addl. Standing Counsel)

JUDGMENT Date of Hearing and Judgment: 15.11.2018

S. K. SAHOO, J.

The appellant Biswanath Patra faced trial in the Court of the learned Addl. Sessions Judge -cum- Special Judge, Malkangiri in Criminal Trial No. 80 of 2003 for offence punishable under section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') and he was found guilty under section 20(b)(ii) of the N.D.P.S. Act and sentenced to undergo R.I. ten years and to pay a fine of rupees one lakh, in default, to undergo R.I. for a further period of two years vide impugned judgment and order dated 17.01.2007.

2. The prosecution case, as per the first information report dated 04.10.2003 lodged by one Sunil Arun Kumar Nayak (P.W.13), S.I. of Police, Malkangiri Police Station is that on 04.10.2003 at about 10.40 a.m. he received credible telephonic information that an old man was moving in a SBMS bus bearing registration No.OR-10B-5227 sitting on seat No. 35 from Kalimela towards Malkangiri and he was carrying one plastic handbag

containing ganja and the bus was proceeding from MV-79 towards Jeypore. P.W.13 entered the information into writing in a P.S. station diary vide SDE No. 62 dated 04.10.2003 at 10.40 a.m. and intimated the fact by sending the abstract of the station diary to the C.I./S.P., Malkangiri through constable No. HC/200 C. Bishoi by making diary entry. Since there was no time to obtain search warrant and there was every possibility of decamping of the suspect from the bus, P.W.13 along with other police officials proceeded to the spot and they arrived at 11 a.m. and on arrival at the spot in question, when the bus arrived, he stopped the bus and told the driver to keep the bus on the left side of the road. Then P.W.13 along with his staff entered into the bus and found one person was sitting in seat no. 35 and was holding one plastic bag keeping it on his thigh and pungent smell of ganja was coming from the hand bag. On being confronted, the old man claimed to be the owner of the bag and further stated that it was containing ganja and he procured the same from the jungle area of Kalimela police station from one unknown person and that he was taking the same to Ganjam district to sell it for higher profit and he disclosed his name as Biswanath Patra (appellant). After detention of the appellant, P.W.13 called two independent witnesses of the locality and offered option in writing to the appellant whether he wanted to be searched in presence of a Gazetted Officer or Magistrate. The appellant offered in writing that he intended to be searched in presence of a Magistrate. P.W.13 sent requisition to S.D.M., Malkangiri through constable with a request to depute an Executive Magistrate to remain present at the time of search and seizure. At about 1.00 p.m., Tahasildar -cum- Executive Magistrate, Malkangiri Sri Radha Ballav Pattnaik (P.W.12) arrived at the spot and P.W.13 narrated about the events and the identity of the Executive Magistrate was conveyed to the witnesses as well as to the appellant and the appellant was asked to get down from the bus with his hand bag containing ganja. A constable was sent to call a weighman who came to the spot and in the presence of the Executive Magistrate as well as other persons, personal search of the appellant was taken but nothing incriminating was found except a cash of Rs.160/- and one bus ticket and when the hand bag was opened, it was found to be containing fruiting and flowering tops of contraband ganja. The appellant failed to produce any licence, authority or permission to possess such ganja. The ganja was weighed by the weighman Sanjib Kumar Ray (P.W.6), which came to 2 K.G. and an extract of 24 grams of sample in duplicate was taken in two polythene covers which were again kept in two paper envelopes and were marked as ‘A1’ and ‘A2’ and the paper slips containing the signatures of the appellant, Executive Magistrate, weighman, witnesses and P.W.13 with seals

were put inside each of the sample packets as well as bulk quantities. The seizure list of ganja of bulk quantity with the plastic hand bag and sample packets drawn was prepared and copy of the seizure list was supplied to the appellant. A separate seizure list was prepared for cash of Rs.160/- and the bus ticket and the personal seal of P.W.13 was left in the zima of the weighman Sanjib Kumar Ray (P.W.6) by executing proper zimanama. P.W.13 arrested the appellant after explaining the grounds of arrest, prepared the memo of arrest and drew up the plain paper F.I.R. at the spot and took up investigation of the case. The appellant was forwarded to Court and the samples were sent to R.F.S.L., Berhampur for examination. P.W.13 obtained chemical examination report, which indicated that the sample contained flowering and fruiting tops of the cannabis plant, commonly known as 'ganja'. Subsequently, the charge of investigation was taken over by the Inspector Narayan Mohanty who submitted charge sheet against the appellant.

3. The appellant was charged under section 20(b)(i) of the N.D.P.S. Act for unlawful possession of 2 K.G. of contraband ganja. The appellant refuted the charge, pleaded not guilty and claimed to be tried.

4. During course of trial, in order to prove its case, the prosecution examined thirteen witnesses.

P.W.1 Muna Das, P.W.2 Sukaranjan Choudhury, P.W.6 Sanjib Kumar Ray and P.W.9 Samir Majumdar did not support the prosecution case for which they were declared hostile.

P.W.3 Arun Pradhan and P.W.4 Gananath Thanapathi are the witnesses to the seizure of some letters from the office of S.P., Malkangiri under seizure list Ext.2.

P.W.5 Jitendra Kumar Pradhan was the constable attached to Malkangiri police station who accompanied the informant to the spot which is R.M.C. check gate and he stated about the presence of the appellant in the SBMS bus and search and seizure of ganja from the possession of the appellant in presence of the Executive Magistrate.

P.W.7 Harish Chandra Hantal was the constable attached to Malkangiri police station who on the basis of command certificate carried sample ganja packets to R.F.S.L., Berhampur from the Court of learned S.D.J.M., Malkangiri.

P.W.8 Asit Barman Biswal stated about the seizure of two letters by the I.O. on his production from the S.R. section of D.P.O., Malkangiri under seizure list Ext.2.

P.W.10 Mangala Khara stated about the seizure of ganja in a bag from the possession of the appellant as per seizure list Ext.4 in presence of Tahasildar, Malkangiri.

P.W.11 N. Sankar Rao was the conductor of SBMS bus and he stated about the seizure of a bag containing ganja from the possession of the appellant as per seizure list Ext.4.

P.W.12 Radhaballava Patnaik was the Tahasildar -cum- Executive Magistrate, Malkangiri who on receipt of requisition from OIC, Malkangiri police station came to the spot and he stated that in his presence, the search and seizure took place and from the possession of the appellant contraband ganja of 2 K.G. was found. He is a witness to the seizure list Ext.4 and Ext.1/1.

P.W.13 Sunil Arun Kumar Naik was the S.I. of police attached to Malkangiri police station who is the informant as well as one of the Investigating Officer of the case.

The prosecution exhibited seven documents. Ext.1/1, 2, 3 and 4 are the seizure lists, Ext.5 is the sample cover, Ext.6 is the F.I.R. and Ext.7 is the chemical examination report.

The prosecution proved the sample ganja as M.O.I.

5. The defence plea of the appellant is one of denial. No witness was examined on behalf of the defence.

6. Though Mr. Sasanka Sekhar Satapathy, Advocate was engaged by the High Court Legal Services Committee to argue the appeal for the appellant but he was not found present when the matter was called and therefore, Mr. Nilamadhaba Praharaj, learned counsel who was present in Court was engaged as Amicus Curiae to assist the Court. He was supplied with paper book and given time to prepare the case. After going through the case records, he placed the impugned judgment and evidence on record.

Mr. Praharaj, learned counsel challenging the impugned judgment and order of conviction contended that the mandatory provision under section 42 of the N.D.P.S. Act has not been complied with and on this sole ground, the appellant is entitled to be acquitted. He argued that the learned trial Court has

not given any finding regarding the compliance of any of the mandatory provisions of the N.D.P.S. Act and in a mechanical manner found the appellant guilty under section 20(b)(ii) even though charge was framed under a wrong provision like 20(b)(i) of the N.D.P.S. Act. He further argued that the bulk quantity of ganja kept in separate packet at the time of seizure was not produced at the time of trial for marking the same as exhibit and the evidence is silent as to where the specimen seal was kept and it was not produced in Court at any time.

Mr. Anupam Rath, learned Addl. Standing Counsel on the other hand supported the impugned judgment and contended that in the first information report, the compliance of section 42 of the N.D.P.S. Act is apparent and moreover it cannot be said that there is any serious prejudice caused to the appellant merely because he was charged under section 20(b)(i) of the N.D.P.S. Act instead of section 20(b)(ii) of the N.D.P.S. Act.

7. Adverting to the contentions raised by the learned counsels for the respective parties and going through the evidence on record, I find there are several infirmities in the prosecution case.

The learned trial Court has framed charge under section 20(b)(i) of the N.D.P.S. Act for unlawful possession of 2 K.G. of Ganja. Section 20(b)(i) prescribes punishment for contravention relating to clause (a) of that section which deals with cultivation of cannabis plant. Therefore, the learned trial Court in the factual scenario has erroneously framed charge under section 20(b)(i) instead of section 20(b)(ii) of the N.D.P.S. Act. This point was not raised during trial. However, it is to be seen whether in view of section 464 of Cr.P.C., there is any failure of justice due to error in framing charge or any prejudice has been caused to the appellant due to such error. I find that in the contents of the charge, it is clearly mentioned on 04.10.2013 at about 11 a.m. near R.M.C. check gate, Malkangiri, the appellant was found in unlawful possession of 2 K.G. of contraband ganja. There is no dispute that framing of charge is not an empty formality. The object behind framing of charge is to make the accused aware of the nature and extent of the accusation against him. The learned trial Court should have been careful enough to mention the charge correctly. However, after going through the contents of the charge, I am of the humble view that no prejudice has been caused to the appellant on account of framing of charge under section 20(b)(i) instead of section 20(b)(ii) of the N.D.P.S. Act or any failure of justice has occasioned thereby inasmuch as the appellant was made aware of the nature and extent of the accusation against him.

8. Under section 42(1), if the empowered officer receives reliable information from any person relating to commission of an offence under the N.D.P.S. Act that the contraband articles and incriminating documents have been kept or concealed in any building, conveyance or enclosed place and he reasonably believes such information, he has to take down the same in writing. However, if the empowered officer reasonably believes about such aspects from his personal knowledge, he need not take down the same in writing. Similarly recording of grounds of belief before entering and searching any building, conveyance or enclosed place at any time between sunset and sunrise is necessary under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act if the concerned officer has reason to belief that obtaining search warrant or authorization for search during that period would afford opportunity for the concealment of evidence or facility for the escape of an offender. Section 42 (2) of the N.D.P.S. Act states that when an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall send a copy thereof to his immediate official superior within seventy-two hours.

The Hon'ble Supreme Court while discussing the provision under section 42 of the N.D.P.S. Act in case of **State of Punjab -Vrs.- Balbir Singh reported in (1994) 7 Orissa Criminal Reports (SC) 283** has been pleased to hold that the object of N.D.P.S. Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to section 42(1). To that extent they are mandatory. Consequently, the failure to comply with these requirements thus affects the prosecution case and therefore, vitiates of the trial.

In case of **State of Punjab -Vrs.- Baldev Singh reported in 1999 (II) Orissa Law Reviews (SC) 474**, it is held as follows:-

> "10. The proviso to sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief.

> Vide sub-section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of his belief under the proviso to sub-section (1) to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a *public place*. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful."

In the case of **State of West Bengal -Vrs.- Babu Chakraborthy reported in (2004) 12 Supreme Court Cases 201**, it is hold that great significance has been attached to the mandatory nature of the provisions, keeping in view the stringent punishment prescribed in the Act. Great importance has been attached to the recording of the information and the ground of belief since that would be the earliest version that will be available to a Court of law and the accused while defending his prosecution. The failure to comply with section 42(1), proviso to section 42(1) and section 42(2) would render the entire prosecution case suspect and cause prejudice to the accused.

In the case of **Dilip and another -Vrs.- State of M.P reported in (2007) 36 Orissa Criminal Reports (SC) 170**, it is held that the effect of a search carried out in violation of the provisions of law would have a bearing on the credibility of the evidence of the official witnesses, which would of course be considered on the facts and circumstances of each case.

The decision rendered in the case of *Baldev Singh (supra)* was further considered by a five-Judge Bench in the case of **Karnail Singh -Vrs.- State of Haryana reported in (2009) 44 Orissa Criminal Reports (SC) 183** wherein it was held in the concluding paragraph as follows:-

> "17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:
>
> (a) The officer on receiving the information (of the nature referred to in sub-section (1) of Section 42 from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

In the case of **Rajender Singh -Vrs.- State of Haryana reported in (2011) 50 Orissa Criminal Reports (SC) 217,** it is held that the total non-compliance with the provisions sub-section (1) and (2) of Section 42 is impermissible and it vitiates the conviction.

In view of the settled position of law, now it is to be seen whether the contentions raised by the learned counsel for the appellant that there is non-compliance of mandatory provision under section 42 of the N.D.P.S. Act is sustainable or not.

The present is not a case where P.W.13 suddenly carried out search at a public place. P.W.13 had the earlier reliable information while he was at the police station and he himself has come up with a case of compliance of section 42 of the N.D.P.S. Act in the first information report.

In the first information report (Ext.6), P.W.13 has mentioned as follows:-

> "..... On 04.10.2003 at 10.40 a.m., I received credible telephonic information that one old man is going in SBMS bus bearing Regd. No.OR 10B 5227 sitting on seat no.35 from Kalimela towards Malkangiri and he has carried one plastic hand bag containing ganja. The said bus is going from MV 79 to Jeypore. I entered the information in the P.S. station diary vide SDE No.62 dated 04.10.2003 at 10.40 a.m. and intimated the fact by sending the abstract of the station diary to the C.I./S.P., Malkangiri vide D.R. No.1711(2)/P.S. dt. 04.10.2003 (T) HC/200 G. Bishoi. There is no time to obtain search warrant and there is every possibility of decamping of suspect from the bus."

In his evidence, P.W.13 simply stated that on 04.10.2003 he received reliable information that ganja was being transported in a bus and accordingly, he along with his staff proceeded to R.M.C. gate, Malkangiri. Neither has he stated about entering the information in the station diary or intimating the fact by sending the abstract of the station diary to any superior officer by making diary entry through any constable. The relevant station diary has not been proved during trial nor was the abstract of the same exhibited. The constable who stated to have carried the abstract to the C.I./S.P., Malkangiri has not been examined. No officer from the office of C.I./S.P., Malkangiri has been examined to depose in that regard.

Therefore, even though in the F.I.R., it is stated about the compliance of section 42 of the N.D.P.S. Act but since the F.I.R. is not a substantive piece of evidence and during trial, the evidence adduced by the prosecution is totally silent in that respect and no corresponding document has been proved to substantiate such compliance, it is difficult to accept the contention raised by the learned counsel for the State.

When the search was conducted after recording reliable information in the police station under section 42(1) as per the F.I.R., therefore, even though the seizure was made in a public place during day time, in my humble view, compliance of the provisions of section 42(2) of the N.D.P.S. Act was necessary.

In view of the aforesaid discussions, it is apparent that there is non-compliance of the provisions under section 42 of the N.D.P.S. Act. Law is well settled that total non-compliance with the provisions under sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible and it vitiates the conviction and renders the entire prosecution case suspect and cause prejudice to the accused.

9. Coming to the contention raised by the learned counsel for the appellant that the bulk quantity of ganja kept in separate packet at the time of seizure was not produced at the time of trial for marking the same as exhibit, it is found that though in the first information report, it is mentioned that the bulk quantity was covered with white cloth stitched separately sealed with wax by heat process by using personal seal of the Executive Magistrate and the informant but the evidence of the informant (P.W.13) is totally silent about the bulk quantity of ganja. Where such bulk quantity was kept after seizure and why it was not produced during trial is shrouded in mystery and no explanation has been offered by the prosecution. If it was kept in Court malkhana, there was no difficulty in producing the same.

In case of **Noor Aga -Vrs.- State of Punjab reported in JT 2008 (7) SC 409**, the Hon'ble Supreme Court held that non-production of primary evidence-the contraband material, by the prosecution before the trial Court has resulted in drawing negative inference against the prosecution and this dents the credibility of the case of prosecution. The best evidence therefore would have been the seized contraband material before the Court which ought to have been produced during the trial and also the prosecution has not tendered any explanation with respect to the failure to produce the evidence. The oral evidence would not discharge the heavy burden on the prosecution particularly where the offence is punishable with stringent sentence as under the N.D.P.S. Act.

In case of **Ashok @ Dangra Jaiswal -Vrs.- State of M.P. reported in (2011) 49 Orissa Criminal Reports (SC) 225**, the Hon'ble Supreme Court held as follows:

> "12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial Court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the Appellant or the other accused."

In case of **Jitendra -Vrs.- State of M.P. reported in (2003) 26 Orissa Criminal Reports (SC) 783**, the Hon'ble Supreme Court held as follows:

> "5. The evidence to prove that charas and ganja were recovered from the possession of the accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (P.W.7), Angad Singh (P.W.8) and Sub-Inspector D.J. Rai (P.W.6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been

seized from the possession of the accused were not even produced before the trial Court, so as to connect it with the samples sent to the forensic science laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the charas and ganja were seized from the possession of the accused or that the samples sent to the forensic science laboratory were taken from the drugs seized from the possession of the accused. Although, the High Court noticed the fact that the charas and ganja alleged to have been seized from the custody of the accused had neither been produced in the Court, nor marked as articles, which ought to have been done, the High Court brushed aside the contention by observing that it would not vitiate the conviction as it had been proved that the samples were sent to the chemical examiner in a properly sealed condition and those were found to be charas and ganja. The High Court observed, 'non-production of these commodities before the Court is not fatal to the prosecution. The defence also did not insist during the trial that these commodities should be produced'. The High Court relied on section 465 Code of Criminal Procedure, 1973 to hold that non-production of the material object was a mere procedural irregularity and did not cause prejudice to the accused.

6. In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the N.D.P.S. Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned. The suggestion made by the defence in the cross-examination is worthy of notice. It was suggested to the prosecution witnesses that the landlady of the house in collusion with the police had lodged a false case only for evicting the accused from the house in which they were living. Finally, we notice that the investigating officer was also not examined. Against this background, to say that, despite the panch witnesses having turned hostile, the non-examination of the investigating officer and non- production of the seized drugs, the conviction under the N.D.P.S. Act can still be sustained, is far-fetched."

In case of **Vijay Jain -Vrs.- State of M.P. reported in (2013) 14 Supreme Court Cases 527**, the Hon'ble Supreme Court held as follows:

"12. We are thus of the view that as the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (P.W.2 and P.W.3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial Court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable."

In view of the ratio laid down by the Hon'ble Supreme Court in the aforesaid decisions, when neither the packet containing bulk quantity of ganja was produced during trial nor any explanation has been offered by the prosecution for such non-production, it affects the credibility of the prosecution case. Mere production of the sample ganja packet which has been marked as M.O.I is not sufficient. It cannot be lost sight of the fact that the prosecution claims the quantity of ganja seized from the possession of the appellant to be 2 K.G. which is obviously lesser than commercial quantity but greater than small quantity and punishable under section 20(b)(ii)(B) of the N.D.P.S. Act. When the contravention relates to 'small quantity' as has been defined under section 2(xxiia) of the N.D.P.S. Act, the punishment is lesser than what has been prescribed for the offence under section 20(b)(ii)(B) of the N.D.P.S. Act. Similarly for 'commercial quantity', the punishment is more stringent. Therefore, it is the duty of the prosecution to adduce cogent evidence relating to the actual quantity of ganja seized from the possession of the accused which is to be by way of oral, documentary evidence and also by actual production of the contraband ganja in Court and marking it as material object.

10. The last contention which was raised by the learned counsel for the appellant is that the prosecution evidence is silent as to where the personal seal was kept and it was not produced in Court at any time.

P.W.13 in the first information report has stated that his personal seal was given in the zima of weighman Sanjib Kumar Roy (P.W.6) by executing proper zimanama. P.W.6 has not supported the prosecution case. The evidence of P.W.13 is completely silent as to whom his personal seal was handed over. The zimanama of the personal seal has not been proved during trial. The order sheet of the Court indicates that the personal brass seal was not produced in Court when the appellant and seized articles were produced in Court. Handing over the brass seal to an independent, reliable and respectable person and asking him to produce it before the Court at the time of production of the seized articles in Court for verification are not the empty formalities or rituals but is a necessity to eliminate the chance of tampering with the articles.

11. In view of the foregoing discussions, the impugned judgment and order of conviction of the appellant under section 20(b)(ii) of the N.D.P.S. Act is not sustainable in the eye of law and the same is hereby set aside and the appellant is acquitted of the charge.

In the result, JCRLA is allowed. The appellant shall be released from custody forthwith if his detention is not required in any other case.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

Before parting with the case, I would like to put on record my appreciation to Mr. Nilamadhaba Praharaj, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.5,000/- (rupees five thousand only).

2018 (II) ILR - CUT- 828

J.P.DAS, J.

CRLMC NO. 5153 & NO. 1720 OF 2015

SUNIL KUMAR GARG & ANR. ……..Petitioners

.Vs.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Quashing of the order taking cognizance for the Offence under various sections of IPC and N.I.Act – Exercise of power – Principles – Held, it is the settled position of law that while exercising the jurisdiction under Section 482 of the Cr.P.C., this Court should not enter into highly disputed question of fact and such powers should be exercised sparingly and with caution only to prevent the abuse of process of the Court and not to stifle a legitimate prosecution – While exercising such powers, this Court cannot embark upon an enquiry as to the reliability of the evidence and sustainability of accusation, which is the responsibility of the trial court – It is also the position of law that even if the dispute between the parties appear to be civil in nature still a criminal prosecution is not barred. (Para 9)

Case Laws Relied on and Referred to :-

1. (2004) 6 SCC 522 (State of Andhra Pradesh .Vs. Golkunda Lingaswami & Anr).

For Petitioner : M/s. A.P.Singh & D.K.Pattnaik , A.A.Dash, B.K.Parida, A.N.Pattnayak, S.A. Pattanaik,M.M.Panda

For Opp. Party : Addl. Standing Counsel M/s.A.K.Mohapatra, S.J.Mohanty & B.Pati

JUDGMENT Date of Hearing : 15.05.2018 Date of Judgment : 02.11.2018

J.P.DAS, J.

This common order shall dispose of both the above applications filed by the same petitioners against the same opposite parties, since the matters in both the applications arose out of the same transactions.

2. In CRLMC No.5153 of 2015, the petitioners assail the order of cognizance passed by the learned S.D.J.M. (Panposh), Rourkela in G.R. Case No.633 of 2014 for the offences punishable under Sections 406/511/34 of the Indian Penal Code corresponding to Raghunathpalli P.S.Case No.66 of 2014 originally registered under Sections 379/411/424/34 of the I.P.C.. In CRLMC. No.1720 of 2015, the petitioners assail the order of cognizance passed by the learned S.D.J.M. (Panposh), Rourkela in G.R.Case No.634 of 2014 for the offences punishable under Sections 418/420/34 of the I.P.C. corresponding to Raghunathpalli P.S. Case No.67 of 2014 originally registered under Sections 418/42/506/34 of the I.P.C..

3. The petitioners are the Managing Director and Director of one M/s Good Luck Capital Private Limited of which M/s Good Luck Traders (henceforth mentioned as "G.L.T") is a sister concern dealing with Steel Business, having its head office in Delhi. The backdrop of the dispute between the parties, cutting short the long chain of events, is that the petitioners came in contact with the opposite party no.2 who happened to be the informant in both the cases and was the Managing Director of one Shivom Minerals Ltd. along with one Mr.Akash Gupta as Director having their business and office at Rourkela in Sundergarh district. The petitioners and the opposite party for their companies entered into two M.O.U on different terms and conditions for supplying of minerals and carrying on steel business. There were number of financial transactions between the two companies and the opposite party-informant issued two cheques for rupees one crore forty lakhs each in favour of the G.L.T on 17.11.2012 in order to secure certain payments said to have been made by the G.L.T in favour of the Firm of the informant. The said two cheques are the subject matter in CRLMC 5153 of 2015. Subsequently, in the month of December, 2012 the informant issued further two cheques for rupees one crore forty lakhs and twenty eight lakhs respectively in favour of the G.L.T. The initial business agreed upon between the parties could not proceed and they entered into the second M.O.U for carrying on further business. In the month of April, 2013 the informant-Company issued three further cheques each amounting to rupees one crore in favour of the G.L.T.. As per the second M.O.U, the G.L.T was to provide 75% of the investment and 25% was to be provided by the Company of the informant.

Thereafter, the G.L.T could not obtain mineral trading license from the State Government for which the business under the second M.O.U also could not proceed. Thereafter, the informant-Company requested the G.L.T to return all the seven cheques issued by them and the petitioner allegedly stated that the first two cheques were already returned and the balance five cheques would be returned shortly thereafter. The informant searched for the two cheques but could not find it and lodged a report at Raghunathpalli P.S. and informed the concerned Bank for stopping the payment. It was further alleged by the informant that apart from telling falsely that the first two cheques were returned to the informant-Company, the petitioners presented all the seven cheques for encashment instead of returning the same to the informant since all their business transactions as per agreement failed. Hence, the informant filed two complaint petitions which were subsequently registered at Raghunathpalli P.S. vide F.I.R Nos. 66 and 67 and after completion of investigation, chargesheets have been filed leading to taking of cognizance in both the cases as stated hereinbefore, which have been challenged in the present applications.

4. It is the case of the petitioners in both the cases that after entering into M.O.U. on demand by the informant for business transactions, they transferred different amounts at different times in favour of the Company of the informant through R.T.Gs and the Company of the informant in order to secure those payments, had issued the cheques with a request not to encash those cheques by the Company of the petitioners. It is their further case that the informant-Company making false promises and representing fabricated transactions placed lucrative proposals before the Company of the petitioner with an ulterior motive of cheating. It is their case that since the business transactions failed due to refusal of licence by the State Government as well as the mischief of the informant-Company, they presented the cheques for encashment but those were bounced from the Bank, for which, they lodged an F.I.R. before Preetvihar P.S., Delhi alleging offences punishable under Sections 406/420/468/471/34, I.P.C.. It is their case that in order to escape the liability for the offences as aforesaid apart from the prosecution under Section 138 of the N.I.Act, the informant has lodged two false complaints with concocted allegations and the learned S.D.J.M. without proper application of judicial mind, has taken cognizance in both the cases which should be quashed.

5. It is the case of the opposite party-informant as well as the State that the issuance of cheques by the informant to the petitioners remained admitted. It is also admitted that the business transactions as agreed upon, could not succeed, for which, the petitioners were liable to return the cheques. But, they fraudulently tried to encash those cheques for which the informant lodged the complaint and in order to escape the liability, the petitioners have lodged a false

F.I.R. against the informant in Delhi. It was further submitted on behalf of the opposite parties that the police after completion of investigation has found out the truth in favour of the informant's allegation apart from the fact that one of the petitioners in course of investigation has also admitted before the Police about the allegations made by the informant. It was also submitted that the allegations as made by the informant having been found out to be true prima-facie, charge-sheets have been filed and the learned S.D.J.M. has rightly taken cognizance thereupon. The submissions and the pleas as have been advanced on behalf of the petitioners are the matters which can only be gone into in course of trial on evidence and those could not have been taken into consideration by the learned trial court at the time of taking cognizance.

6. The dispute between the parties as per their submissions is that the informant issued seven cheques in faovur of the petitioners for certain business transactions as per two M.O.U and since the business could not proceed the petitioners were liable to return those cheques to the informant which they did not and put those cheques for encashment instead fraudulently. The plea advanced by the petitioners is that in course of their business transactions, they had transferred huge amounts to the account of the informant-Company through R.T.Gs at different times and the cheques were issued by the informant to secure those payments and since the business failed and the informant did not refund the amounts, the cheques were presented for enchashment but bounced from the Bank. Simply taking into consideration the submissions and counter submissions as aforesaid it can safely be said that all these matters could not have taken into consideration at the time of taking cognizance. The allegations as made by the informant have been found out to be prima-facie true by the Investigating Agency and the cognizance has been taken of the offences on submission of the charge-sheet. As per the settled proposition of law, the accused persons had no locus-standi to place their defence plea at the time of cognizance and the learned trial court is only to see as to whether the allegations as made are prima-facie true to proceed against he accused persons.

7. The main thrust of argument advanced on behalf of the petitioners was that the informant has lodged two complaints only to escape the liability of the criminal case filed by the petitioners before the Delhi Police and also the liability for the offence under Section 138 of the N.I.Act. Thus, it was submitted that the two cases filed by the informant are nothing but counter-blast to the cases filed by the petitioners. But as seen from the record, the first F.I.R. of the informant was registered on 20.03.2014 and the second F.I.R. was registered also on the same day at Raghunathpalli P.S. in the district of Sundergarh, whereas the F.I.R. of the petitioners was registered at Preetvihar P.S., Delhi on 23.07.2014 i.e. four months after the complaint lodged by the informant. Thus, it cannot be said prima-facie that the F.I.Rs registered on the complaint of the informant-opposite party were counter-blast to the cases lodged by the petitioners. So far as the liability under

Section 138 of the N.I.Act is concerned, it is neither been pleaded by the petitioners nor has been placed as to whether any complaint has been lodged by the petitioners before the appropriate court against the informant for the offence under Section 138 of the N.I.Act and if lodged, the date thereof.

8. Certain citations of case laws have been filed on behalf of the petitioners in support of their contentions that the F.I.Rs lodged as counter-blast to escape the liability for the offence under the Negotiable Instrument Act or for the other offences should be quashed in exercise of the power under Section 482 of the Cr.P.C. by the High Court.

9. But, it is the settled position of law that while exercising the jurisdiction under Section 482 of the Cr.P.C., this Court should not enter into highly disputed question of fact and such powers should be exercised sparingly and with caution only to prevent the abuse of process of the Court and not to stifle a legitimate prosecution ***(2004) 6 SCC 522*** **(State of Andhra Pradesh Vrs. Golkunda Lingaswami and Anr).**While exercising such powers, this Court cannot embark upon an enquiry as to the reliability of the evidence and sustainability of accusation, which is the responsibility of the trial court. It is also the position of law that even if the dispute between the parties appear to be civil in nature still a criminal prosecution is not barred.

10. In the present case, as narrated hereinbefore, the informant lodged the complaints with the allegations that he had issued the cheques for continuance of business transactions and deposit of his share of investment which should have been returned to him due to failure of the business as per the M.O.U. Per contra, it is the case of the petitioners that they had transferrerd different amounts at different times to the accounts of the informant's Company through R.T.Gs and the cheques were issued to secure those amounts and hence, they were at liberty to encash those cheques in order to get back their amount paid to the informant-Company. Learned counsel appearing for the petitioners placing voluminous documents relating to the business transactions between the parties submitted that the petitioners were not liable to return the cheques to the informant as alleged and that as per the terms of agreement, the informant opposite party had issued those cheques to secure the payments made by the G.L.T of the petitioners in favour of the informant's Company through R.T.Gs at different times. Suffice it to say that to examine those documents and their implications would amount to a mini trial which is neither permissible nor called for at this stage. The documents placed on behalf of the petitioners as plea of defence can only be thrashed out on evidence in course of trial. The facts and the circumstances as revealed, do not lead to a conclusion that there is absolutely no case against the petitioners and the trial of the dispute would be a futile exercise wasting the time of the Court so as to quash the orders of cognizance in exercise of the power under Section 482 of the Cr.P.C.. Accordingly, both the applications stand rejected being devoid of any merit.