THE INDIAN LAW REPORTS
(CUTTACK SERIES, MONTHLY)

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

Mode of Citation
2019 (I) I L R - CUT.

FEBRUARY-2019

Pages : 193 to 432

Edited By

BIKRAM KISHORE NAYAK, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

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

Annual Subscription : ₹ 300/-

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N O M I N A L I N D E X

ACTS & RULE

Acts & No.	
1950	Constitution of India, 1950
1973-2…..	Code of Criminal Procedure, 1973
1908-5…..	Code of Civil Procedure, 1908
2003-19…	Electricity Act, 2003
1984- 66….	Family Courts Act, 1984
1964-1…...	Orissa Grama Panchayat Act, 1964
1860-45….	Indian Penal Code, 1860
1947-14….	Industrial Disputes Act, 1947
1989- 24…	Indian Railways Act, 1989
1894-1…..	Land Acquisition Act, 1894
1963-36…	Limitation Act, 1963
1988-59….	Motor Vehicles Act, 1988
1069-15…	Orissa Education Act, 1969
1972- 69…	Orissa Forest Act, 1972
1980-65….	National Security Act, 1980
1985-61….	Narcotic Drugs And Psychotropic Substances Act, 1985
1972-39….	Payment of Gratuity Act, 1972
1988-49….	Prevention of Corruption Act, 1988
1908-16….	Registration Act, 1908
1984-66….	The Family Courts Act, 1984
1948-11….	The Minimum Wages Act, 1948
2005- 43…	The Protection of Women From Domestic Violence Act, 2005

RULE : - The Central Industrial Security Force Rules - 1969

SUBJECT INDEX

Section 100 – Second appeal – Plaintiff alleged that the defendants having no right, title, interest and possession over the land caused problem in his peaceful possession of the suit land when he wanted to repair ridge – The suit filed for seeking various relieves – When can be granted ? – Held, the settled position of law is that for the purpose, the plaintiffs have to stand on their own and they cannot take advantage of the weakness of the case of the defendants or their omissions.

Durga Das Dey & Ors. -V- Jatindranath Giri & Ors.

2019 (I) ILR-Cut…… 381

Section 115 - r/w Sec. 16 & 37 of the Arbitration and Conciliation Act, 1996 – Civil Revision – Challenge is made to the order rejecting an application filed under section 16 of the Arbitration and Conciliation Act, 1996 – The question arose as to whether civil revision is maintainable? – Held, No. – Reasons discussed.

Bedabyas Barik -V- Sukanti Barik.

2019 (I) ILR-Cut…… 295

Order 7 Rule 11 – Provision under – Plaintiff instituted suit for declaration of the registered sale deed executed by him as void – Defendant filed petition for a direction that the plaintiff has to pay ad-valorem court fees – Plaintiff objected saying that the sale deed has been executed without consideration and as such he can put his own valuation and pay the court fees – Question arose as to whether the plaintiff, who is a party to the sale deed and seeks declaration of that sale deed to be void, shall pay the ad-valorem court fees or not ? – Held, this Court finds that the plaintiff has executed the sale deed and it is evident that consideration amount has been paid – Plaintiff has to pay ad-valorem court fees.

Kumar Soumyakanta Bisoi -V- Banita Panda & Anr.

2019 (I) ILR-Cut…… 321

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition seeking grant, execute and register a mining lease deed – An area of 100.063 hectares of land was allotted in favour of petitioner for its captive mining – Out of that, 64.463 hectares was non-forest land and 35.60 hectares was forest land – In respect of 64.463 hectares of non-forest mining lease has already been executed and petitioner is in operation of the same – The split up area of 35.60 hectares, which is forest land, in respect of the same, the required provisions of laws have been followed and due clearances have been given by the respective authorities – Effect of – Held, nothing remains but to execute a mining lease in favour of petitioner as it has complied with all the statutory requirements and deposited requisite fees for various accounts – But during pendency of execution of the mining lease, the Minor Mineral (Development and Regulation) Act, 1957 has undergone amendment, which has been

inserted by Act 10 of 2015 with effect from 12.01.2015 – Whether amended provision can have application – Held no, reasons indicated – Direction to execute mining lease – But at the same time, this Court is of the considered opinion that there is nothing available on record to stand in the way of petitioner for executing the mining lease, as it has already complied all the requirements under various provisions of the Act and all the authorities concerned have acknowledged the requisite fees deposited for the purpose of execution of such mining lease.

M/s. Balasore Alloys Ltd. & Anr. -V- State of Odisha & Ors.

2019 (I) ILR-Cut…… 214

Articles 226 &27 – Writ petition challenging the clarification issued by Council of Higher Secondary Education on the question of vocational training qualification and seek for direction to consider their vocational certificates for all practical purposes including their service prospects – Petitioners primarily acquired intermediate qualification and after that they pursued the vocational course – After completion of vocational course they are serving as 'Gomitras' – While continuing as 'Gomitras' applied for the post of Live Stock Inspector – Consideration of their applications – Authority while considering their applications held that, one person can't hold two equivalent qualification in same time presuming vocational course as similar to the intermediate course – The examination committee passed resolution to the extent that, vocational qualification shall be cancelled/withdrawn thereby debarring the petitioners to hold the post of 'Gomitra' as well as applying to the post of Live Stock Inspector – Action of the authority on the basis of such clarification challenged – Provisions of Orissa Education Act and Orissa Higher Secondary Regulation, 1982 – Held, there is no such bar in the regulations debarring a candidate from applying to the vocational course of the council, after acquiring the certificate of +2 Arts/Science & Commerce – In absence of any statutory restriction, the decision of the Committee can't be sustained in the eye of law as because on acquisition of vocational qualification a right has already been accrued in favour of the petitioners – Mere passing of a resolution cannot take away the right, which has already been accrued in favour of the petitioners, and the same cannot have any justification and, as such, such decision has been taken on the caprice and whims of the committee, which is arbitrary, unreasonable and contrary to the provisions of law.

Basudev Guru & Ors. -V- State of Odisha & Ors.

2019 (I) ILR-Cut…… 355

Articles 226 and 227 – Writ petition – Challenge is made to the rejection of technical bid on the ground that the bidder had no requisite experience of executing similar nature of work as per relevant clause of DTCN – Six members Technical Committee has considered the bid and has opined that the petitioner has no requisite experience of executing similar nature of

SERVICE LAW – Regularization – Petitioners joined as Casual Workers in 1982 in Central Rice Research Institute – Government of India, Ministry of Personnel and Pension, issued a scheme vide Memo No.51016/2/90-Estt.(C) dated 10.09.1993 with regard to grant of temporary status and regularization of casual workers who are eligible in accordance with the said guidelines which was given effect from 01.09.1993 – As per the scheme, the temporary status would be confirmed for all casual labourers, who were in employment on the date of issue of the said memorandum and who rendered a continuous service of at least one year, which means that they must have engaged for a period of 240 days or 206 days in case of offices observing five days week – Such conferment of temporary status would be without reference to the creating availability of regular Group-D posts – Writ petition challenging the order of CAT refusing to grant the relief of regularization – Held, Needless to say, the petitioners have already rendered 20 years of services and have completed three years of temporary status – They should have been considered for absorption against the permanent Group-D post – It is well settled law laid down by the apex Court that the casual workers having temporary status continuing for two to three years, the presumption can be taken that there is a regular need of their services and they should have been absorbed against Group-D posts – The order passed by the Central Administrative Tribunal is contrary to the law laid down by the apex Court.

Bansidhar Naik & Ors. -V- Union of India & Ors.

2019 (I) ILR-Cut…… 235

WORDS AND PHRASES – "Abandonment of service" – Meaning of – Abandonment of service can be inferred from the existing facts and circumstances which prove that the employee intended to abandon the service**.**

Manju Saxena -V- Union of India & Anr. (S.C)

2019 (I) ILR-Cut…… 193

2019 (I) ILR - CUT- 193 (S.C.)

ABHAY MANOHAR SAPRE, J & INDU MALHOTRA, J.

CIVIL APPEAL NOs. 11766 -11767 OF 2018
(Arising out of SLP (Civil) Nos. 30205-30206 of 2017)

MANJU SAXENA ……..Appellant

.Vs.

UNION OF INDIA & ANR. ……..Respondent(s)

(A) WORDS AND PHRASES – "Abandonment of service" – Meaning of – Abandonment of service can be inferred from the existing facts and circumstances which prove that the employee intended to abandon the service. (Para 5.3)

(B) INDUSTRIAL DISPUTE ACT, 1947 – Section 25-F – Provisions under – Applicability – An employee who voluntarily abandons work cannot be treated as in "continuous service" of the employer as per Section 2 (oo) of the Industrial Disputes Act – Held, in such event procedure for retrenchment under Section 25F of the ID Act will not apply to such an employee – Condition precedent for Retrenchment of an employee – Discussed. (Para 5.3)

"Once it is established that the Appellant had voluntarily abandoned her service, she could not have been in "continuous service" as defined under S. 2 (oo) the I.D. Act, 1947. Section 25F of the I.D. Act, 1947 lays down the conditions that are required to be fulfilled by an employer, while terminating the services of an employee, who has been in "continuous service" of the employer. Hence, Section 25F of the I.D. Act, would cease to apply on her",

Case Laws Relied on and Referred to :-

1 (1964) 4 SCR 265 : Buckingham & Carnatic Co. Ltd. .Vs. Venkatiah & Ors.
2 (2013) 10 SCC 253: Vijay S Sathaye .Vs. Indian Airlines Ltd. & Ors.
3 AIR 1960 SC 923 : Hathisingh Manufacturing Ltd. .Vs. Union of India
4(1991) 1 SCC 189 : Gurmail Singh & Ors. .Vs. State of Punjab & Ors.
5 (2003) 4 SCC 619 : Pramod Jha & Ors. .Vs. State of Bihar & Ors.

For Appellant : In person
For Respondent :Gegan Gupta [Caveat]
Gegan Gupta [R-2]

JUDGMENT Date of Judgment : 03.12. 2018

INDU MALHOTRA, J.

Leave granted.

1. The present S.L.P.s arise out of the impugned Judgment dated 14.07.2017 passed in L.P.A. No. 467/2017, and Order dated 13.09.2017

passed in R.P. No. 380/2017 of the Delhi High Court, wherein the High Court dismissed the L.P.A filed by the Appellant against the 2nd Respondent -HSBC Bank.

2. Briefly stated, the factual matrix in which the present S.L.P. has been filed are summarized as under:

2.1 The Appellant was appointed on 01.04.1986 as a "Lady Confidential Secretary" by the 2nd Respondent-HSBC Bank, (hereinafter referred to as "the R2Bank").

Subsequently, on 23.04.1992 the Appellant came to be promoted as a "Senior Confidential Secretary" to the Senior Manager (North India) of HSBC.

2.2 In May 2005, the post of "Senior Confidential Secretary" became redundant, as the Officer with whom the Appellant was attached, left the services of the R2-Bank. Her services were utilized by giving her some other duties for the time being, till alternate jobs could be offered to her.

The Management admittedly offered her four alternate jobs of (i) Business Development Officer, (ii) Customer Service Officer, (iii) Clearing Officer, and (iv) Banking Services Officer. Each of these jobs were in the same pay scale.

The Appellant has admitted in her Statement of Claim dated 20.03.2006, that she declined to accept any of these jobs on the ground that such jobs were either temporary in nature, or the claimant did not possess the experience or Work-knowledge to take up such jobs.

2.3 On 01.10.2005, the Bank issued a Letter terminating the services of the Appellant on the ground that her current job had become redundant. The Appellant was offered several job opportunities, however, she did not choose any of these offers. The Bank had offered a generous severance package, which she was not prepared to accept. The Bank terminated her service, and paid 6 months' compensation in lieu of Notice as per the contract of employment. In addition, as a special case, the Bank paid Compensation, which was equivalent to 15 days' salary for every completed year of service. The total amount paid to the Appellant was Rs. 8,17,071/.

2.4 The Appellant raised an Industrial Dispute before the Regional Labour Commissioner under the Industrial Disputes Act, 1947 (hereinafter referred to as the I.D. Act) on 03.10.2005, and sought enhancement of the severance package paid to her. It is relevant to note that the Appellant did not raise any claim for reinstatement to the R2-Bank.

Conciliation proceedings were commenced between the Appellant and R2-Bank, wherein the Appellant made the following claims:

HEADS	**AMOUNT (INR)**
Severance	69,99,600.00
Provident Fund	8,90,111.60
Gratuity	3,81,209.00
Leave Encashment	86,541.40
Compensation + Notice Pay	8,17,071.00
TOTAL	**91,74,533.00**

The Bank, in response, offered the following package:

HEADS	**AMOUNT (INR)**
Severance	32, 79, 600.00
Provident Fund	8,90,111. 60
Gratuity	3,81,209.00
Leave Encashment	86,541.40
Compensation + Notice Pay	8,17,071.00
TOTAL	**57,29,533.00**

The only difference between the two parties was with respect to the amount of Severance payable to the Appellant. Since the parties were unable to arrive at a settlement, the conciliation proceedings failed.

2.5 The Appellant filed her Statement of Claim dated 20.03.2006, before the Central Government Industrial Tribunal (referred to as "the CGIT") claiming *inter alia* an enhanced severance package, waiver of outstanding Housing Loan, and full pension. The Claim was opposed by the R2-Bank. The R2-Bank filed its Written Statement and

contested the claim of the Appellant, stating that the Appellant was not a "workman" under the I.D. Act, 1947. The Bank further stated that they had followed the procedure outlined under the I.D. Act, while terminating the services of the Appellant.

The Ld. CGIT passed an Award dated 01.06.2009, and directed the R2Bank to reinstate the Appellant, with full terminal benefits.

2.6 The R2-Bank filed Writ Petition bearing No. W.P. (C) 11344/2009 before the Delhi High Court, to challenge the Award passed by the CGIT. The High Court vide Interim Order dated 22.03.2013 remanded the matter to the CGIT for fresh consideration on the point whether the Appellant could be considered to be a "Workman" as per the Industrial Disputes Act, 1947. The Writ Petition was kept pending during the pendency of the remand. The CGIT passed a fresh Award dated 15.07.2015 holding the Appellant to be a "workman" under the I.D. Act, 1947.

The Ld. CGIT directed the R2-Bank to reinstate the Appellant with continuity of service, full back wages, and all consequential benefits.

2.7 During the pendency of the Writ Petition, the Appellant had filed an Application under S. 17B of the I.D. Act, 1947 before the Delhi High Court seeking interim maintenance. The High Court vide Interim Order dated 27.07.2012 directed payment of a monthly sum of Rs. 75,000/to the Appellant, towards Interim Maintenance u/S. 17B of the I.D. Act, 1947.

2.8 Aggrieved by the Order dated 27.07.2012, the R2 -Bank filed an L.P.A. before the Delhi High Court to challenge the amount awarded to the Appellant u/S. 17B. The Division Bench vide Order dated 24.08.2012, reduced the monthly sum payable to Rs. 58,330/per month which was as per her last drawn salary.

The S.L.P. filed by the Appellant being S.L.P. (C) No. 36513/2012 to challenge the Order dated 24.08.2012, came to be dismissed vide Order dated 07.01.2013.

The Appellant accordingly has been paid back wages u/S. 17B at Rs. 58,330/per month.

2.9 The Appellant also raised a claim for waiver of the outstanding amount of a Housing Loan availed by her during the course of her service, which was outstanding on the date of her termination. The total amount of outstanding loan was approximately Rs. 22,16,702/.

The Appellant challenged proceedings for recovery initiated by the R2-Bank before the Delhi High Court in W.P. (C) No. 19451/2006. A Consent Order dated 18.03.2010 came to be passed whereby the outstanding amount of Rs.22,16,702/towards the Housing Loan, was to be adjusted from her back wages, subject to the final outcome of the W.P. (C) No. 13344/2009.

2.10 The Writ Petition filed by the R2-Bank was allowed by the learned Single Judge vide Judgment and Order dated 12.04.2017, and the Award passed by the CGIT came to be set aside.

The High Court accepted the R2-Bank's submissions, and held that the Appellant's refusal to accept any of the four alternate positions offered to her, amounted to "abandonment" of her job. Hence there was no question of her services having been illegally terminated. The Appellant had received monetary compensation under several heads, to the tune of Rs. 1,07,73,736/during the pendency of the Writ Petition, which was almost 13 times her legal entitlement. This included payments made under the various heads such as Compensation paid during termination, Gratuity, Payment towards Interim Award, Payments under S. 17B, Payment towards legal expenses. The Appellant was directed to refund the entire amount except the sum of Rs. 8,17,071/, which was the compensation paid at the time of termination.

2.11 Aggrieved by the Judgment & Order dated 12.04.2017 in W.P. (C) 11334/2018, the Appellant filed L.P.A. No. 467/2017 before the Division Bench. The Division Bench vide Judgment & Order dated 14.07.2017 dismissed the L.P.A., and upheld the Judgment of the learned Single Judge holding that the Appellant had abandoned her job.

The Division Bench however modified the operative direction passed by the Ld. Single Judge for restitution of the amounts paid. The Division Bench ordered that the Appellant shall not be required to

restitute the amount of Rs. 8,17,071/paid at the time of termination, the litigation expenses, and the amounts paid under S. 17B of the I.D. Act, 1947.

2.12 The Appellant filed Review Petition No. 380/2017 which was dismissed vide Order dated 13.09.2017.

2.13 The Appellant has assailed the Judgment dated 14.07.2017 and Order dated 13.09.2017 passed by the Division Bench in the L.P.A. and the Review Petition, by the present S.L.P.s.

3. The Appellant was appearing in Person. Even though the Court had made a suggestion that a Counsel be appointed to represent her, she declined the same. The submissions made by the Appellants are:

3.1 The Appellant submitted that she is entitled to a Severance Package of Rs. 69.99 lakhs, which is equivalent to her last drawn salary of Rs. 58,330/per month for a period of 10 years, i.e. 120 months.

The calculations put forth by the Appellant is as follows:

[Severance Package = Last drawn monthly Salary x 120 months];

[Rs. (58,330 x 120) = Rs. 69,99,600/]

3.2 The Appellant submitted that she had been in "continuous service" for over 20 years with the R2bank. Consequently, she was eligible for all benefits payable to a 'workman' under the I.D. Act.

3.3 The Appellant further submitted that the terms of the Housing Loan taken by her during the course of service, provided for 782certain relaxations and benefits to the employees. The Appellant submitted that her outstanding loan amount should be waived by the R2-Bank.

3.4 The Appellant submitted that the R2bank had been deducting T.D.S. on all the payments made to her during the pendency of the legal proceedings. The Appellant submits that this deduction is illegal, and she is entitled to a refund of a sum of Rs. 13,69,083/deducted towards T.D.S.

4. The R2-Bank was represented by Mr. Dhruv Mehta, Sr. Adv, alongwith Mr. Gagan Gupta, Adv, the Counsel for the R2-bank *inter alia* submitted:

4.1 It is the admitted position that the Appellant's post had become redundant when her boss left the Bank. The Appellant was offered four alternate positions of (i) Business Development Officer, (ii) Customer Service Officer, (iii) Clearing Officer, and (iv) Banking Services Officer in the same pay scale. The Appellant however declined each of these offers. In these circumstances, her services came to be terminated. As a special case, a severance amount of Rs. 8,17,071/was paid apart from the other benefits.

4.2 It was further submitted that the Bank complied with all the mandatory requirements specified in S. 25F (a) and (b) of the I.D. Act. The compensation of Rs. 8,17,071/granted to the Appellant, was computed in accordance with S. 25F (b) i.e. compensation equivalent to 15 days' salary multiplied by the number of years of employment.

The High Court had recorded that the Appellant had already received monetary benefits in excess of the compensation she was entitled to under the law. Therefore, the Appellant was not entitled to any additional amount.

4.3 The R2-Bank submitted that during Conciliation proceedings, they had offered a Severance Package of Rs. 32.79 lacs which was worked out on the basis of the last drawn Basic Salary + Monthly Allowances, for past 10 years (equal to 120 months). The Basic Salary was Rs. 19,280/and Monthly Allowances [H.R.A. + Medical + L.T.A. of Rs. 8,050/]. The total basic component was Rs. 27,330/(19,280 + 8,050).

The severance package by the Bank was computed as follows:

Severance Package = (Monthly basic component x 120 months) = Rs. 27,330 x 120 = Rs. 32,79,600/

5. We have perused the pleadings and Written Submissions made by the parties.

5.1 It is the admitted position that the Bank had offered four alternative positions such as "Business Development Officer",

"Customs Service Officer", which were at par with her existing pay scale and emoluments. The Appellant was however not willing to accept any of the alternate positions offered to her. Nor was she willing to accept the redundancy package offered to her. In the circumstances the R2Bank was justified in terminating the services of the Appellant, vide termination letter dated 01.10.2005.

5.2 The Bank has complied with the statutory requirements under S. 25F of the I.D. Act which lays down the conditions that an employer must comply, on the retrenchment of a workman.

In the present case, the High Court has held that the Appellant had "abandoned" her job, on her refusal to accept any of the alternative positions with the bank, on the same pay scale.

5.3 The concept of "abandonment" has been discussed at length in a Judgment delivered by a 3Judge Bench of the Supreme Court in *The* ***Buckingham & Carnatic Co. Ltd.*** **v** ***Venkatiah & Ors.***[1] wherein it was held that abandonment of service can be inferred from the existing facts and circumstances which prove that the employee intended to abandon service. This case was followed by a two judge bench in ***Vijay S Sathaye*** **v** ***Indian Airlines Ltd. & Ors.***[2] .

In the case before us, the intentions of the Appellant can be inferred from her refusal to accept any of the 4 alternative positions offered by the R2-Bank. It is an admitted position that the alternative positions were on the same pay scale, and did not involve any special training or technical knowhow.

In any event, the claims raised by the Appellant before various forums were with respect to enhancement of compensation, which are monetary in nature. The Appellant's conduct would constitute a voluntary abandonment of service, since the Appellant herself had declined to accept the various offers of service in the Bank. Furthermore, even during conciliation proceedings she has only asked for an enhanced severance package, and not reinstatement.

Once it is established that the Appellant had voluntarily abandoned her service, she could not have been in "continuous service" as defined under S. 2(oo) the I.D. Act, 1947.

S. 25F of the I.D. Act, 1947 lays down the conditions that are required to be fulfilled by an employer, while terminating the services of an employee, who has been in "continuous service" of the employer. Hence, S. 25F of the I.D. Act, would cease to apply on her.

The condition precedent for Retrenchment of an employee, as provided in S. 25F of the I.D. Act, 1947 was discussed by a Constitution Bench of this Court in ***Hathisingh Manufacturing Ltd.*** **v** ***Union of India***[3]**,** while deciding the constitutional validity of S. 25FFF. The Constitution Bench held,

"9. …Under Section 25F, no workman employed in an industrial undertaking can be retrenched by the employer until (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period has expired or the workman has been paid salary in lieu of such notice, (b) the workman has been paid retrenchment compensation equivalent to 15 days' average salary for every completed year of service and (c) notice in the prescribed manner is served on the appropriate Government….By S. 25F a prohibition against retrenchment, until the conditions prescribed by that Section are fulfilled in imposed."

S. 25F of the I.D. Act, 1947 is extracted herein below:

"25F. Conditions precedent to retrenchment of workmen. No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

(a) The workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government [or such authority as may be specified by the appropriate Government by notification in the Official Gazette]."

In the present case, the R2-Bank has paid the Appellant a sum of Rs. 8,17,071/, which included 6 months' pay in lieu of Notice under S. 25F(a) and an additional amount calculated on the basis of 15 days' salary multiplied by the number of years of service, in compliance with S. 25F(b).

However, no Notice was sent to the Appropriate Government or authority notified, in compliance with S. 25F(c) of the I.D. Act.

A three Judge Bench of this Court in ***Gurmail Singh & Ors.*** **v** ***State of Punjab & Ors.***[4] Held that the requirement of clause (c) of S. 25F can be treated only as directory and not mandatory. This was followed in ***Pramod Jha & ors.*** **v** ***State of Bihar & Ors.***[5] wherein it was held that compliance with S. 25F(c) is not mandatory.

5.4 The Appellant has admittedly received an amount of Rs. 1,07,73,736/under various heads:

HEADS	**AMOUNT (IN RS.)**
Towards Notice Period	1,77,684/
Severance Pay	6,39,387/
Gratuity	3,81,209/
Back Wages pursuant to Execution	8,00,000/-
Towards Interim Award	33,19,096/
Payments made under S. 17B.	54,56,360/
TOTAL	**1,07,73,736/-**

The Appellant has claimed an amount of Rs. 69.99 lakhs. The Appellant has already received almost double the amount claimed by her.

6. In light of the discussions above, the aforesaid amounts received by her may be treated as a final settlement of all her claims. The impugned Judgment of the Division Bench dated 14.07.2017, is modified to this extent. The Civil Appeals stand dismissed, with no order as to costs. All applications stand disposed of accordingly.

2019 (I) ILR - CUT- 203 (S.C.)

DR. DHANANJAYA. Y. CHANDRACHUD, J & HEMANT GUPTA, J.

CIVIL APPEAL NO. 116 OF 2019
(@SLP(C) No(s). 26932/2018)

SNEH LATA GOEL ……..Appellant(s)

.Vs.

PUSHPLATA & ORS. ……Respondent(s)

CODE OF CIVIL PROCEDURE, 1908 – Section 21 read with Section 47 – Objection before the executing court questioning the territorial jurisdiction of the court which passed the decree – Whether permissible ? – Held, No, the bench, referring to Section 21 of CPC, observed: "This provision which the legislature has designedly adopted would make it abundantly clear that an objection to the want of territorial jurisdiction does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit – Hence, it has to be raised before the court of first instance at the earliest opportunity, and in all cases where issues are settled, on or before such settlement – Moreover, it is only where there is a consequent failure of justice that an objection as to the place of suing can be entertained – Both these conditions have to be satisfied." – Order of High court which was in excess of jurisdiction in reversing the judgment of the executing court which had correctly declined to entertain the objection to the execution of the decree on the ground of want of territorial jurisdiction on the part of the court which passed the decree, set aside. (Para 6 & 17)

Case Laws Relied on and Referred to :-

6 AIR 1954 SC 340 : Kiran Singh .Vs. Chaman Paswan
7 (2005) 7 SCC 791 : Harshad Chiman Lal Modi.Vs. DLF Universal Ltd.
8 AIR 1962 SC 199 : Hiralal .Vs. Kalinath
9 (2005) 7 SCC 791 : Harshad Chiman Lal Modi.Vs. DLF Universal Ltd.
10 (2007) 2 SCC 355 : Hasham Abbas Sayyad .Vs. Usman Abbas Sayyad.
11 (2009) 2 SCC 244 : Mantoo Sarkar .Vs. Oriental Insurance Co. Ltd.
12 (1970) 1 SCC 670 : Vasudev Dhanjibhai Modi .Vs. Rajabhai Abdul Rehman.

For Appellant : Shyamal Kumar [P-1]
For Respondents : Ankur Yadav [R-1]
Sujeeta Srivastava [R-2]
Sujeeta Srivastava [R-3]

JUDGMENT Date of Judgment : 07. 01.2019

DR. DHANANJAYA.Y. CHANDRACHUD, J.

1 Leave granted.

2 This appeal arises from a judgment and order of the High Court of Jharkhand at Ranchi dated 15/17 July 2018.

3 The facts lie in a narrow compass:

On 9 May 1985, a partition suit[1] was instituted by Smt. Saroja Rani, daughter of Late Rai Sri Krishna (since deceased), in respect of her 1/4th share in the suit property which comprises of properties at Ranchi and Varanasi. The suit was instituted at Ranchi in the Court of the Special Subordinate Judge. The defendant in that suit (since deceased) filed a petition before the High Court of Judicature at Patna questioning the jurisdiction of the Ranchi Courts. The petition was disposed of by the High Court on 10 May 1989 with the direction that any objection to jurisdiction would be decided by the Special Subordinate Judge at Ranchi as a preliminary issue. A preliminary decree was passed ex-parte on 13 June, 1990 granting the Petitioner her extent of 1/4th share in the schedule property. A final decree was passed on 5 April 1991 confirming the preliminary decree passed on 13 June, 1990.

One of the defendants in the partition suit filed a title suit[2] before the Court of Subordinate Judge, Ranchi. On 22 July 2003, the suit was dismissed for nonprosecution. The first respondent filed a title suit[3] before the Court of Subordinate Judge at Varanasi which was dismissed under Order VII, Rule 11 of the CPC on 12 April 2005 on the ground of being barred under Section 21A of the Code of Civil Procedure 1908 ("CPC"). The first respondent filed an application under Order IX Rule 13 in respect of the title suit filed at Ranchi which was also dismissed as withdrawn on 19 February 2008.

Since the mother of the appellant was alive when the suit was instituted, the claim was confined to a 1/4th share. During the pendency of the suit, the mother died. As a result, there was a modification in the share of the three sisters at 1/3rd each. On 18 December 2013, the Subordinate Judge at Ranchi passed a supplementary final decree in view of the death of the mother of the appellant and the first respondent on 9 February 1996.

4. On 12 May 2014, the appellant filed proceedings for the execution of the final decree at Ranchi.[4] On 1 January 2015, the first respondent filed an objection under Section 47 of the Code of Civil Procedure contending that the decree dated 13 June 1990, the final decree dated 5 April 1991 and the supplementary final decree dated 18 December 2013, were without

1. 154/1985 , 2. 114/1998, 3. 176/2000, 4. 5/2014, 5. 43/2015

jurisdiction and therefore, a nullity. On 10 March 2015, the first respondent challenged the decree dated 13 June, 1990 in appeal under Section 96 of the CPC.[5] The appeal is pending.

5. On 10 March 2016, the executing court dismissed the objections of the first respondent under Section 47 of the CPC with the following observations:

> "The decree holder is entitled to get the fruits of the decree and the executing court cannot go behind the decree. When a decree is made by a court which as no inherent jurisdiction, an objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record. Where the objection as to the jurisdiction of the court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at trial, which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree on the ground of jurisdiction."

Aggrieved by the order of the executing court, the first respondent initiated proceedings under Article 227 of the Constitution of India. The High Court by its impugned judgment and order came to the conclusion that the executing court was in error in holding that it lacked jurisdiction to entertain the objection as to the validity of the decree on ground of an alleged absence of territorial jurisdiction.

6. The High Court observed that the plea that the decree could not be executed on the ground that it had been passed by a court which had no territorial jurisdiction to entertain the partition suit could have been raised under Section 47 of the CPC. The High Court held thus:

> "The executing court fell in serious error in law where it has observed that the executing court will have no jurisdiction to entertain an objection as to the validity of the decree on the ground of jurisdiction. Under Section 47 CPC, the petitioner has not challenged the validity of the decree on merits, rather the plea taken by her is that the decree cannot be executed for it has been passed by a court which had no territorial jurisdiction to entertain Partition Suit No.154 of 1985."

The application raising the objection was hence restored to the file of the executing court for disposal.

7. Assailing the judgment of the High Court, these proceedings have been instituted.

Mr Mukul Rohatgi, learned senior counsel appearing on behalf of the appellant submitted that an objection to territorial jurisdiction does not relate to the inherent jurisdiction of the civil court. Such an objection has to be

addressed before that court and in the event that the court rejects such an objection, it must be raised before the competent court in appeal. Consequently, the High Court was in error in directing the executing court to deal with such an objection. Moreover, it was urged that the respondent was aware of the proceedings which were taking place, which is evident from the following circumstances:

(i) The respondent had filed a title suit before the Court at Ranchi which was dismissed for non-prosecution on 22 July 2003;

(ii) The respondent filed a title suit before the Court at Varanasi which was dismissed under Order VII, Rule 11 of the CPC on 12 April 2005; and

(iii) The respondent filed an application under Order IX Rule 13 in respect of the title suit filed at Ranchi which was also dismissed as withdrawn on 19 February 2008.

Based on these circumstances, it was urged that the objection which has been allowed to be raised in execution is merely an effort to delay and obstruct the implementation of the decree which has been passed in the suit for partition.

8. On the other hand, Mr. S. R. Singh, learned senior counsel appearing on behalf of the respondents, has urged the following submissions:

(i) An objection to the lack of territorial jurisdiction is an objection to the subject matter of the suit and hence of a nature that can be raised before the executing court. In support, reliance is placed on the decisions of this Court in **Kiran Singh** v **Chaman Paswan**[6] and **Harshad Chiman Lal Modi** v **DLF Universal Ltd**.[7];

(ii) The impugned order of the High Court is an interlocutory order and hence it is not appropriate at this stage to entertain a proceeding under Article 136 of the Constitution of India; and

(iii) The case of the respondents all along has been that the property on the basis of which jurisdiction was founded at Ranchi did not belong to the common ancestor and in which event, the civil court at Ranchi had no jurisdiction to entertain the suit for partition.

9. In assessing the merits of the rival submissions, it would, at the outset, be necessary to advert to the provisions of Section 21 of the CPC.

6. AIR 1954 SC 340, 7. (2005) 7 SCC 791

> "Section 21(1) postulates that no objection as to the place of suing shall be allowed by any appellate or revisional court unless the objection was taken in the court of first instance at the earliest possible opportunity and in all cases where issues are settled on or before such settlement, and unless there has been a consequent failure of justice.
>
> (2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.
>
> (3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice."

Sub-section (1) of Section 21 provides that before raising an objection to territorial jurisdiction before an appellate or revisional court, two conditions precedent must be fulfiled:

> i) The objection must be taken in the court of first instance at the earliest possible opportunity; and
>
> ii) There has been a consequent failure of justice.

This provision which the legislature has designedly adopted would make it abundantly clear that an objection to the want of territorial jurisdiction does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit. Hence, it has to be raised before the court of first instance at the earliest opportunity, and in all cases where issues are settled, on or before such settlement. Moreover, it is only where there is a consequent failure of justice that an objection as to the place of suing can be entertained. Both these conditions have to be satisfied.

10. The learned counsel appearing on behalf of the respondents has submitted that the objection as to the lack of territorial jurisdiction was raised in the written statement before the trial court. But evidently the suit was decreed ex-parte after the respondents failed to participate in the proceedings. The provisions of Section 21(1) contain a clear legislative mandate that an objection of this nature has to be raised at the earliest possible opportunity, before issues are settled. Moreover, no such objection can be allowed to be raised even by an appellate or revisional jurisdiction, unless both sets of conditions are fulfilled.

11. Learned counsel appearing on behalf of the respondent has placed a considerable degree of reliance on the judgment of four Judges of this Court in **Kiran Singh** (supra). In that case, there was a dispute in regard to the valuation of the suit. The issue would ultimately determine the forum to which the appeal from the judgment of the trial court would lie. If the valuation of the suit as set out in the plaint was to be accepted, the appeal would lie to the district court. On the other hand, if the valuation as determined by the High Court was to be accepted, the appeal would lie before the High Court and not the District Court. It was in this background that this Court held that as a fundamental principle, a decree passed by a court without jurisdiction is a nullity and that its validity could be set up wherever it is sought to be enforced or relied upon, even at the stage of execution in a collateral proceeding. Moreover, it was held that a defect of jurisdiction, whether pecuniary or territorial or whether it is in respect of the subject matter of the action, strikes at the very authority of the court to pass the decree and cannot be cured even by the consent of the parties.

The Court then proceeded to examine the effect of Section 11 of the Suit Valuation Act 1887 on this fundamental principle. This Court held thus:

> "7. Section 11 enacts that notwithstanding anything in Section 578 of the Code of Civil Procedure, an objection that a court which had no jurisdiction over a suit or appeal had exercised it by reason of overvaluation or undervaluation, should not be entertained by an appellate court, except as provided in the section...a decree passed by a court, which would have had no jurisdiction to hear a suit or appeal but for overvaluation or undervaluation, is not to be treated as, what it would be but for the section, null and void, and that an objection to jurisdiction based on overvaluation or undervaluation, should be dealt with under that section and not otherwise. The reference to Section 578, now Section 99 CPC, in the opening words of the section is significant. That section, while providing that no decree shall be reversed or varied in appeal on account of the defects mentioned therein when they do not affect the merits of the case, excepts from its operation defects of jurisdiction. Section 99 therefore gives no protection to decrees passed on merits, when the courts which passed them lacked jurisdiction as a result of overvaluation or undervaluation. It is with a view to avoid this result that Section 11 was enacted. It provides that objections to the jurisdiction of a court based on overvaluation or undervaluation shall not be entertained by an appellate court except in the manner and to the extent mentioned in the section. It is a self-contained provision complete in itself, and no objection to jurisdiction based on overvaluation or undervaluation can be raised otherwise than in accordance with it. With reference to objections relating to territorial jurisdiction, Section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or Revisional Court, unless there was a consequent failure of justice. It is the same principle that

> has been adopted in Section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying Sections 21 and 99 of the Civil Procedure Code and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice,and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits."
>
> (Emphasis supplied)

12. Dealing with the question of whether a decree passed on appeal by a court which had jurisdiction to entertain it only by reason of undervaluation or overvaluation can be set aside on the ground that on a true valuation that court was not competent to entertain the appeal, the Court held that a mere change of forum is not 'prejudice' within Section 11 of the Suits Valuation Act. This Court held thus:

> "12. …it is impossible on the language of the section to come to a different conclusion. If the fact of an appeal being heard by a Subordinate Court or District Court where the appeal would have lain to the High Court if the correct valuation had been given is itself a matter of prejudice, then the decree passed by the Subordinate Court or the District Court must, without more, be liable to be set aside, and the words "unless the overvaluation or undervaluation thereof has prejudicially affected the disposal of the suit or appeal on its merits" would become wholly useless. These words clearly show that the decrees passed in such cases are liable to be interfered with in an appellate court, not in all cases and as a matter of course, but only if prejudice such as is mentioned in the section results. And the prejudice envisaged by that section therefore must be something other than the appeal being heard in a different forum. A contrary conclusion will lead to the surprising result that the section was enacted with the object of curing defects of jurisdiction arising by reason of overvaluation or undervaluation, but that, in fact, this object has not been achieved. We are therefore clearly of opinion that the prejudice contemplated by the section is something different from the fact of the appeal having been heard in a forum which would not have been competent to hear it on a correct valuation of the suit as ultimately determined." (Emphasis supplied)

The Court disallowed the objection to jurisdiction on the ground that no objection was raised at the first instance and that the party filing the suit was precluded from raising an objection to jurisdiction of that court at the appellate stage. This Court concluded thus:

> "16. If the law were that the decree of a court which would have had no jurisdiction over the suit or appeal but for the overvaluation or undervaluation should be treated as a nullity, then of course, they would not be stopped from setting up want of jurisdiction in the court by the fact of their having themselves invoked it. That, however, is not the position under Section 11 of the Suits Valuation Act."

Thus, where the defect in jurisdiction is of kind which falls within Section 21 of the CPC or Section 11 of the Suits Valuation Act 1887, an objection to jurisdiction cannot be raised except in the manner and subject to the conditions mentioned thereunder. Far from helping the case of the espondent, the judgment in **Kiran Singh** (supra) holds that an objection to territorial jurisdiction and pecuniary jurisdiction is different from an objection to jurisdiction over the subject matter. An objection to the want of territorial jurisdiction does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit.

13. In **Hiralal** v **Kalinath**[8], a person filed a suit on the original side of the High Court of Judicature at Bombay for recovering commission due to him. The matter was referred to arbitration and it resulted in an award in favour of the Plaintiff. A decree was passed in terms of the award and was eventually incorporated in a decree of the High Court. In execution proceedings, the judgment-debtor resisted it on the ground that no part of the cause of action had arisen in Bombay, and therefore, the High Court had no jurisdiction to try the cause and that all proceedings following thereon where wholly without jurisdiction and thus a nullity. Rejecting this contention, a four judge Bench of this Court held thus:

> "The objection to its [Bombay High Court] territorial jurisdiction is one which does not go to the competence of the court and can, therefore, be waived. In the instant case, when the plaintiff obtained the leave of the Bombay High Court on the original side, under clause 12 of the Letters Patent, the correctness of the procedure or of the order granting the leave could be questioned by the defendant or the objection could be waived by him. When he agreed to refer the matter to arbitration through court, he would be deemed to have waived his objection to the territorial jurisdiction of the court, raised by him in his written statement. It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure."
>
> (Emphasis supplied)

In **Harshad Chiman Lal Modi** v **DLF Universal Ltd**.[9], this Court held that an objection to territorial and pecuniary jurisdiction has to be taken at the earliest possible opportunity. If it is not raised at the earliest, it cannot be allowed to be taken at a subsequent stage. This Court held thus:

8. AIR 1962 SC 199, 9. (2005)7 SCC 791

> "30. The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity."

In **Hasham Abbas Sayyad** v **Usman Abbas Sayyad**[10], a two judge Bench of this Court held thus:

> "24. We may, however, hasten to add that a distinction must be made between a decree passed by a court which has no territorial or pecuniary jurisdiction in the light of Section 21 of the Code of Civil Procedure, and a decree passed by a court having no jurisdiction in regard to the subject-matter of the suit. Whereas in the former case, the appellate court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with."

Similarly, in **Mantoo Sarkar** v **Oriental Insurance Co. Ltd**[11], a two judge Bench of this Court held thus:

> "20. A distinction, however, must be made between a jurisdiction with regard to the subject-matter of the suit and that of territorial and pecuniary jurisdiction. Whereas in the case falling within the former category the judgment would be a nullity, in the latter it would not be. It is not a case where the Tribunal had no jurisdiction in relation to the subject-matter of claim…in our opinion, the court should not have, in the absence of any finding of sufferance of any prejudice on the part of the first respondent, entertained the appeal."

14. The objection which was raised in execution in the present case did not relate to the subject matter of the suit. It was an objection to territorial jurisdiction which does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit. An executing court cannot go behind the decree and must execute the decree as it stands. In **Vasudev Dhanjibhai Modi** v **Rajabhai Abdul Rehman**[12], the Petitioner filed a suit in the Court of Small Causes, Ahmedabad for ejecting the Defendant-tenant. The suit was eventually decreed in his favour by this Court. During execution proceedings, the defendant-tenant raised an objection that the Court of Small Causes had no jurisdiction to entertain the suit and its decree was a nullity. The court executing the decree and the Court of Small Causes rejected the

10. (2007) 2 SCC 355 , 11. (2009) 2 SCC 244, 12. (1970) 1 SCC 670

contention. The High Court reversed the order of the Court of Small Causes and dismissed the petition for execution. On appeal to this Court, a three judge Bench of this Court, reversed the judgment of the High Court and held thus:

> "6. A court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.
>
> 8. If the decree is on the face of the record without jurisdiction and the question does not relate to the territorial jurisdiction or under Section 11 of the Suits Valuation Act, objection to the jurisdiction of the Court to make the decree may be raised; where it is necessary to investigate facts in order to determine whether the Court which had passed the decree had no jurisdiction to entertain and try the suit, the objection cannot be raised in the execution proceeding."

15. In this background, we are of the view that the High Court was manifestly in error in coming to the conclusion that it was within the jurisdiction of the executing court to decide whether the decree in the suit for partition was passed in the absence of territorial jurisdiction.

16. The respondent has filed a first appeal (First Appeal No. 43/2015) where the issue of jurisdiction has been raised. We must clarify that the findings in the present judgment shall not affect the rights and contentions of the parties in the first appeal.

17. The High Court has manifestly acted in excess of jurisdiction in reversing the judgment of the executing court which had correctly declined to entertain the objection to the execution of the decree on the ground of a want of territorial jurisdiction on the part of the court which passed the decree.

18. We have also not found merit in the contention that the impugned order of the High Court, being an order of remand, is in the nature of an interlocutory order which does not brook any interference. By the impugned order, the High Court has directed the executing court to entertain an objection to the validity of the decree for want of territorial jurisdiction. Such an objection would not lie before the executing court. Moreover, the objection that the property at Ranchi did not belong to the common ancestor is a matter of merits, which if at all, has to be raised before the appropriate court in the first appeal.

19. For the above reasons, we allow the appeal and set aside the impugned judgment and order of the High Court. The executing court shall conclude the execution proceedings expeditiously. There shall be no order as to costs.

2019 (I) ILR - CUT- 213 (S.C.)

L. NAGESWARA RAO, J & M.R. SHAH, J.

SPECIAL LEAVE TO APPEAL (CRL.) NO(S). 2600-2601/2016

SANGITA SAHA ……...Petitioner (S)

.Vs.

ABHIJIT SAHA & ORS. ……Respondent (S)

THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 12, 17 & 19 – Application by wife seeking right of residence in the share household and for maintenance to herself and her daughter – Consideration thereof – Pre-condition – Held, the wife-petitioner was to establish the incident of domestic violence, then only she will be entitled for the relief.

For Petitioner(s) : Mr. P.S.Datta,Sr.Adv. Ms. Anwesha Saha,Adv.
Mr. Fuzail Ahmad Ayyubi.
For Respondent(s) : Mr. Subhasish Bhowmick, Mr. GoldyGoyal,
Ms. Meera Kaura Patil.

ORDER Date of Order: 28.01.2019

The petitioner is the wife of the respondent No.1. The respondent Nos.2 and 3 are the Father-in-law and Mother-in-law. Respondent No.4 is the Sister-in-law, who is married. The petitioner filed a case under the Protection of Women from Domestic Violence Act, 2005 seeking right of residence in the share household and for maintenance to herself and her daughter. The Magistrate dismissed the case filed by the petitioner dated 18.5.2013. The appeal filed by the petitioner was allowed by the District Judge on 23.6.2014 by holding that the petitioner has a right to accommodation in the share household and maintenance of Rs.2,500/- for herself and Rs.4,000/- for the child.

The respondent filed a revision before the High Court, which was allowed. The High Court set aside the order passed by the learned District Judge in the appeal by observing that the petitioner was unable to establish any incident of torture or demand of money or physical violence. In that view of the matter, the High Court was of the opinion that the petitioner was not entitled to any order in her favour. It is pertinent to state that the High Court held that the petitioner was entitled to claim residence in the shared household. But that entitlement is only in case she establishes domestic violence, which she did not.

The learned counsel appearing for the petitioner submitted that the High Court fell in error in adding that the petitioner could not produce any evidence in support of her claim. According to him, the evidence of the petitioner was sufficient to conclude that she was subjected to domestic violence. He also submitted that in any event, the child is entitled for maintenance.

We are in agreement with the finding recorded by the High Court that there is absolutely no evidence to prove domestic violence. However, we are of the considered opinion that the child has to be paid maintenance at the rate of Rs.4,000/- as was determined by the learned District Judge. The learned counsel for the respondent fairly acceded to the same.

For the aforementioned reasons, we dismiss the Special Leave Petition. The respondent No.1 is also directed to pay Rs. 4,000/- p.m. as maintenance to the child w.e.f. May, 2013. Pending application(s), if any, stand disposed of.

2019 (I) ILR - CUT- 214

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

W.P.(C) NO. 521 OF 2017

M/S. BALASORE ALLOYS LTD. & ANR. .....Petitioners

.Vs.

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

A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition seeking grant, execute and register a mining lease deed – An area of 100.063 hectares of land was allotted in favour of petitioner for its captive mining – Out of that, 64.463 hectares was non-forest land and 35.60 hectares was forest land – In respect of 64.463 hectares of non-forest mining lease has already been executed and petitioner is in operation of the same – The split up area of 35.60 hectares, which is forest land, in respect of the same, the required provisions of laws have been followed and due clearances have been given by the respective authorities – Effect of – Held, nothing remains but to execute a mining lease in favour of petitioner as it has complied with all the statutory requirements and deposited requisite fees for various accounts – But during pendency of execution of the mining lease, the Minor Mineral (Development and Regulation) Act, 1957 has undergone amendment, which has been inserted by Act 10 of 2015 with effect from 12.01.2015 – Whether amended provision can have application – Held no, reasons indicated – Direction to execute mining lease – But at the same time, this Court is of the considered opinion that there is nothing available on record to stand in the way of petitioner for executing the mining lease, as it has already complied all the requirements under various provisions of the Act and all the authorities concerned have acknowledged the requisite fees deposited for the purpose of execution of such mining lease. (Para 9 to12)

(B) PROMISSORY ESSTOPEL – Principles – Indicated – In general words, 'estoppel' is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/her position – In such a case, the former shall be estopped from going back on the word given – The principle of estoppel is only applicable in cases where the other party has changed his position relying upon the representation thereby made – Therefore, applying the above principles of law to the present context, if petitioner has acted upon on the basis of the correspondences made from time to time by the authority concerned, the benefit which has been accrued on petitioner cannot be taken away on the plea of amendment of the MMDR Act and Rules framed there under. (Para 14 to18)

Case Laws Relied on and Referred to :-

1. (2017) 2 SCC 125 : Bhusan Power and Steel Limited .Vs. S.L. Seal, Additional Secretary (Steel and Mines), State of Odisha.
2. 1999 (4) SCC 149 : Tata Iron & Steel Co. Ltd. Vs. Union of India.
3. (1996) 9 SCC 709 : Ferro Alloys Corporation Ltd. .Vs. Union of India.

4 . (2003) 2 SCC 355 (365) : B.L. Sreedhar .Vs. K.M. Munireddy.
5. (2010) 12 SCC 458 (469) : H.R. Basavaraj .Vs. Canara Bank.
6. AIR 1968 SC 718 : Union of India .Vs. M/s. Anglo Afghan Agencies etc.,
7. AIR 1971 SC 2021 : Chowgule & Company (Hind) Pvt. Ltd. .Vs. Union of India.
8. AIR 1979 SC 621 : M/s Motilal Padampat Sugar Mills Co. Ltd. .Vs. The State of Uttar Pradesh.
9. AIR 1986 SC 806 : Union of India .Vs. Godfrey Philips India Ltd..
10. AIR 1987 SC 2414: Delhi Cloth & General Mills Ltd. .Vs. Union of India.
11. AIR 1988 SC 2181: Bharat Singh .Vs. State of Haryana.

For Petitioner : M/s Neeraj Kissan Kaul and S.D. Das, Sr. Adv.along M/s Nalin Kohli, Gautam Mitra, Samar Kachwaha, Rishad Medora and Haripada Mohanty,

For Opp. Parties : Mr. S.P. Mishra, Advocate General, Mr. B.P.Pradhan, Addl. Government Advocate Mr. A.K. Bose, Asst. Solicitor General of India, Mr. A. Mohanty, Central Government Counsel

JUDGMENT Date of Hearing :17.04.2018 : Date of Judgment : 24.04.2018

DR. B.R. SARANGI, J.

M/s. Balasore Alloys Ltd., petitioner no.1, a public limited company registered under the Companies Act, 1956, and petitioner no.2, who is one of its shareholders, have filed this application seeking direction to State of Odisha to grant, execute and register a mining lease deed over remaining area of 35.60 hectares in village Kaliapani in the district of Jajpur; pursuant to the grant order dated 09.01.2017 read with letter of intent issued by the State Government, vide its communication dated 24.05.1999, read with previous approval granted by the Central Government, vide its communication dated 16.04.1999; and further seeks direction to declare the provisions contained under Rule 8(4) of the Minerals (Other Than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 as void, illegal and/or ultra vires to and/or contrary to the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 and also contrary to the Articles 14 and 19(1)(g) of the Constitution of India.

2. The factual matrix of the case as pleaded in the writ petition and as narrated in the judgments of the Supreme Court cited before this Court, which led to filing of the instant application, is that originally Ferro Alloys Corporation Ltd. (for short "FACOR") put forward its claim for grant of mining lease for extracting an important mineral chromite in Sukinda Valley situated in the State of Orissa. The State of Orissa is having substantial

reserves of the aforesaid mineral. Originally, Tata Iron & Steel Co. Ltd. (for short "TISCO") was granted mining lease for 50 square kilometres of area in Sukinda Valley by order of the Collector, Cuttack sometime in September 1952. Initially, the mining lease over 1813 hectares of area was granted on 12.01.1953 to TISCO for chromite extraction after preliminary exploration for a period of 20 years. After the Orissa Estates Abolition Act, 1951 (for short "the OEA Act") came into force, the rights of the erstwhile Zamindar (Raja of Sukinda) were vested in the State, which granted the lease to TISCO. In 1973, renewal was granted for an area of 1261.476, hectares subject to the condition that TISCO will establish a beneficiating plant as to the friable and lean ore in the leasehold area for the purpose of improving the quality for use in the indigenous plants, namely, Ferro-Chrome and Refractories.

2.1. Before the aforesaid lease could expire by efflux of time, on 03.10.1991, TISCO applied to the State authorities for second renewal of the mining lease for 20 more years under Section 8(3) of the Mines and Minerals (Development and Regulation) Act, 1957 (for short "the MMDR Act"). The State Government of Orissa recommended to the Central Government for approval of the said second renewal for the entire area, in which TISCO was having earlier lease. The aforesaid recommendation was made in compliance with the requirement prescribed under the MMDR Act read with the Mineral Concession Rules, 1960 (for short "Concession Rules, 1960"). The said recommendation was for re-grant of mining lease for 10 years to TISCO for the entire area of 1261.476 hectares, though the demand of TISCO for second renewal of the lease was for 20 years. However, the State Government granted lease for a period of 10 years with effect from 12.01.1993 subject to certain conditions mentioned in the recommendatory letter. On 03.06.1993, the Government of India, with reference to the recommendation of the State Government dated 28.11.1992, conveyed its approval under Section 8(3) in relaxation of Section 6(1)(b) of the MMDR Act.

2.2. On 11.06.1993, a Member of Parliament complained to the Ministry that during the last fifty years, TISCO had not done much for the industrialisation of the State of Orissa and the mining areas granted to it were hardly exploited for more than three decades, therefore, renewal of lease of the entire chromite mining area in favour of TISCO once again would not be in the interest of development of the State and also would not be in national interest. The matter was looked into by the Central Government afresh and accordingly it reviewed its earlier order dated 03.06.1993 and granted approval for renewal of lease to TISCO confining it to only half the area, i.e.,

650 hectares. By subsequent order dated 05.10.1993 the Central Government further directed that rest of the area of approximately 600 hectares be deleted from the existing lease of TISCO and made available to other industries by the State Government as per the MMDR Act and the Concession Rules, 1960 in the interest of mineral and industrial development in the country. The aforesaid order of the Central Government was challenged by TISCO before this High Court in OJC No. 7729 of 1993 filed on 19.10.1993. The rival claimants, Jindal Strips Limited and Jindal Ferro Alloys Limited filed a cross-petition being OJC No. 7054 of 1994 in the this High Court praying for a suitable writ or order directing the authorities concerned not to grant renewal of lease to TISCO. But in the writ application filed by TISCO, FACOR made a party on its request for intervention. Indian Charge Chrome Limited (for short "ICCL") and Indian Metals Ferro Alloys Limited (for short "IMFA") also filed writ petition bearing OJC No. 5422 of 1994 in the this High Court opposing the grant of renewal of mining lease to TISCO, whereas M/s Ispat Alloys (for short "ISPAT") had not filed any writ petition in this High Court, though it was also a claimant of mining lease for the very same mineral.

2.3. This Court, after hearing the parties concerned in the writ petitions, by its judgment and order dated 04.04.1995, took the view that the entire matter was required to be reconsidered by the Central Government, and also held that the order dated 03.06.1993 of the Central Government granting approval for renewal of lease to TISCO for the entire area and the subsequent order dated 05.10.1993 could not be sustained in law. The matter had got to be reconsidered by the Central Government as to the proposal of subsequent renewal of the lease of TISCO and as to whether the Central Government would authorise renewal of such lease by forming an opinion in the interest of mineral development. This Court did not observe anything as to the merit of the claim of TISCO for subsequent renewal of the lease. Regarding locus standi of the other writ petitioners before the High Court, whose writ petitions were being disposed of by the aforesaid common judgment, it was observed that their apprehension was without justification and their interest was of contingent nature and that in the event the Central Government found it not prudent to authorise subsequent renewal of TISCO's lease, the area eventually would be available and the State Government of Orissa would take steps for making necessary advertisements and inviting applications for grant of mining lease. It was suggested that the other petitioners, who were opposing renewal of TISCO's lease, were

deserved to be given hearing by the Central Government by way of fair play and in compliance with the principle of natural justice and to enable them to place necessary records for consideration by the Central Government.

2.4. Against the said order of the High Court dated 04.04.1995, TISCO filed Special Leave Petition before the Supreme Court, being SLP (C) No. 10830 of 1995 and, while considering the SLP filed by TISCO and other contesting parties, the apex Court passed an interim order in TISCO's SLP that the pendency of the proceedings in the special leave petitions would not stand in the way of the Central Government in disposing of the matter in accordance with law. In the meantime, on 03.05.1995 FACOR made a representation to the Central Government staking its claim for being granted mining lease for the entire area of 1261.476 hectares.

2.5. The Central Government in its turn and in compliance with the decision of the High Court and as a follow-up action, appointed a High-Powered Expert Committee under the Chairmanship of Shri S.D. Sharma, Joint Secretary in the Ministry of Mines, to consider the submissions filed before the Central Government by parties in the High Court proceedings in pursuance of the directions of this Court in its judgment dated 04.04.1995. The Committee was directed to submit its report to the Government within two weeks from the date of the order of the Central Government, i.e., 24.05.1995. The Committee was also required to give a personal hearing to all the parties concerned, as stipulated in the judgment of this High Court. The aforesaid Expert Committee known as "Sharma Committee", after hearing the parties concerned gave a detailed report on 16.08.1995. As per the said report, second renewal of TISCO's lease was recommended for a smaller area, namely, 406 hectares. The Sharma Committee also gave personal hearing to other claimants for mining lease in the area and who were opposing renewal of lease claimed by TISCO. The Sharma Committee, after hearing them, assessed the needs of these rival claimants and came to its own estimates regarding the requirements of these rival claimants. The Committee made it clear that it was not undertaking the task of granting any lease to any of these rival claimants in connection with the remaining area, which might become available after reducing the occupied mining lease area with TISCO. After confirming TISCO's renewal of lease of 406 hectares, the balance 855 hectares of land, which was to be available with the State of Orissa for granting mining leases to other claimants, had to be processed by the State authorities in accordance with law. The Sharma Committee, however, in the light of the claims put forward by rival claimants before it and the data

submitted by them in support of their respective cases for allotment of leases in their favour, made the assessment of their requirements.

2.6. On the basis of the report of the Sharma Committee, the Central Government by its detailed order dated 17.08.1995 requested the State Government of Orissa to take necessary steps to issue orders granting subsequent renewal of mining lease for chrome ore in favour of TISCO for 406 hectares for a period of 20 years over a compact and contiguous area. It was also directed that the State of Orissa should take further action on the mining lease applications of the other 4 applicants, other than TISCO, i.e., (1) Jindal Strips Limited/Jindal Ferro Alloys Limited, (2) FACOR (*3*) ICCL/IMFA and (*4*) Ispat Alloys Limited. In the said order, the Central Government further directed the State Government of Orissa to grant mining lease to the aforesaid four applicants as per law over the balance area of 855.476 hectares to be released by TISCO, on the basis of proportionate requirements of the chrome ore for these parties as assessed by the Committee, in a fair, just, equitable and contiguous manner in consultation with the Indian Bureau of Mines within a period of 30 days from the date of issue of the order of the Central Government. The State Government was also directed by the Central Government to seek its approval for grant of mining leases as per the provisions of the MMDR Act and the Rules framed thereunder. It was also observed that since the other four parties were in dire necessity of the raw material (chrome ore) and had set up mineral-based industries and were suffering for want of chrome ore, the Central Government, in conformity with the observations of the High Court of Orissa in its judgment dated 04.04.1995 and in exercise of powers conferred by sub-rule (1) of the said Rule 59, relaxed the provisions of sub-rule (1) of Rule 59 with a view to expedite the process for making available the raw material, namely, chrome ore, to the needy industries in the interest of the mineral development. This arrangement was made pending SLP of the TISCO before the apex Court. By judgment dated 23.07.1996, the assessment of requirement of chrome ore as made by Sharma Committee and was accepted by the Central Government, was confirmed in the SLP preferred by TISCO.

2.7. Being aggrieved by the order of the Central Government dated 17.08.1995, the FACOR made a detailed representation to the State Government on 26.06.1996 spelling out its own requirement of chrome ore, which, according to it, was not correctly assessed by Sharma Committee and which assessment was accepted by the Central Government. The FACOR's claim for grant of mining lease for chrome ore over the entire area of M/S.

1261.476 hectares in Sukinda Valley was applied for on 19.10.93. However, subsequently on 29.06.1997, the State Government of Orissa recommended to the Central Government for granting leases to four claimants, namely, IMFA/ICCL, Jindals, Ispat and FACOR over 50% of the left over area totally admeasuring 855.476 hectares on the basis of 50% of their respective requirements, as assessed by the Sharma Committee. The remaining 50% of the balance area out of 855.476 hectares was sought to be thrown open for consideration of claims of other claimants for such mining leases along with aforesaid four claimants to the extent their requirements were not fully met by reduction of their estimated requirements by 50% as per the said recommendation of the State Government.

2.8. Being aggrieved by the order of the State Government dated 29.06.1997 and the earlier order of the Central Government dated 17.08.1995 the FACOR filed a fresh writ petition being OJC No.12032 of 1997 and, after hearing, this Court took the view that the writ petition filed by the FACOR, after the decision rendered by the apex Court in TISCO's case (supra), challenging the very same order of the Central Government dated 17.08.1995, which was confirmed by the apex Court, was not maintainable on the ground of *res judicata*. It was further held that the order of the Central government dated 17.08.1995 was legally justified and the subsequent order of the State Government dated 29.06.1997 could also not be said to be suffering from non-application of mind and the decision making process of the State Government was not suffering from any infirmity. Consequentially, the FACOR filed SLP before the apex Court which was registered as Civil Appeal No. 1626 of 1999, which was decided on 22.03.1999 upholding the decision of the Central Government based on the recommendation made by the Sharma Committee to reduce the leasehold area of TISCO and distribute the balance area amongst the other applicants, including the present petitioner no.1, to meet their genuine needs and requirements of chrome ore for captive consumption.

2.9. In the meantime, the State Government upon due consideration of the application decided, vide its order dated 24.06.1997, to grant mining lease in favour of petitioner no.1 and sent recommendation to the Central Government seeking approval under Section 5(1) of the MMDR Act. In turn, the Central Government, vide its letter dated 16.04.1999, while giving prior approval under Section 5(1) of the MMDR Act, directed the State Government under Rule 27(3) of the Concession Rules, 1960 to incorporate special conditions in the mining lease which is to be executed in favour of

petitioner no.1. After having obtained the previous approval of the Central Government, the State Government issued a letter of terms and conditions vide its letter dated 24.05.1999 directing petitioner no.1 to submit its acceptance on the said terms and conditions governing the grant of mining lease of an area of 100.063 hectares at Village-Kaliapani, Tahasil-Sukinda, Dist.-Jajpur, Odisha, which has been accepted by petitioner no.1, vide its communication dated 25.05.1999.

2.10. Out of the aforesaid area of 100.063 hectares of land, 35.60 hectares was forest lands whereas 64.463 hectares was non-forest land. Since the land granted/allotted, vide letter dated 25.04.1999, in favour of petitioner no.1 for mining purpose comprises both forest and non-forest land, mining operation over the forest land could not be undertaken without fulfilling the requisite formalities for diversion of forest lands into non-forest uses as required under Forest (Conservation) Act, 1980. Consequentially, as petitioner no.1 was in dire need of the raw material, it requested the State Government to split the area into two parts, vide its letter dated 27.12.1999. Considering such request of petitioner no.1, the State Government allowed the proposal of splitting up total area into two parts which comprises of 64.463 hectares as non-forest area and 35.60 hectares as forest area and requested petitioner no.1 to furnish two separate mining plans. The petitioner no.1 submitted two separate mining plans, namely, one for 64.463 hectares for non-forest area and the other for 35.60 hectares forest area before the Mining Plan Approval Authority, i.e., the Indian Bureau of Mines(IBM), which approved the mining plan in respect of 35.60 hectares forest area vide its letter dated 31.10.2000 communicated to petitioner no.1. Subsequently, the mining plan was modified and approved by the Indian Bureau of Mines (IBM), vide its letter dated 24.04.2009.

2.11. Again, due to change of mining method from opencast to underground method, another mining plan was approved by the IBM, vide its letter dated 09.11.2012. Thereafter, a grant order was issued in favour of petitioner no.1 and a lease deed was executed for 64.463 hectares, where the mining operation is continuing. But so far as 35.60 hectares is concerned, petitioner no.1 applied different authorities to get forest and environment clearance and diversion of forest land into non-forest uses under the Forest (Conservation) Act, 1980, and consent to establish from the State Pollution Control Board, Odisha. The State Pollution Control Board, Odisha issued the consent on 28.01.2006 over the said area of 35.60 hectares for production of chromite ore through opencast method of mining. Subsequently, due to change of proposed mining method to underground mining, the State

Pollution Control Board, Odisha issued another consent to establish for Ispat Sukinda Chromite Mines of petitioner no.1 over an area of 35.60 hectares at Village-Kaliapani in the district of Jajpur under Section 25 of the Water (Prevention and Control of Pollution) Act, 1974 and Section 21 of Air (Prevention and Control of Pollution) Act, 1981.

2.12. On the basis of such diversion proposal submitted by petitioner no.1, the State Government in Forest and Environment Department, vide its letter dated 05.10.2005, forwarded the proposal of petitioner no.1 to the Chief Conservator of Forest, Government of India, Ministry of Environment and Forest, for accordance of approval as per the provision under Section 2 of the Forest (Conservation) Act, 1980. In response to the same, vide letter dated 10.10.2006, the Ministry of Environment and Forest, Government of India approved in-principle for diversion of 35.285 hectares forest land (excluding the safety zone of 0.315 hectares) in Mahagiri DPF with certain conditions as stipulated in that letter. The Ministry of Environment, government of India granted environmental clearance with specific conditions, such as clearance under Forest (Conservation) Act, 1980, approval from Central Ground Water Authority, clearance from State Pollution Control Board, advertisement in two local newspapers relating to the environmental clearance to the project, among others. Further, the State Environment Impact Assessment Authority (SEIAA), Odisha has accorded environment clearance, vide letter dated 07.10.2016 for production of 0.4 MTPA through underground mining. As per the compliance of the letter dated 10.10.2006, petitioner no.1 deposited an amount of Rs.2,04,95,300/- towards the Net Present Value (NPV) and deposited the fees for transfer/mutation of the 35.285 hectares of the said forest land to non-forest land in village Barunia under Darpan Tahasil of Dist.-Jajpur in favour of Forest Department, Govt. of Odisha for raising compensatory afforestation. The gazettee notification to that effect has been issued by the State Govt., vide Gazettee Notification dated 26.06.2009. The petitioner no.1 has also deposited a sum of Rs. 10,81,300/- for compensatory afforestation charges and an amount of Rs. 24,605/- towards safety zone maintenance fees with the authorities of the State Govt. on 11.02.2008.

2.13 As per the application of petitioner no.1, the wild life conservation plan was approved by the Chief Conservator of Forest, Govt. of India, vide its letter dated 07.08.2008, in respect of the said 35.60 hectares of land. As per the direction in the said letter, petitioner no.1 deposited an amount of Rs.65,00,000/- towards cost of wild life conservation plan and Rs. 7,12,000/- towards contribution for Regional Wild Life Management Plan and further

deposited an amount of Rs. 81,465/- towards royalty cost of enumerated trees with the State Govt. towards fund of CAMPA (Compensation Afforestation Fund Management and Planning Authority) Fund. The petitioner no.1 has also deposited an amount of Rs. 1,76,64,024/- towards premium, ground rent and cess on forest land for the said land measuring 35.285 hectares for diversion of the said land. After complying all the formalities, the Deputy Conservator of Forest (Central), Ministry of Environment and Forest, Government of India, vide its letter dated 26.06.2009 communicated to the Principal Secretary, Forest and Environment Department, Govt. of Odisha, indicated therein that Central Govt., after careful consideration of the proposal of the State Govt., has conveyed its approval under Section 2 of the Forest (Conservation) Act, 1980 for diversion of 35.285 hectares of forest land in Forest Block No. 27 of Mahagiri DPF in Cuttack Division for chromite mining by the petitioner subject to compliance of the conditions specified in the said diversion order. In response to the same, petitioner no. 1, vide its letter dated 30.06.2009, requested the State Government for issuance of grant order over the said land of 35.60 hectares, but, as the Govt. did not take any action and/or decision on that respect, petitioner no.1 again vide its letter dated 18.02.2012 requested the State Government by submitting its representation for issuance of the grant order keeping in view the fact that it has complied with all the requirements as per law.

2.14. The Central Ground Water Authority, vide letter dated 07.05.2012, intimated to petitioner no.1 that no ground water clearance is required for the project but, however, in order to neutralize the adverse impact of ground water withdrawal that may arise on long term basis, advised petitioner no.1 to undertake certain conditions. Apart from getting all clearance/consent, Palli Sabha under Forest Right Act, 2006 was held in the year 2014 and the Palli Sabha consented the mining operation and further plan for wildlife management has also been approved by the authorities concerned. Accordingly, the Collector, Jajpur has granted certificate under Forest Rights Act, 2006, vide its letter dated 24.09.2014. Therefore, when the mining lease has already been executed in respect of 64.463 hectares, out of 100.063 hectares, the split up area, it is contended that the State opposite parties should have executed the mining lease in respect of 35.60 hectares as per Rule 8 of the Concession Rules, 2016. As petitioner no.1 already received all the statutory clearance, as required under law, and complied all the directions and terms and conditions stipulated in various laws, the obligation lies on the State opposite parties to execute the mining lease in respect of balance area of 35.60 hectares.

2.15 In the meantime, MMDR Amendment Ordinance came into force on 12.01.2015. Thereafter, the MMDR Act, 1957 was amended on 27.03.2015, which came into force with a retrospective effect from 12.01.2015. In the said amended MMDR Act, under Section 10-A (2)(c) it has been specifically mentioned that where the Central Government has communicated previous approval as required under Sub-section (1) of Section 5 for grant of a mining lease, or if a letter of intent (by whatever name called) has been issued by the State Government to grant a mining lease, before the commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, the mining lease shall be granted, subject to fulfillment of the conditions of the previous approval, or of the letter of intent, within a period of two years from the date of commencement of the said Act. In exercise of power conferred under Section 13 of the MMDR Act, 2015, the Central Government framed Rules called, Mineral (Other Than Atomic and Hydro Carbons Energy Minerals) Concession Rules, 2016 published on 04.03.2016. Under Rule 8(4) of the said Rules, it lays down that if lease deed is not executed and registered on or before 11.01.2017, the right of the applicant under letter of intent or prior approval granted by Central Government would be forfeited automatically. Keeping in view the aforementioned provisions, petitioner no.1 wrote a letter to the State Government on 06.04.2016 that it had deposited nine documents in compliance with terms and conditions of letter of intent dated 24.05.1999 and reiterated that it has already complied with all the terms and conditions of the letter of intent issued by the Government of India and requested the State Government to issue grant of mining lease and also execution of the lease deed in its favour as per Rule 8 of the Concession Rules, 2016.

2.16. On 07.04.2016, the State Environment Impact Assessment Authority accorded environment clearance for a period of 30 yeas under the provisions of EIA notification 2006 and 2009 for the underground mining technique. On 17.11.2016, the Ministry of Environment and Forest issued another guideline directing to re-file online applications for permission for grant of forest land on lease under Section 2(iii) of the Forest (Conservation) Act, 1980. In response to the same, petitioner no.1 submitted online application on 29.11.2016, which was forwarded by Special Secretary to Government of Odisha, Department of Forest and Environment, with a proposal for diversion of forest land of petitioner no.1, to Ministry of Environment and Forest for approval, vide communication dated 20.12.2016, which in turn was recommended to the Regional Empowered Committee and resubmitted in the

Ministry on 21.12.2016. On 06.01.2017, the forest clearance was granted by Ministry of Environment and Forest under Section 2(iii) of Forests (Conservation) Act, 1980 in respect of 35.60 hectares of land. On the very same day, i.e. on 06.01.2017, petitioner no.1 submitted the compliance report under Rule 8(1) of the Concession Rules, 2016 to the State Government with a request to issue necessary orders for grant, execution and registration of the mining lease within the time prescribed under the Rules.

2.17. On 09.01.2017, the State Government issued the grant order for the mining lease, just two days before the cut off date, i.e., 11.01.2017 stipulated under Rule 8(4) of the Concession Rules, 2016 and ordered petitioner no.1 to furnish the performance security of the required amount to the State Government to be specified by the Director of Mines and also sign the Mines Development and Production Agreement in the prescribed format followed with the execution and registration of the mining lease deed on or before 11.01.2017 as required under Rule 8. In compliance of the same, petitioner no.1 deposited Bank Guarantee for an amount of Rs.32.00 crores and stamp duty of Rs.18.00 crores in two days. It was also informed to petitioner no.1 that the lease deed had to be executed and registered on or before 11.01.2017, as provided under Rule 8(4) of the Concession Rules, 2016 or else the right of petitioner no.1 under Clause-(c) of Sub-section (2) of Section 10-A for the grant of mining lease shall be forfeited without any further orders.

2.18 On 11.01.2017, the cut off date as provided under the Concession Rules,2016, the lease deed could not have been executed, since the petitioner had to comply with the conditions of the grant order and the conditions under the grant order involved the petitioner arranging Bank Guarantee to the tune of Rs.50.00 crores, which was not possible in two days, hence this application.

3. Considering the plight of the petitioners, this Court passed an interim order on 11.01.2017 to the following effect:

> *"Connect with W.P.(C) Nos.281 and 283 of 2017.*
>
> *The submission of Mr. Rakesh Dwivedi, learned Senior Counsel for the petitioners is that the petitioners had applied for grant of mining lease, which was duly approved by the Central Government under Section 5(1) of the Mines and Minerals (Development and Regulation)Act, 1957 on 16.04.1999. The application however kept pending and in the meantime, the Act was amended and certain provisions have been inserted by Act 10 of 2015 with effect from 12.1.2015. Under the new provision of Section 10A, lease deed is to be granted within a period of two years*

from the date of the amendment of the Act i.e. with effect from 12.1.2015. Besides, several prayers which have been made, the grievance of the petitioners at this stage is with regard to the provision of Rule 8(4) of Mineral (Other than Atomic and Hydro Carbons Energy Minerals) Concession Rules, 2016, which provides that in case the mining lease is not executed on or before 11.1.2017, the rights of the applicant shall be forfeited.

2. The submission of the learned counsel for the petitioners is that because of lapses on the part of the opposite parties, though the order granting mining lease has been passed with considerable delay, i.e., on 09.01.2017, but the execution and registration has not been effected by 11.01.2017 and it is, thus, submitted that the petitioners should not be made to suffer because of the lapses on the part of the opposite parties. The petitioners further contends that the provision of sub-rule (4) of Rule 8 is contrary to the provisions of Section 10-A (2)(c) of MMDR Act, 1957 and as such, the same cannot be sustained in the eye of law.

3. In our view, the matter requires consideration.

4. Mr. A.K.Bose, learned Asst. Solicitor General accepts notice on behalf of opposite parties no. 1 and 2 and Mr. B.P.Pradhan, learned Addl. Government Advocate accepts notice on behalf of opposite party no.3. They pray for and are granted four weeks time to file counter affidavit and the petitioners shall have two weeks thereafter to file rejoinder affidavit.

5. List this matter immediately after six weeks.

6. Considering the facts and circumstances of the case and keeping in view the submissions made by the learned counsel for the parties, as an interim measure, it is directed that the provisions of Rule 8(4) of Mineral (Other than Atomic and Hydro Carbons Energy Minerals) Concession Rules, 2016, shall not be made applicable in the case of the petitioners till the next date of listing."

During pendency of the writ application, the petitioner has furnished Bank Guarantee worth of Rs.32.00 crores with the State Government for execution of the lease deed.

4. Mr. Neeraj Kishan Kaul, learned Senior Advocate appearing for the petitioners, on the backdrop of the facts of the case in hand as narrated above, has categorically submitted that the petitioner has not committed any laches on its part so as to grant mining lease and execute the same in its favour and, as such, the provisions contained in Section 10-A(2)(c) of the MMDR Act, 2015 read with Rule 8(4) of Concession Rules, 2016 has no application in view of the law laid down by the apex Court in ***Bhusan Power and Steel Limited v. S.L. Seal, Additional Secretary (Steel and Mines), State of Odisha***, (2017) 2 SCC 125, as it has been saved under paragraph 22.3 of the said judgment. It is further contended that the petitioner's claim has accrued pursuant to the judgment of the apex Court in ***Tata Iron & Steel Co. Ltd. v.***

Union of India, (1996) 9 SCC 709 and ***Ferro Alloys Corporation Ltd. v. Union of India,*** 1999 (4) SCC 149. Once such right has been accrued, the same cannot be taken away due to lapses on the part of the opposite parties, when the petitioner no.1 has complied all the terms and conditions, as and when raised by the opposite parties. Therefore, necessary consequential corollary will be that direction should be given to execute the mining lease in respect of balance area of 35.60 hectares of forest land, which has been splitted up from the total area of 100.063 hectares, may be at the request of petitioner no.1. It is further contended that after compliance of all requirements, there is no valid and justifiable reason not to execute the mining lease in favour of petitioner no.1 in respect of the remaining area of 35.60 hectares, as it has complied all the terms and conditions and, more particularly, has got clearance from statutory authorities, as required from time to time.

5. Mr. S.P. Mishra, learned Advocate General appearing for the State opposite party contended that the petitioner has to comply the terms and conditions mentioned in letter dated 06.01.2017 at Annexure-2 and only thereafter action has to be taken by the authority concerned. It is contended that in paragraph 2 of the writ application the petitioner pleaded that delay has been occurred on account of the fact that clearance under Section 2(iii) of the Forest (Conservation) Act, 1980 was granted by the Ministry of Environment, Forest and Climate Change on 06.01.2017 only. If the clearance was received on 06.01.2017 and the petitioner no.1 has to comply with certain conditions mentioned therein, unless the same is complied, there may not be any difficulty on the part of the State authorities to execute the mining lease.

6. Mr. A.K. Bose, learned Asst. Solicitor General of India contended that even if the area has been allocated in favour of petitioner no.1, but the same has to be given effect to in compliance of the statutory provisions contained in the MMDR Act and Rules framed thereunder. To substantiate his contention, he has relied upon the judgment dated 11.09.2015 rendered by Andhra Pradesh High Court in Writ Petition No.10364 of 2015 and batch (***Coromandel Mining & Exports Pvt. Ltd. v. Union of India***). It is further contended that delay on the part of the authority cannot defeat the purpose of the statute, therefore the contention raised by the petitioners cannot sustain in the eye of law.

7. We have heard Mr. Neeraj Kishan Kaul, learned Senior Advocate appearing along with Mr. Nalin Kohli, Mr. Gautam Mitra, Mr. Samar Kachwaha and Mr. Haripad Mohanty, learned counsel for the petitioners; Mr. S.P. Mishra, learned Advocate General along with Mr. B.P.Pradhan, learned Addl. Government Advocate for the State-opposite party no.1; and Mr. A.K.Bose, learned Asst. Solicitor General along with Shri A. Mohanty, learned Central Government Counsel for Union of India-opposite parties no.2 and 3. Pleadings having been exchanged between the parties, and with the consent of learned counsel for the parties, the matter is being disposed of finally at the stage of admission.

8. The facts delineated above are undisputed. It is admitted case of the parties that the right of petitioner no.1 accrues pursuant to the orders passed by the apex Court in the cases of ***Ferro Alloys Corporation Ltd.*** and ***Tata Iron & Steel Co. Ltd.*** mentioned supra. Pursuant to the recommendation made by the "Sharma Committee", which has been approved by the Central Government, an area of 100.063 hectares of land has been allotted in favour of petitioner no.1 for its captive mining and out of that 64.463 hectares was non-forest land and 35.60 hectares was forest land. It is also undisputed that so far as 64.463 hectares non-forest land is concerned, the mining lease has already been executed and petitioner no.1 is in operation of the same. Therefore, the split up area of 35.60 hectares, which is forest land, in respect of the same, different provisions were to be followed and the same have been followed and due clearances have been given by the respective authorities, as stated in detail in the factual matrix narrated above. Therefore, nothing remains but to execute a mining lease in favour of petitioner no.1, as it has complied with all the statutory requirements and deposited requisite fees for various accounts. But during pendency of execution of the mining lease, the Minor Mineral (Development and Regulation) Act, 1957 has undergone amendment, which has been inserted by Act 10 of 2015 with effect from 12.01.2015.

9. Section 10-A(2)(c) of the MMDR Act, 2015, which is relevant for the purpose of this case, is extracted hereunder:

> *"**10A**. **Rights of existing concession holders and applicants.-***
>
> *xx xx xx*
>
> ***(2)** Without prejudice to sub-section (1), the following shall remain eligible on and from the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015:—*
>
> *xx xx xx*

> ***(c)*** *where the Central Government has communicated previous approval as required under sub-section (1) of section 5 for grant of a mining lease, or if a letter of intent (by whatever name called) has been issued by the State Government to grant a mining lease, before the commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, the mining lease shall be granted subject to fulfilment of the conditions of the previous approval or of the letter of intent within a period of two years from the date of commencement of the said Act:*
>
> *Provided that in respect of any mineral specified in the First Schedule, no prospecting licence or mining lease shall be granted under clause (b) of this subsection except with the previous approval of the Central Government."*

Similarly, in exercise of powers conferred under Section 13 of the MMDR Act, 1957, the Central Government has framed a Rule called the Minerals (Other Than Atomic and Hydro Carbons Energy Minerals) Concession Rules, 2016, which was published on 04.03.2016. For the purpose of this case, Rule 8(4) of the aforesaid Rules, being relevant, is reproduced hereunder:-

> ***"8. Rights under the provisions of clause(c) of sub-section (2) of section 10A.-***
>
> *xx xx xx*
>
> ***(4)*** *Where an order for grant of mining lease has been issued under sub-rule (2), the mining lease shall be executed with the applicant in the format specified in Schedule VII and registered on or before 11th January, 2017, failing which the right of such an applicant under clause (c) of sub-section (2) of section 10A for grant of a mining lease shall be forfeited and in such cases, it would not be mandatory for the State Government to issue any order in this regard."*

10. A conjoint reading of both the provisions clearly indicates that where the Central Government has communicated previous approval, as required under Sub-section (1) of Section 5 for grant of mining lease, or if a letter of intent (by whatever name called) has been issued by the State Government to grant a mining lease, before the commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, the mining lease shall be granted subject to fulfilment of the conditions of the previous approval or of the letter of intent within a period of two years from the date of commencement of the said Act. As such, when an order for grant of mining lease has been issued under Sub-rule (2), the mining lease shall be executed with the applicant in the format specified in Schedule-VII and registered on

or before 11th January, 2017, failing which the right of such applicant under Clause-(c) of Sub-section (2) of Section 10-A for grant of mining lease shall be forfeited and in such cases, it would not be mandatory for the State Government to issue any order in that regard.

11. Considering this mandate put under Section 10-A(2)(c), the apex Court in the case of ***Bhushan Power and Steel Limited*** (supra) in paragraph 22 of the judgment held as follows:-

> *"**22.** Newly inserted provisions of the Amendment Act, 2015 are to be examined and interpreted keeping in view the aforesaid method of allocation of mineral resources through auctioning, that has been introduced by the Amendment Act, 2015. Amended Section 11 now makes it clear that the mining leases are to be granted by auction. It is for this reason that sub-section (1) of Section 10-A mandates that all applications received prior to 12-1-2015 shall become ineligible. Notwithstanding, sub-section (2) thereof carves out exceptions by saving certain categories of applications even filed before the Amendment Act, 2015 came into operation. Three kinds of applications are saved:*
>
> ***22.1.** First, applications received under Section 11-A of the Act. Section 11-A, under new avatar is an exception to Section 11 which mandates grant of prospecting licence combining lease through auction in respect of minerals, other than notified minerals. Section 11-A empowers the Central Government to select certain kinds of companies mentioned in the said section, through auction by competitive bidding on such terms and conditions, as may be prescribed, for the purpose of granting reconnaissance permit, prospecting licence or mining lease in respect of any area containing coal or lignite. Unamended provision was also of similar nature except that the companies which can be selected now for this purpose under the new provision are different from the companies which were mentioned in the old provision. It is for this reason, if applications were received even under unamended Section 11-A, they are saved and protected, which means that these applications can be processed under Section 11-A of the Act.*
>
> ***22.2.** Second category of applications, which are kept eligible under the new provision, are those where the reconnaissance, permit or prospecting licence had been granted and the permit-holder or the licensee, as the case may be, had undertaken reconnaissance operations or prospecting operations. The reason for protecting this class of applicants, it appears, is that such applicants, with hope to get the licence, had altered their position by spending lot of money on reconnaissance operations or prospecting operations. This category, therefore, respects the principle of legitimate expectation.*
>
> ***22.3.** Third category is that category of applicants where the Central Government had already communicated previous approval under Section 5(1) of the Act for grant of mining lease or the State Government had issued letter of intent to grant a mining lease before coming into force of the Amendment Act, 2015. Here again, the raison dêtre is that certain right had accrued to these applicants inasmuch as all*

the necessary procedures and formalities were complied with under the unamended provisions and only formal lease deed remained to be executed.

22.4. *It would, thus, be seen that in all the three cases, some kind of right, in law, came to be vested in these categories of cases which led Parliament to make such a provision saving those rights, and understandably so."*

12. Taking into consideration the law laid down by the apex Court, petitioner no.1 craves leave to indicate that it comes under the description prescribed under Para 22.3 of the judgment, referred to above, meaning thereby it comes under 3rd category of applicants where the Central Government had already communicated the previous approval under Section 5(1) of the Act for grant of mining lease and the State Government has issued letter of intent to grant a mining lease before coming into force of the Amendment Act, 2015. Consequentially, certain right had accrued to petitioner no.1, inasmuch as all the necessary procedures and formalities were complied with under the unamended provisions and only formal lease deed remained to be executed. Therefore, all the three cases, as mentioned in paragraphs 22.1, 22.2 and 22.3 of the judgment, referred to above, some kind of right, in law, came to be vested in the said categories of cases, which led the Parliament to make the provisions contained in Section 10-A(2)(c) saving those rights. This being the law laid down by the apex Court, examining the same on the factual matrix of the case in hand, certainly right has accrued in favour of the petitioner no.1, as it has already complied all terms and conditions prescribed by various authorities under various provisions of law and, as such, entire action has been taken under the unamended provisions and when petitioner no.1 is only waiting for execution of the mining lease, the same cannot be frustrated taking into account provisions contained in Section 10-A(2)(c) read with Rule 8(4) of the Concession Rules, 2016.

13. Needless to say that for execution of the mining lease, when certain terms and conditions have been directed to be complied with and petitioner no.1 has complied with the same, more specifically when petitioner no.1 has deposited the requisite fees under various provisions of the Act and the same having been acknowledged by the authority concerned, without any objection, now they are estopped from taking recourse of law to state that the benefit is not admissible to the petitioner.

14. In ***Black's Law Dictionary, 7th Edn. at page 570*** 'estoppel' has been defined to mean a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true,

15. In ***B.L. Sreedhar v. K.M. Munireddy***, (2003) 2 SCC 355 (365) it has been held by the apex Court that 'estoppel' is based on the maxim *allegans contrarir non est audiendus* (a party is not to be heard contrary) and is the *spicy of presumption juries et de jure* (absolute, or conclusive or irrebuttable presumption) The said judgment has been relied on by the apex Court in ***H.R. Basavaraj v. Canara Bank***, (2010) 12 SCC 458 (469).

16. It has been clarified in the case of ***H.R. Basavaraj*** mentioned supra that in general words, 'estoppel' is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/her position. In such a case, the former shall be estopped from going back on the word given. The principle of estoppel is only applicable in cases where the other party has changed his positions relying upon the representation thereby made.

17. The principle of promissory estoppel has been considered by the apex Court in ***Union of India v. M/s. Anglo Afghan Agencies etc***., AIR 1968 SC 718; ***Chowgule & Company (Hind) Pvt. Ltd. v. Union of India***, AIR 1971 SC 2021; ***M/s Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh***, AIR 1979 SC 621; ***Union of India v. Godfrey Philips India Ltd.***, AIR 1986 SC 806; ***Delhi Cloth & General Mills Ltd. v. Union of India***, AIR 1987 SC 2414; and ***Bharat Singh v. State of Haryana***, AIR 1988 SC 2181 and many other subsequent decisions also.

18. Therefore, applying the above principles of law to the present context, if petitioner no.1 has acted upon on the basis of the correspondences made from time to time by the authority concerned, the benefit which has been accrued on petitioner no.1 cannot be taken away on the plea of amendment of the MMDR Act and Rules framed thereunder.

19. Much reliance has been placed by Mr. A.K. Bose, learned Asst. Solicitor General of India on the judgment of the Andhra Pradesh High Court in ***Coromandel Mining & Exports Pvt. Ltd.*** (supra). Factually, in that case the petitioners had applied for prospecting licence-cum-mining lease and when their applications were pending, by that time the Amendment Act came into force. Consequentially, the applicants became ineligible. But keeping in view the factual parameters of the said case, that when the applications were pending for consideration become ineligible after commencement of the Amendment Act, the applicants challenged the provisions contained in the Amendment Act itself, this Court is the opinion that the said fact is not applicable to the present context, in view of the fact that in the instant case

the right of petitioner no.1 has accrued pursuant to the judgments of the apex Court rendered in ***Ferro Alloys Corporation Ltd.*** and ***Tata Iron & Steel Co. Ltd.*** mentioned supra and, as such, petitioner no.1 has been allotted with 100.063 hectares of land and on the basis of the splitting up application petitioner no.1 has been permitted to split non-forest land of 64.46 hectares and forest land of 35.60 hectares. So far as non-forest land is concerned, mining lease has already been granted and petitioner no.1 is operating the same, whereas in respect of the forest land of 35.60 hectares, subject to compliance of the provisions of the various Acts, the lease has to be executed by the petitioner with the State Government.

20. Mr. S.P. Mishra, learned Advocate General stated that in view of the pleadings made in paragraph 2 of the writ application, if petitioner no.1 complies with the said terms and conditions, then the State Government may not have any difficulty to execute the mining lease in favour of petitioner no.1. As a matter of fact, petitioner no.1 has already complied with required terms and conditions, but by virtue of the MMDR Amendment Act, 2015 no lease deed has been executed and, as such, the provisions contained in Section 10-A(2)(c) of MMDR Amendment Act, 2015 read with Rule 8(4) of the Concession Rules, 2016 may not have any application to the present context, in view of the law laid down by the apex Court in ***Bhushan Power and Steel Limited*** (supra).

21. So far the various provisions contained in Section 10-A(2)(c) of MMDR Amendment Act, 2015 read with Rule 8(4) of the Concession Rules, 2016 are concerned, it has been brought to the notice of this Court that the matter is pending before the apex Court for consideration. Therefore, this Court is refrained from examining the same, when the matter is subjudice before the apex Court. But at the same time, this Court is of the considered opinion that there is nothing available on record to stand in the way of petitioner no.1 for executing the mining lease, as it has already complied all the requirements under various provisions of the Act and all the authorities concerned have acknowledged the requisite fees deposited for the purpose of execution of such mining lease. Therefore, we direct the opposite parties to execute the mining lease as expeditiously as possible, preferably within a period of two months hence.

22. The writ application is thus allowed. No order to costs.

2019 (I) ILR - CUT- 235

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

W.P.(C) NO. 12558 OF 2003

BANSIDHAR NAIK & ORS. …… Petitioner

.Vs.

UNION OF INDIA & ORS. ……Opp. Parties

SERVICE LAW – Regularization – Petitioners joined as Casual Workers in 1982 in Central Rice Research Institute – Government of India, Ministry of Personnel and Pension, issued a scheme vide Memo No.51016/2/90-Estt.(C) dated 10.09.1993 with regard to grant of temporary status and regularization of casual workers who are eligible in accordance with the said guidelines which was given effect from 01.09.1993 – As per the scheme, the temporary status would be confirmed for all casual labourers, who were in employment on the date of issue of the said memorandum and who rendered a continuous service of at least one year, which means that they must have engaged for a period of 240 days or 206 days in case of offices observing five days week – Such conferment of temporary status would be without reference to the creating availability of regular Group-D posts – Writ petition challenging the order of CAT refusing to grant the relief of regularization – Held, Needless to say, the petitioners have already rendered 20 years of services and have completed three years of temporary status – They should have been considered for absorption against the permanent Group-D post – It is well settled law laid down by the apex Court that the casual workers having temporary status continuing for two to three years, the presumption can be taken that there is a regular need of their services and they should have been absorbed against Group-D posts – The order passed by the Central Administrative Tribunal is contrary to the law laid down by the apex Court. (Para 8 and 12)

Case Laws Relied on and Referred to :-

1. (2015) 8 SCC 265 : Amarkant Rai Vs. State of Bihar & Ors.
2. (2006) 4 SCC 1 : Secretary, State of Karnataka and Others Vs.Umadevi (3) & Ors.

For Petitioners : M/s. Ras Behari Mohapatra & R.K.Mahanta.

For Opp. Parties : M/s Sashi Bhusan Jena, S. Behera & A. Mishra.

JUDGMENT Decided on: 23.07.2018

DR. B.R. SARANGI, J.

The petitioners have filed this writ petition challenging the order dated 21.05.2003 passed by learned Central Administrative Tribunal, Cuttack

Bench, Cuttack in O.A. No.679 of 2002 refusing to absorb the petitioners against permanent post of Group-D by regularizing their services with all consequential benefits at par with regular Group-D employees working under the Central Rice Research Institute-opposite party no.3 as per ICAR Circular No.24(15)/93-CDN dated 23.11.1994, which has been adopted from the scheme prepared by the Department of Personnel and Training (DOP &T) for grant of temporary status and regularization of casual workers.

2. The factual matrix of the case, in hand, is that the Indian Council of Agricultural Research is a Society registered under the Societies Registration Act, 1860 which is amenable to the jurisdiction of the Central Administrative Tribunal, pursuant to notification dated 28.02.1990 under Section 14(2) of the Administrative Tribunals Act, 1985. The Central Rice Research Institute at Cuttack is a research unit/project of the Indian Council of Agricultural Research. It is fully aided by the Government of India and is engaged in the Agricultural Research activities and other allied sciences. It performs its duties and functions under the statutory provisions and in doing so it engages daily rated labourers for various activities. These labourers are being paid their wages as per the minimum wages fixed by the Government of India from time to time under the Minimum Wages Act. They were engaged due to exigency of work, without considering relevant factors about their educational qualification, age limit and other relevant requirements for the purpose of regular appointment under the requirements rules/schemes.

3. Guidelines have been issued from time to time to engage such type of daily rated wagers. All the Directors/Project Directors under the ICAR were requested to review the appointment of the Casual Workers in their institutes. Vide Office Order dated 31.01.1990, opposite party no.3 enhanced the rate of wages at the rate of $1/30^{th}$ of pay at the minimum of the pay scale of S-S-Grade-I, i.e., Rs.750-12-870-EB-14-940 with D.A. as admissible to the Central Government Employees from time to time for the work of 8 hours a day w.e.f. 16.12.1988. The engagement of such casual employees was restricted only to the days on which they actually performed duty under the institute, with a paid weekly as per calculation of pay scale, pursuant to the office order issued by the authority concerned. Taking into consideration the length of service put in as Casual Workers, a list was drawn up indicating their seniority as on 01.01.1991 and the same was circulated among the casual workers inviting objection to the list as drawn up by the authority. Therefore, the petitioners name found place at Sl. No.267, 268 and 269 respectively in the said list taking into consideration their initial date of

joining i.e. 15.12.1982, 13.12.1982 and 13.12.1982. Opposite party no.2 adopted the scheme issued by the Government of India, Ministry of Personnel and Pension, vide Memo No.51016/2/90-Estt.(C) dated 10.09.1993, in respect of grant of temporary status and regularization of casual workers who are eligible in accordance with the said guidelines which was given effect from 01.09.1993. As per the scheme, the temporary status would be confirmed for all casual labourers, who were in employment on the date of issue of the said memorandum and who rendered a continuous service of at least one year, which means that they must have engaged for a period of 240 days or 206 days in case of offices observing five days week such conferment of temporary status would be without reference to the creating availability of regular Group-D posts. The temporary status casual labourers were entitled to the minimum pay scale for a corresponding regular Group-D Official including D.A., H.R.A. and C.A. Besides that they were entitled to other benefits such as, increment, live entitlement, maternity benefit.

4. As per the provisions contained in the scheme prepared by the D.O.P. & T which was adopted and circulated vide letters dated 23.09.1994 and 23.11.1994, the Director of Central Rice Research Institute issued an Office Order dated 13.01.1995 by granting the temporary status w.e.f. 01.09.1993 and regularizing the services of the casual labourers in the said list, where the names of the petitioners found place at Sl. Nos.111, 113, 115, 116, 044 and 045 respectively. Consequence thereof, the petitioners have been paid the wages at daily rates with reference to the minimum of the pay scale for a corresponding regular Group-D Officials including DA, HRA, CCA. But, the benefits of increments at the same rate, as applicable to Group-D employees were not paid and the leave entitlement in a prorate basis, maternity leave and even after, rendering three years continuous service after conferment of temporary status were not allowed. Therefore, the petitioners approached the authority concerned for several times for absorption in the Group-D posts and to extend full benefits at par with Group-D employees working under opposite party no.3. Needless to say, by the time the petitioner approached the authority concerned they had already rendered more than 20 years of services besides, after completion of three years of temporary status, they should have considered for their absorption against permanent Group-D posts. But the same having not been done, the petitioners approached the Central Administrative Tribunal by filing OA No.679 of 2002. Learned Tribunal dismissed the said O.A. vide order dated 21.05.2003. Hence this application.

5. Mr. R.B. Mohapatra, learned counsel for the petitioners contended that the order passed by the Central Administrative Tribunal is an outcome of non-application of mind inasmuch as the Tribunal has failed to take note of the contentions raised in the counter affidavit that as and when Ban Order on filling up of posts and creation of posts for regularization of the services of the casual employees having temporary status would be lifted, the prayer of the petitioners working in their organization would be considered as per seniority and suitability pursuant to the guidelines laid down by the Government in this regard. Instead of making observation that as and when the ban order lifted, the case of the petitioners would be considered, the Tribunal dismissed the application which is contrary to the materials available on record itself. Reliance has been placed on ***Amarkant Rai v. State of Bihar and Ors***., (2015) 8 SCC 265 and it is submitted keeping in view the ratio decided therein the petitioners' case should be considered to regularize their services basing upon their suitability in terms of the circular issued by the Government of India adopted by opposite party no.3.

6. Mr. S.B. Jena, learned counsel appearing for opposite party no.4 contended that the learned Central Administrative Tribunal is well justified in its order dated 21.05.2003 rejecting the claims of the petitioners, which does not warrant interference of this Court at this stage.

7. We have heard Mr. R.B. Mohapatra, learned counsel for the petitioners and Mr. S.B. Jena, learned counsel for opposite party no.4 and perused the records. Pleadings having been exchanged between the parties and with the consent of learned counsel for the parties, the matter is being disposed of finally at the stage of admission.

8. The facts delineated above are undisputed. As such, the petitioners have been granted temporary status with effect from 01.09.1993, pursuant to the scheme prepared by the Department of Personnel and Training, which was adopted and circulated vide letters dated 23.09.1994 and 23.11.1994. Consequence thereof, the Director of C.R.R.I. issued an office order on 13.01.1995. The scheme also prescribes the procedure for filling up of Group-D posts and regularization of casual workers with a temporary status. Two out of every three vacancies in Group-D cadres in respective offices, where the casual labourers have been working, would be filled up as per the existing recruitment rules and in accordance with the instructions issued by the Department of Personnel and Training, from amongst casual workers with a temporary status. Regular Group-D staff referred surplus for any reason

will have prior claim for absorption against existing/future vacancies. On 10.01.2000, the opposite parties issued a letter to all the Directors/Project Directors of the Institute/Centre clarifying the points in respect of scheme prepared by the Department of Personnel and Training, wherein it has been stated that the facilities of paid weekly off would be admissible only after six months of continuous work. Relying upon the said circular, the petitioners have been paid the wages at daily rate basis with reference to the minimum of the pay scale for a corresponding regular Group-D officials including DA, HRA and CCA and the benefit of increments at the same rate as applicable to Group-D employees are not paid and the leave entitlement in a pro-rate basis, maternity leave after rendering three years continuous service after conferment of temporary status were not allowed. Needless to say, the petitioners have already rendered 20 years of services under opposite party no.3. Besides that, after completion of three years of temporary status they should have been considered for absorption against the permanent Group-D post.

9. It is well settled law laid down by the apex Court that the casual workers having temporary status continuing for two to three years, the presumption can be taken that there is a regular need of their services and they should have been absorbed against Group-D posts.

10. The Constitution Bench of the apex Court in ***Secretary, State of Karnataka and Others v. Umadevi (3) and Others***, (2006) 4 SCC 1 observed in paragraph-53 that regular appointment of employees who have worked for more than ten years should be considered in merits.

11. Therefore, applying the principles laid down by the apex court to the present context, as the petitioners have worked for more than 20 years and by virtue of circular issued by the Department of Personnel and Training adopted by opposite parties no.2 and 3 since they have already got temporary status with effect from 01.09.1993, their services have to be regularized against the vacant posts of Group-D.

12. Reliance has been placed on the judgment of ***Umadevi*** (supra) in the case referred by the learned counsel for the petitioner in ***Amarkanta Rai*** mentioned (supra). As the petitioners have already completed more than 20 years of service by the time learned Central Administrative Tribunal passed the order, the authority should have considered their case for regularization in service against vacant posts of Group-D and non-consideration of the same is vitiated in the eye of law. As it appears, the order of the learned Central

Administrative Tribunal was passed on 21.05.2003 and by that time the Constitution Bench judgment of ***Umadevi*** (supra) had not seen the light of the day. During pendency of the writ petition, there is change of position laid down by the apex court, which has been followed in a subsequent case in ***Amarkant Rai*** (supra).

13. Keeping in view the ratio decided in both ***Umadevi*** and ***Amarkant Rai*** (supra), we are of the considered view that the petitioners' case for regularization as Group-D posts should be taken into consideration by the authority concerned in the light of those judgments. As such, the order dated 21.05.2003 passed by the Central Administrative Tribunal in O.A. No.679 of 2002, being contrary to the law laid down by the apex Court, we are inclined to quash the same and allow the writ petition permitting the opposite parties to regularize the services of the petitioners taking into consideration the ratio decided in ***Umadevi*** and ***Amarkant Rai*** mentioned (supra).

14. The writ petition is accordingly allowed. No order as to cost.

2019 (I) ILR - CUT- 240

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

W.P.(C) NO. 2905 OF 2009

RASHMI METALIKS LTD. & ANR. ……..Petitioner

.Vs.

UNION OF INDIA, (EAST COAST RAILWAYS, BHUBANESWAR) & ORS. ……..Opp. Parties

INDIAN RAILWAYS ACT, 1989 – Section 73 and 78 – Provisions under – Imposition of punitive charges for over loading of wagon – No show cause notice for making such demand – No material showing that the demand notice issued before delivery of the goods – Demand notice quashed.

Case Laws Relied on and Referred to :-

1. AIR 2011 CALCUTTA 216 : Union of India & Anr. (E.Rly) .Vs. Ultra Tech Cement Ltd. & Anr.,

For Petitioner : M/s. Bikram K. Nayak, N. Pal.
Asok Mohanty, Senior Adv.,

For Opp. Parties : M/s. A.K. Sahoo, S.K. Ojha, N.R. Pandit, H.M.Das.
A.K. Mishra, Standing Counsel

ORDER Date of Order : 04.01.2019

K.S. JHAVERI, CJ.

Heard Mr. Asok Mohanty, learned Senior Advocate for the petitioners and Mr. A.K. Mishra, learned Standing Counsel appearing for the Railway.

By way of this writ petition, the petitioners have prayed for the following relief:

> "It is therefore prayed that your Lordships would graciously be pleased to admit the writ petition, issue notice to the opposite parties to show cause as to why the writ petition shall not be allowed and upon their showing no cause or insufficient cause, allow the writ petition and issue a writ in the nature of mandamus or an appropriate writ quashing the impugned notices dt.12.09.2008 and 09.02.2009 under Annexures-3 and 8 and further direct the opposite parties to accept the indents from the petitioner Company and allow the movement of rakes, without asking the alleged punitive charges amounting to Rs.1,86,99,211/-."

Learned counsel for the petitioners has submitted a date chart which raising following contentions:

> "In the present writ petition, the Petitioners have challenged the notice dated 12.09.2008 under Annexure-3 and subsequent demand notice dated 09.02.2009 issued by Sr. Divisional Commercial Manager, East Coast Railway, Khurda Road wherein the Opp. Parties (Railways) have demanded punitive charges to the tune of Rs.1,86,99,211/- for allegedly over loading of wagons while transporting iron ore from Nimpura Yard to Paradeep Port.
>
> **16.06.2008 and 22.06.2008**- During the month of June, 2008 the petitioner, having been allotted with rakes for transportation of iron ore started loading of iron ores from different Stations and after completion of loading, the Railway Authority issued two nos. of Railway Receipts (RR) on 16.06.2008 and 22.06.2008. Thereafter the Trains started its journey to the destination point. **(Annexure-2)**
>
> **06.07.2008 & 08.07.2008-** The wagons reached the destination point i.e. Paradeep Port and unloaded the iron ore without any intimation about the over loading or otherwise.

12.09.2008—Notice dated 12.09.2008 was received from Traffic Inspector, Paradeep Port Trust Railway regarding imposition of punitive charges allegedly for over loading of wagons. **(Annexure-3)**

09.02.2009—Letter dated 09.02.2009 issued by Sr. Divisional Commercial Manager, East Coast Railway, Khurda Road demanding punitive charges to the tune of RS.1,86,99,211/- for allegedly over loading of wagons was received much after the delivery of the goods. **(Annexure-8).**

-------It is humbly submitted that in view of Sections 73 and 78 of the Railways Act, 1989 the Opp. Parties are not legally entitled to make the demand of punitive charges after delivery of the goods and as such the demand is without jurisdiction.

-------Further, it is an admitted fact that the demand has been made after the delivery of the goods and therefore in view of the provisions specifically stipulating that punitive charges can only be imposed before delivery, the demand as made is bad in law and liable to be quashed.

-------That the Opp. Parties in their counter affidavit at sub-para of Paragraph 21 have admitted the fact of delivery of the goods before raising the demand. The relevant portion of the counter affidavit runs as follows:

"It is further humbly submitted that there was over loading of 5 rakes in the year 2008 from 01.01.2008 to 02.12.2008 and also demand notice dated 09.02.2009 for punitive charges by the Sr. Divisional Commercial Manager, Khurda Road Division is based on the weighment slips and also in terms of provision vide Section 73 of the Railways Act, 1989. It is worthwhile to mention here that if the consignor, the consignee or the endorsee fails to pay on demand any freight and other charges due to him in respect of any consignment, the Railway Administration may detain such consignment or part thereof of if such consignment is delivered, it may detain any other consignment of such person which is in or thereafter comes into its possession. Hence non-acceptance of indent by the Railway Administration is justified in the eyes of law in terms of Section 83 of the Railways Act, 1989."

------That in view of the admitted fact that the demand of punitive charges was made after delivery of the goods and as such there remains no dispute about the legal provision that as per Section 73 and 78 of the Railways Act, 1989, the demand of punitive charges cannot be made after delivery of the consignment at the destination point.

Section 73 and 78 of the Indian Railways Act, which are relevant for the purpose of our discussion reads as follows:

"73. Punitive charge for over-loading a wagon. - Where a person loads goods in a wagon beyond its permissible carrying capacity as exhibited under sub-section (2) or sub-section (3), or notified under sub-section (4) of section 72, a Railway administration may, in addition to the freight and other charges, recover from the consignor, the consignee or the endorsee, as the case may be, charges by way of penalty at such rates, as may be prescribed, before the delivery of the goods:

> Provided that it shall be lawful for the Railway administration to unload the goods loaded beyond the capacity of the wagon, if detected at the forwarding station or at any place before the destination station and to recover the cost of such unloading and any charge for the detention of any wagon on this account.
>
> 78. Power to measure, weigh, etc.--Notwithstanding anything contained in the railway receipt, the railway administration may, before the delivery of the consignment, have the right to-
>
> (i) re-measure, re-weigh or re-classify and consignment;
>
> (ii) recalculate the freight and other charges; and
>
> (iii) correct any other error or collect any amount that may have been omitted to be charged."

Learned counsel for the petitioners mainly contended that the impugned order is violative of the principles of natural justice and also in gross violation of Sections 73, 78 and 79 of the Indian Railways Act and there is nothing on record to show that before delivering the material the petitioners have acknowledged the weight which has been alleged in the impugned notices. He has strongly relied upon the decision of the ***Calcutta High Court in the case of Union of India & Anr. (E.Rly) v. Ultra Tech Cement Ltd. & Anr.,*** reported in ***AIR 2011 CALCUTTA 216***, paragraphs-19, 20 and 21 of which read as under:

> "19. After considering the facts and materials placed before us and after scrutinizing the Sections of the Railways Act as well as the paragraphs of the manual we find that admittedly the demand notices were issued by the railways after the delivery of goods.
>
> 20. After considering Sections 73 and 83 it appears to us that the said two Sections govern the realization of the charges and from the said sections it appears to us that as has been held by the Hon'ble Single Judge in order to take punitive charge for overloading a wagon, the concerned parties must be given intimation of the overloading and once the goods have been booked after due weighment, such punitive charge cannot be levied unless the goods are re-weighed in the presence of the representatives of the parties concerned. The said principle has been laid down in the case of Union of India Vs. Agarwala (Supra) and further we have noticed that the conduct of the railways would show that the belated demand has been made subsequent to the delivery being effected and thereby it violates the instruction given in the railways manual to its officials to obtain payment prior to the release of the goods prescribed.
>
> 21. We noticed the paragraphs of the manual and in the light of the sections of the Railways Act, we find that the writ petitioners were not afforded a chance to exercise the right conferred on a consignee or a consignor under Section 79 of the

Act. Therefore, we have no hesitation to hold that the steps taken by the railways are in violation of the said provisions of law, thereby is not sustainable in the eye of law."

We have heard the counsels for both the sides. However, learned counsel for the opposite parties made a statement that in one of the writ petitions, i.e., W.P.(C) No.7895 of 2009 part payment pursuant to demand is already made and he has assured that the balance amount will be paid to the petitioners therein. But in our considered opinion, in view of the language of Sections 73 and 78 of the Indian Railways Act, the impugned order not only suffers from violation of the principles of natural justice but also there is no material on record to establish that the impugned notice was issued before delivery of the alleged consignment.

In that view of the matter, the impugned notices dated 12.09.2008 and 09.02.2009 are required to be quashed and set aside. Accordingly, the same are quashed and set aside. The matter is remitted back to the authority. Both the petitioners will appear before the authority on 4.2.2019 and after providing the relevant documents, it will be open for the authority to pass a fresh reasoned order after hearing the petitioners. The said exercise will be completed on or before 30.6.2019.

Refund of the amount, if any deposited, shall be subject to the order to be passed by the authorities after hearing the parties.With the above direction, the writ petition is disposed of.

2019 (I) ILR - CUT- 244

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

W.P.(C) NO. 10725 OF 2018

SURYANARAYAN MOHANTY .....Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the rejection of technical bid on the ground that the bidder had no requisite experience of executing similar nature of work as per relevant clause of DTCN – Six members Technical

Committee has considered the bid and has opined that the petitioner has no requisite experience of executing similar nature of work – Plea of petitioner that the decision based on erroneous appreciation of clause 2.1(4) and 2.1(5) of the DTCN – Plea not supported by any cogent material – Whether it will be proper for the court to substitute its decision ? – Held, in view of the observation made by the Hon'ble Supreme Court at paragraphs 12 and 16 in the case of *Master Marine Services (P) Ltd.* as quoted it will be appropriate for us not to substitute our opinion where an expert Committee after considering all the aspects of the matter has taken a decision in rejecting the financial bid taking into consideration that the petitioner was not fulfilling the criteria under Clauses 2.1(4) and 2.1(5) – Thus, other allegations with regard to administrative/technical decision, as submitted by the learned counsel for the petitioner, cannot be taken into consideration. (Para 15 & 16)

Case Laws Relied on and Referred to :-

1. (2013) 10 SCC 95 : Rashmi Metaliks Limited and Anr. Vs. Kolkata Metropolitan Development Authority and Ors.,
2. AIR 2014 SC 1483 : M/s. Siemens Aktiengeselischaft & S. Ltd. Vs. DMRC Ltd. & Ors,
3. 2017 (II) ILR-CUT-763 : Gangadhar Jena Vs. State of Odisha & Ors.
4. (2005) 6 SCC 138 : Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd. & Anr.

For Petitioners : M/s. Umesh Ch. Mohanty, T. Sahoo, B.K. Swain, R.P. Panigrahi,& N. Mohanty.

For Opp. Parties : Mr. P.K. Muduli, Addl. Govt. Adv.

ORDER Heard & Decided on: 07.01.2019

K.S. JHAVERI, C.J.

Heard learned counsel for the petitioner, learned Additional Government Advocate for the State opposite parties and learned counsel for the opposite party No.5.

2. By way of this writ petition, petitioner has prayed for following relief:

> (i) Issuance of appropriate writ quashing the result of the evaluation of technical bid by the Technical Evaluation Committee floated in the web-site dated 19.6.2018 under Annexure-3 declaring the petitioner as disqualified and the consequential actions in opening the price bid of the opp. partyNo.5 along with another Bidder and declaring the said Opp.party No.5 as L1 Bidder as per the notice floated in the web-site on 20.6.2018 under Annexure-5.

(ii) Issuance of a writ of mandamus directing the opp. Parties No.1 to 4 to re-evaluate the technical bid of the petitioner on the face of the provisions stipulated under clause 2.1(4) & (5) and stipulations made there under so far as execution of similar nature of works put to tender on the face of the certificate submitted in the tender under Annexure-2 series and accordingly made reevaluation of the price bid so as to find out the successive L1 bidder and accordingly direct for award of contract in favour of the petitioner.

3. The facts of the case of the petitioner in brief are that the Engineer-in-Chief, Rural Works Odisha, Bhubaneswar (O.P. No.2) invited National Competitive Bidding through e-procurement No. 12-2017-18 (Bridges) dated 16.3.2018 on percentage rate tender for the works through e-procurement i.e. for Construction of HL Bridge over River Kusei & Local Nallah at 1st KM & 1/500 km on Batto Panchupalli road in the district of Keonjhar with approximate estimated cost of Rs. 9,95,20,000/- under the RW Division, Anandpur. As per the said tender notice technical bid was fixed to be opened on 26.4.2018 and price bid thereafter. On 31.3.2018, O.P. No.2 issued corrigendum extending the tender schedule for availing the tender up to 2.5.2018 and the opening of technical bid to be held on 4.5.2018. The case of the petitioner is that he has submitted his bids having all eligibility within the time, along with documents including the Turn over Certificate and execution of similar nature of work like the present tender, issued by the Executive Engineer, RW Division, Keonjhar and RW Division, Bhadrak-I. On the basis of the same and calculating the amount received by the petitioner in applying the Escalation Factor as per the eligibility criteria of Clause 2.1 (4) & (5) and stipulation there under the petitioner have achieved Rs. 798.68 lacks against the requirement of execution of similar nature of work @ 75% of the estimated cost of the work put to tender which comes to Rs. 7.46 crores only. On 19.6.2018, the tender Evaluating Authorities evaluated the technical bid of the bidders and rejected the technical bid of the petitioner vide letter No. 16164 dated 19.6.2018 and uploaded the said in the web-site on 20.6.2018. The technical bid of the petitioner has been declared disqualified due to inadequate experience in execution of similar nature of works. The petitioner also represented to the authorities in this regard. However, on 20.6.2018, the price bid of the bidder namely M/s. H.L. Infrastructure and M/s. C.P. Mohanty & Associates were opened and uploaded in the web-site from which it is revealed that M/s. H.L. Infrastructure has been declared as L1 Bidder with offer of 5.52% less than the amount of estimated rate. Challenging the said action of the authorities, petitioner filed this writ petition on 25.6.2018.

4. On 26.06.2018, this Court directed the Government counsel to take instructions and thereafter the matter was listed on 26.11.2018, when the following order was passed by the Court:

> "In spite of the order dated 26.6.2018, no reply is filed.
>
> As a last chance, list this matter on 10.12.2018 for filing of reply, failing which Commissioner-cum –Secretary to Govt. Rural Works Department, Odisha, Bhubaneswar shall remain present on 10.12.2018.
>
> Till the next date, there shall be stay of further proceeding in respect of the tender call notice under Annexure-1 series, with a direction to the opposite parties not to finalise the same."

5. Thereafter, when the matter was listed on 10.12.2018, the following order was passed by this Court:

> "Learned counsel for the opposite party No.5 has filed the counter affidavit in Court today. The counter affidavit be kept on record. A copy of the counter affidavit be served on the learned counsel for the petitioner.
>
> Learned counsel for the petitioner requests for time.
>
> The matter to come up on 07.01.2019 with a view to enable the learned counsel for the parties to complete their pleadings.
>
> Interim order dated 26.11.2018 shall continue till the next date."

6. The main contention of the petitioner is in respect of the eligibility criteria prescribed under clause 2.1(4) & (5) of the DTCN, which reads as under:

> "2.1(4) The intending tenderer(s) should have executed similar nature of work worth 75% of the estimated cost put to tender (as in Col-3 of the Table) during any three financial year taken together of the last preceding five years (excluding the current financial year). In case of contract spanning for more than one financial year, the break up of execution of work in each of financial year should be furnished. A certificate to this effect must be enclosed from the officer not below the rank of Executive Engineer as per enclosed Format-I.
>
> 2.1(5) The intending tenderer(s)should have the total financial turn over in respect of Civil Engineering works of an amount not less than the amount put to tender (as in Col-3 of the Table) during any 3(three) financial years taken together of the last proceeding five financial years (excluding the current financial year). The financial turn over certificate for Civil Engineering works should be submitted from the Charted Accountant showing clearly the financial turn over financial year wise."

7. It is stated that though the petitioner was fulfilling all the criteria, in spite of that, misreading both the clauses and without considering the financial turnover of the petitioner under Annexure-2, which was issued by the Chartered Accountant, his bid was rejected vide order dated 19.6.2018 mentioning the ground therein "Disqualified due to inadequate experience in similar nature of work". It is submitted that the petitioner on 07.6.2018 made a representation to the O.P. No.2 which was also accepted by the local Executive Engineer and he had also accepted the contentions of the petitioner and made an endorsement that "please discuss and give reasons of disqualification" and in spite of such representation the opp. Parties did not consider the technical bid of the petitioner in its proper perspective and proceeded further and opened the price bid of the two qualified bidder in the technical bid wherein the opposite party No.5- M/s. H.L. Infrastructure has been shown as L1 bidder with less offer of 5.52 against the estimated cost.

8. It is also contended by the learned counsel for the petitioner referring to the approximate estimated cost of the work in question as reflected at Sl. No.1 of page 5 of the original DTCN that the Approx. Estimated cost of the work was Rs. 9,95,20,000/-, whereas with a view to favour the opposite party No.5, the price was escalated to Rs. 10,57, 57, 567.75 and thus the opposite parties-authorities have acted only with a view to favour the opposite party No.5 herein. Learned counsel for the petitioner, strongly relied upon his affidavit in rejoinder and Government guidelines Note (iii) under Clause 6.3.15 of the O.P.W.D. Code Vol.I and submitted that the finalization of tenders for the works above Rs. 7.00 crores and upto Rs. 10.00 Crores should be done at the level of Engineer-in-Chief as Chairman concerned Chief Engineer as member and Financial Adviser/AFA/Accounts Officer of the same office as member secretary and in case of divergent views of Tender Committee, final decision will be taken by the next higher authority. It is further contended that the opposite parties-authorities have acted arbitrarily and rejected his bid ignoring the Administrative approval, under Annexue-10, accorded for the work in question.

9. Learned counsel for the petitioner relied upon the decisions of the Supreme Court in the case of ***Rashmi Metaliks Limited and Anr. Vs. Kolkata Metropolitan Development Authority and Ors.,*** (2013) 10 SCC 95; and ***M/s. Siemens Aktiengeselischaft & S. Ltd. Vs. DMRC Ltd. & Ors,*** AIR 2014 SC 1483 mainly contending that if there is illegality and irregularity in the decision making process of the authority, the Court should interfere in such matters. He has also placed reliance upon a decision of the Division

Bench of this Court in the case of ***Gangadhar Jena Vs. State of Odisha & Ors.,*** reported in 2017 (II) ILR-CUT-763, wherein by a conjoint reading of sub-clauses of Clause 121.3 of the Tender Call Notice relating to General Experience, it was observed that the requirement of experience of "execution" of "similar nature of work" and cannot be interpreted to "completion of similar nature of work", and a conjoint reading must be given to the relevant clauses of the Tender Call Notice. Paragraph 9 of the judgment in ***Rashmi Metaliks Limted*** (supra), upon which reliance has been placed by the learned counsel reads as under:

> "9. Tata Cellular states thus :
>
> "77. The duty of the court is to confine itself to the question of legality.
> Its concern should be :
>
> 1. whether a decision-making authority exceeded its powers?
>
> 2. committed an error of law,
>
> 3. committed a breach of the rules of natural justice,
>
> 4. reached a decision which no reasonable Tribunals would have reached or,
>
> 5. abused its powers.
>
> Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :
>
> i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
>
> ii) Irrationality, namely, Wednesbury unreasonableness.
>
> iii) Procedural impropriety.
>
> The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex parte Brind, (1991) 1 AC 696, Lord Diplock refers specifically to one development namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the Court should, 'consider whether something has gone wrong of a, nature and degree which requires its intervention."

Paragraphs 25 and 26 of the judgment in ***M/s. Siemens Aktiengeselischaft & S. Ltd.*** (supra), upon which reliance has been placed by the learned counsel reads as under:

> "25. Secondly, because even assuming that the process of validation of the GEC values and their achievability was an implied condition in the evaluation process, DMRC had on the basis of an internal simulation satisfied itself that the GEC values were not unachievable. The High Court has referred to the simulation results and so

has our attention been drawn to the said result from the original record produced by DMRC. We do not see any illegality or irregularity in the process of verification conducted by the DMRC to test the achievability of the GEC values. It is true that DMRC had conducted the simulation in regard to the GEC values offered by HR only but then in the absence of any condition in the tender notice requiring DMRC to conduct such verification even in regard to other GEC values, there was no need for it to undertake any such exercise. DMRC was, in our opinion, entitled to adopt such methods as were reasonable to satisfy itself above about the GEC values and their achievability offered by lowest tenderer in whose favour it was considering the award of the contract. The upshot of the above discussion, therefore, is that the process by which the bids were evaluated and eventually accepted was transparent, fair and reasonable and does not, therefore, call for any interference from this Court.

26. That brings us to the question whether the Government of India was justified in appointing a Committee to test the evaluation of bids and, if so, whether this Court ought to look into the Report of the Committee. There is more than one aspect that needs to be kept in view in this regard. The first and foremost is the fact that the Committee was appointed at a stage when the matter was already pending before the High Court. Considerable time was spent by learned counsel for the parties in debating whether the constitution of the Committee by the Government itself tantamounted to interference with the course of justice, hence contempt. We do not, however, consider it necessary to pronounce upon that aspect in these proceedings especially because we have not been called upon to initiate such contempt proceedings. All that we need say is that once the Government had known that the entire issue regarding the validity of the process adopted by DMRC including the transparency and fairness of the process of evaluation of the bids was subjudice before the High Court of Delhi and later before this Court, it ought to have kept its hands off and let the law take its course. It could have doubtless placed all such material as was relevant to that question before the High Court and invited a judicial pronouncement on the subject instead of starting a parallel exercise. The Government could even approach the High Court and seek its permission to review the process of evaluation either by itself or through an expert Committee if it felt that any such process would help the Court in determining the issues falling for consideration before the Court more effectively. Nothing of that sort was, however, done. On the contrary even when the Secretary to the MoUD pointed out that the matter is subjudice and any further action in the matter could await the pronouncement of the Court, the Hon'ble Minister heading MoUD directed the constitution of the Committee with the following terms:

"2(1) To examine if a fair, equitable and transparent tender process was followed by DMRC, as per the prescribed guidelines"."

Paragraph 11 of the judgment of this Court in ***Gangadhar Jena*** (supra), upon which reliance has been placed by the learned counsel reads as under:

"11. From a conjoint reading of sub-clauses (a), (b) and (c) of the Clause 121.3 of the Tender Call Notice relating to General Experience, it is clear that what was required, was experience of "execution" of "similar nature of work"; and not

> "completion" of "similar nature of work". Sub-clause (a) clearly mentions that "work in progress" as well as "completed work" should be taken into account while evaluating the experience. Sub- clause (a) further clarifies that the class of work which was to be considered for such experience was "Civil Engineering Construction Work". Clause 13 of the Tender Call Notice also speaks of similar work, which has to be read along with Clause 121.3(a), and cannot be read in isolation. Sub-clause (c) of Clause 121.3 also speaks of similar nature of work, which is also to be read along with sub-clause (a), which specifies the nature of the work to be "Civil Engineering Construction Works". Learned counsel for the opposite parties have not been able to point out that how the "bridge work" is to be treated as "similar nature of work", which is nowhere mentioned in the Tender Call Notice."

10. Placing reliance upon the aforesaid decisions, it is submitted that the petitioner has wrongly been deprived from his legitimate right and qualification in view of clauses 2.1(4) and 2.1.(5) of the DTCN, as quoted above, and if both the clauses are read together, petitioner would be found suitable and eligible to compete in the competition and further as the bid of the petitioner was Rs. 27,28,545.25 less than the bid offered by the opposite party No.5 the petitioner could have the L1 Bidder and would have granted the contract and also the State would have saved Rs. 27,28,545.25. Therefore, as the decision making process in awarding the work in question is illegal, arbitrary and unreasonable, it is prayed that this Court may interfere with the same.

11. On the other hand, Mr. P.K. Muduli, learned Addl. Government Advocate pointed out the specific contention in the counter filed by the opposite parties-authorities, particularly, at paragraph 4 of the affidavit, which reads as under:

> "…As per Clause 2.1.(4) and Clause 2.1(5) of DTCN, it is the responsibility of the petitioner to obtain Experience Certificate from the Executive Engineer concerned in "Format-I" to establish execution of similar nature of work worth 75% of the estimated cost put to tender. The estimated cost of the work in question is Rs. 995.20 lakhs and 75% of the estimated cost is Rs. 746.40 lakhs. *The work in question is construction of a high level bridge. So experience towards execution of bridge is the requirement as per Clause – 2.1.(4) of the DTCN. The technical bids were opened on 19.6.2018 by the Technical Committee consisting of six members and the documents uploaded by the bidders were verified. After thorough verification of the documents uploaded by the petitioner, the Committee found that the petitioner has experience of execution of bridge work for a value of Rs. 543.05 lakhs only against the requirement of Rs. 746.40 lakhs*.

> It is further submitted that all the Experience Certificates submitted by the bidders do not relate to bridge work. Those Experience Certificates which relate to execution of bridge work have been taken into consideration. *The experience Certificates as enclosed at Pages – 54,55, & 63 of the Writ petition were taken into account year wise but the Certificate at page 62 of the Writ Petition having certified by the petitioner himself was not accepted being in violation of Clause 2.1(4) of DTCN. The Experience Certificate from Pages 56 to 61 do not relate to experience with regard to execution of bridge work so same were not taken into account. The petitioner has given experience certificate for execution of bridge work worth Rs. 150.34 lakhs for the financial year 2012-13, Rs. 133.24 lakhs for the financial year 2013-14, Rs. 300.95 lakhs for the financial year 2014-15, Rs. 180.86 lakhs for the financial year 2015-16 and Rs.91.09 lakhs for the financial year 2016-17. Therefore, the experience for the three financial years 2012-13, 2013-14 and 2014-15 as per Clause – 2.1(4) of the DTCN were taken into consideration which comes to worth Rs. 584.53 lakhs*."

12. It is submitted by Mr. Muduli that for the reasons stated in the above quoted paragraphs, the petitioner was not eligible for the work in question. He has also pointed out that the Expert Committee, reading together both the clauses, has considered the bid of the petitioner, but he was not found eligible, therefore, it cannot be said that the authorities have taken any erroneous or illegal action. Mr. Muduli, learned AGA placed reliance upon a decision of the Supreme Court in the case of ***Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd. & Anr.,*** (2005) 6 SCC 138, the relevant paragraphs of the judgment is quoted below:

> "**11.** The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three Judge Bench in Tata Cellular v. Union of India AIR 1996 SC 11. It was observed that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. (See para 85 of the reports.)
>
> ***12.*** *After an exhaustive consideration of a large number of decisions and standard books on Administrative Law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The Court does not sit as*

a court of appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi- administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the reports.)

13. In Sterling Computers Ltd. v. M/s M.N. Publications Ltd. AIR 1996 SC 51 it was held as under :

"While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process." By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Court have inherent limitations on the scope of any such enquiry. But at the same time the Courts can certainly examine whether "decision making process" was reasonable rational, not arbitrary and violative of Article 14 of the Constitution. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract. ....."

14. In Raunaq International Ltd. v. I.V.R. Construction Ltd. 1999 (1) SCC 492 it was observed that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of ability to deliver the goods or services as per specifications.

15. The law relating to award of contract by State and public sector corporations was reviewed in Air India Ltd. v. Cochin International Airport Ltd. 2000 (2) SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the Court must exercise its discretionary powers under Article 226 with great caution

and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere.

16. *The only ground on which the High Court has quashed the decision of CONCOR awarding the contract to the appellant is that there was no license to act as surveyor/loss assessor under the Insurance Act, 1938 in favour of the appellant which is a company. This question was considered by the TEC in its meeting held on 17.1.2004. The TEC also took notice of the fact that there were only two bidders (the appellant and the first respondent) in the tender and it would be desirable to prevent the tender from lapsing into a single bidder tender. After receipt of the reply from the appellant, the TEC again evaluated the tenders for pre- qualification bid and after noting that M/s Master Marine Services Pvt. Ltd. is known to be an established surveyor doing work for a number of shipping lines at various CONCOR terminals and further that Capt. Percy Meher Master, who had the license, had been appointed the Chairman of the company, made a recommendation that both, the appellant and the first respondent may be qualified for their technical capabilities. It has to be borne in mind that para 11 of the Instructions clearly conferred a power upon the CONCOR to relax the tender conditions at any stage, if considered necessary, for the purpose of finalizing the contract in overall interest of the CONCOR and the trade. Therefore, having regard to the fact that the Chairman of the company had a license under the Insurance Act, the condition regarding the holding of such a license by the appellant itself, in the facts and circumstances of the case, could be relaxed. So far as commercial considerations are concerned, it is the specific case of the CONCOR, which has not been disputed by the first respondent, that ninety eight per cent of the work under the contract is of data entry of a container, for which the appellant had quoted Rs.3.00 against Rs.3.75 as quoted by the first respondent and for this kind of work no license under IRDA is required. In such circumstances, no such public interest was involved which may warrant interference by the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution while undertaking judicial review of an administrative action relating to award of a contract. We are, therefore, clearly of the opinion that the High Court erred in setting aside the order of the CONCOR awarding the contract to the appellant."*

13. Further, learned counsel for the opposite party No.5 pointed out that Clauses 2.1(4) and 2.1(5) of the DTCN will operate in a different field. It is submitted that in the Office Memorandum dated 16.06.2011 of Works Department Clause 2.1(5) has been inserted in the DTCN as qualification criteria and this clause deals with the bid capacity but not the criteria of similar nature of works. Therefore, escalation factor is to be applied to criteria of bid capacity and not to the criteria of similar nature of works. Further, Clause 2.1(4) of the DTCN of the present contract works deals with

criteria of similar nature of works and Clause 2.1(5) deals with criteria of bid capacity, hence, the decisions taken by the opp. Parties-authorities are in conformity with the provisions of the O.P.W.D. Code and the criteria prescribed in the DTCN. Therefore, the rejection of the technical bid of the petitioner for inadequate experience in execution of similar nature of work cannot be said to be improper or arbitrary. Further, learned counsel for O.P. No.5 has taken us through the counter affidavit of O.P. No.5 at paragraph-4 and pointed out that after award of contract, opposite party No.5, in consonance with terms and conditions stipulated in the contract agreement, has already commenced the work since 22.10.2018 in order to complete the work within the stipulated period of completion and in the meantime the opposite party No.5 has already spent around 1.5 crores towards preparations of site, advances for man, machinery and materials etc., which is more than 10% of the total cost. The construction machinery & accessories are already there in the project site, but the progress of the work has been stopped since 06.12.2018 after receiving the letter dated 5.12.2018 from O.P. No.4, wherein it has been instructed him to stop the work till finalization of this present writ petition. Therefore, it is prayed that petitioner is only making a false plea of arbitrariness, as a result of which opposite parties, more particularly, opposite party No.5 is suffering with huge loss.

14. In the rejoinder filed by the petitioner, an attempt is made to show that the opposite parties-authorities have not followed the Government Guidelines in the tender which costs is more than Rs. 10.00 crores and have committed breach of that conditions and decision was not taken by the appropriate Committee and thus the decision taken in finalizing the tender is question is contrary to the Government guidelines as prescribed under Note (iii) of Clause 6.3.15 of the OPWD Code Vol.I.

15. We have heard learned counsel for the parties at length.

Before proceeding with the matter, it will not be out of place to mention that the petitioner has participated in the tender and with the open eyes he has filed the tender going through all the eligibility criteria. Right from the beginning, we had a specific query to the petitioner that assuming without admitting that even the Clauses 2.1(4) and 2.1(5) of the DTCN are read together, whether the petitioner had claimed the benefit of clause 2.1(5) in the tender. However, counsel for the petitioner was not in a position to show from the record that he has claimed any exemption. Assuming, without admitting, even if the clause which was pointed out by

the learned counsel for the petitioner, is not taken into his favour, he has not claimed that benefit in any of the tender document. In that view of the matter, we are of the firm opinion that even if the affidavit of the Government is not accepted, petitioner having not claimed any benefit of Clause 2.1(5) of the DTCN in his tender document cannot make any grievance subsequently. However, we have gone through the counter affidavit of the opposite parties. The contentions raised by the learned counsel for the opposite parties that Clauses 2.1(4) & 2.1(5) of the DTCN are operating it different field is justified. Clause 2.1(4) deals with criteria of execution of work of "similar nature" and Clause 2.1.(5) deals with criteria of bid capacity. Further, as per criteria, it is the responsibility of the petitioner to obtain Experience Certificate from the Executive Engineer in 'Format-I' to establish execution of similar nature of work worth 75% of the estimated cost put to tender. But, in the present case the petitioner has failed to do so. Moreover, the technical bids were opened by a Six Members Technical Committee and it was found that the petitioner submitted the experience certificate execution of bridge work for last five financial years which costs is much less than the required costs as per the tender condition.

16. Further, in view of the observation made by the Hon'ble Supreme Court at paragraphs 12 and 16 in the case of ***Master Marine Services (P) Ltd.*** (Supra), as quoted above, it will be appropriate for us not to substitute our opinion where an expert Committee after considering all the aspects of the matter has taken a decision in rejecting the financial bid taking into consideration that the petitioner was not fulfilling the criteria under Clauses 2.1(4) and 2.1(5). Thus, other allegations with regard to administrative/technical decision, as submitted by the learned counsel for the petitioner, cannot be taken into consideration. In our considered opinion, the escalation/enhancement of price will only come if a bidder is eligible in all respect. As per the documents shown and reasons recorded by the authorities, the petitioner even was not fulfilling the criteria under Clause 2.1(4). Thus, the plea of escalation as per Clause 2.1 (5) was rightly not taken into consideration.

17. In view of the above, we see no cogent reason to interfere with the decision taken by the authorities in rejecting the technical bid of the petitioner. Hence the writ petition is dismissed being devoid of any merit. No order as to costs.

2019 (I) ILR - CUT- 257

SANJU PANDA, J & S.K. SAHOO, J.

W.P.(C) NO. 9403 OF 2014

SUDARSHAN NAIK & ORS. .....Petitioners

.Vs.

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

(A) LAND ACQUISITION ACT, 1894 – Section 4(1) – Notification under for acquisition of land for public purpose for establishment of Industry – Acquisition by IDCO which is owned or controlled by the State Govt. – Question raised as to whether the acquisition of land for a Company can be called for 'public purpose'? – Held, Yes. – Reasons indicated.

The expression 'public purpose' as per section 3(f) (iv) includes the provision of land for a corporation owned or controlled by the State. There is no dispute that IDCO is wholly owned and controlled corporation of Govt. of Odisha and it has been made nodal agency for acquisition of land for setting up industrial projects in Odisha. It appears that after acquisition of land, the Collector, Jharsuguda transferred the ownership of land to IDCO under a long term lease for ninety nine years and on getting possession of the land, IDCO transferred the ownership of land to Vedanta under a long term lease arrangement.In case of ***Sooraram Pratap Reddy -Vrs.- District Collector reported in (2008) 9 Supreme Court Cases 552*** *while analysing the expression 'public purpose' as defined under clause (f) of section 3 of 1894 Act, it is held that the expression 'public purpose' is of very wide amplitude. It is merely illustrative and not exhaustive. The inclusive definition does not restrict its ambit and scope. The expression is incapable of precise and comprehensive definition. It is used in a generic sense of including any purpose wherein even a fraction of the community may be interested or by which it may be benefited. A 'public purpose' is thus wider than a 'public necessity'. Purpose is more pervasive than urgency. As per the policy decision of the Government, the land acquisition proceeding was completed and the land acquisition for IDCO was for a public purpose and the policy decision of the Government has not been challenged. It is the settled proposition of law that in absence of illegality or violation of law, a Court of law will not interfere in policy matters of the Government.(Para 10).*

(B) LAND ACQUISITION ACT, 1894 – Section 4(1) read with section 6(1) – The notification under section 4(1) was made in the year 2007 – Declaration under section 6(1) was made in the year 2008 – Plea of irregular procedure adopted while making acquisition of the land – Records show contrary as all required procedures have been followed – Some of the petitioners had challenged the same land acquisition proceeding in an earlier writ petition which was disposed of as some of the petitioners had received compensation amount and others were given liberty to approach the Special Land Acquisition Officer – In the present writ petition, the filing of the earlier writ petition has not been

mentioned – Effect of – Held, it appears that after the declaration under section 6(1) was made in the year 2008, award was passed in 2010 – The compensation amount has been received by the villagers to a large extent – The possession of land was handed over to IDCO and deed was executed – The petitioners have approached this Court six years after the declaration under section 6(1), we are of the view that the writ petition suffers not only on the ground of laches but also on the ground of suppression of material facts – Writ petition dismissed.

(Para 11 to 14)

Case Laws Relied on and Referred to :-

1. A.I.R. 2008 S.C. 261 : Devinder Singh .Vs. State of Punjab.
2. A.I.R. 2007 S.C. 1411 : Ashok Kumar .Vs. State of Haryana.
3. J.T. 2011 (9) S.C. 390 : Devender Kumar .Vs. State of U.P.
4. (2013) 1 SCC 403 : Surinder Singh Brar .Vs. Union of India.
5. A.I.R. 2007 S.C. 1151 : Vyalikaval House Building Co-op. Society .Vs. V. Chandrappa.
6. (2008) 12 SCC 481: K.D. Sharma .Vs. SAIL.
7. (2002) 7 SCC 712 : Urban Improvement Trust .Vs. Bheru Lal.
8. (1996) 1 SCC 250 : State of Tamil Nadu -.Vs. L. Krishnan .
9. (2012) 12 SCC 797 : Andhra Pradesh Industrial Infrastructure Corpn. Ltd. .Vs. .- Chinthamaneni Narasimha Rao.
10. (1996) 11 SCC 501 : Municipal Corporation .Vs. I.D.I. Co. Pvt. Ltd.
11. (2008) 4 SCC 695 : Swaika Properties (p) Ltd. .Vs. State of Rajasthan .
12. (2010) 4 SCC 532 : Sawaran Lata .Vs. State of Haryana.
13. (2008) 9 SCC 552 : Sooraram Pratap Reddy .Vs. District Collector.
14. A.I.R. 2013 S.C. 3557 : V.K.M. Kattha Industries Pvt. Ltd. .Vs. State of Haryana.
15. A.I.R. 2001 S.C. 3863) : S.H. Rangappa .Vs. State of Karnataka.
16. 2007 S.C. 1411 : Ashok Kumar .Vs. State of Haryana A.I.R.
17. Urban Improvement Trust .Vs. Bheru Lal (2002) 7 SCCes 712
18. K.D. Sharma .Vs. SAIL (2008)12 SCC 481
19. (2013) 55 Orissa Criminal Reports (SC) 881, Moti Lal .Vs. Prem Prakash
20. (1996) 1 SCC 250 : State of Tamil Nadu .Vs. L. Krishnan.
21. (2012) 12 SCC 797 : Andhra Pradesh Industrial Infrastructure Corpn. Ltd. .Vs. Chinthamaneni Narasimha Rao.
22. (1996) 11 SCC 501 : Municipal Corporation .Vs. I.D.I. Co. Pvt. Ltd.
23. (2008) 4 SCC 695 : Swaika Properties (P) Ltd. .Vs. State of Rajasthan.
24. (2010) 4 SCCses 532 : Sawaran Lata .Vs. State of Haryana.

For Petitioners : Mr. A.K. Nanda, G.N. Sahu

For Opp. Parties nos. : Mr. Kishore Kumar Mishra (Addl. Govt. Adv.)
Mr. Jaganath Patnaik (Senior Adv.)
Mr. Rajat Kumar Rath, (Senior Adv.)

JUDGMENT Date of Hearing: 04.01.2019 Date of Judgment: 11.01.2019

S. K. SAHOO, J.

The petitioners who are thirty five in numbers and belonged to villages Kurebaga and Siriapali situated in the district of Jharsuguda, have filed this writ application challenging the publication of preliminary notification under section 4(1) of the Land Acquisition Act, 1894 (hereafter '1894 Act') dated 04.07.2007 under Annexure-1 issued by the Joint Secretary, Revenue and Disaster Management Department, Government of Odisha, Bhubaneswar relating to purported acquisition of about Ac. 200.93 dec. land in Mouza Siriapali for public purpose in connection with establishment of industry by IDCO. They have further challenged the declaration made under section 6(1) of 1894 Act dated 14.08.2008 under Annexure-3 that such land in Mouza Siriapali is required for public purpose relating to establishment of industry by IDCO with a further prayer to quash the land acquisition proceeding i.e. L.A. Case No.07 of 2006 pending before the Special Land Acquisition Officer, Jharsuguda (opposite party no.3).

2. It is the case of the petitioners that they are farmers and primarily depend on agriculture for their livelihood. The Govt. of Odisha issued a notification (Annexure-1) under section 4(1) of the 1894 Act to acquire an area of Ac. 200.93 dec. land in Mouza Siriapali for construction of an Aluminum Smelter and a Captive Power Plant by the opposite party no.5 Vedanta Aluminium Limited. Such notification dated 04.07.2007 was brought to the public notice in the village by affixing notices in the public place and also by beating of drums on dated 10.08.2007 but there was no newspaper publication in the petitioners' village/locality in respect of such notification. It is the further case of the petitioners that since there was strong rumor about such land acquisition, the petitioners and similarly affected farmers enquired about the fact and submitted a representation on 05.09.2007 under Annexure-2 before the opp. party no.2, the Collector, Jharsuguda narrating their grievances and requesting him to exclude their lands from such acquisition proceeding. The opp. parties nos. 2 and 3 did not take into consideration the grievances of the petitioners nor afforded any opportunity of hearing in spite of mandate of law under section 5-A(2) of the 1894 Act.

It is the further case of the petitioners that in view of the proviso (ii) to section 6(1) of the 1894 Act, no declaration in respect of any particular land covered by a notification under section 4(1) shall be made after the expiry of one year from the date of the publication of such notification. Since section 4(1) notification was made on dated 04.07.2007 and the same was

published in the locality of the petitioners by affixing a copy of the same in a conspicuous place in the village along with beating of drum on 10.08.2007 as reveals under Annexure-1 and the declaration under section 6(1) was issued on 14.08.2008 but was brought to the notice of the general public by affixing a copy of the same in the village only on 10.06.2009, such declaration is beyond the prescribed period for which the proceeding is vitiated in the eye of law.

It is the further case of the petitioners that though the Government proposed to acquire the land in village Siriapali for public purpose that to establishment of industry by IDCO but the Memorandum of Understanding dated 04.04.2007 between the Governor of Odisha and the opp. party no.5 Vedanta Aluminium Ltd. indicates that the said private company agreed to pay IDCO or the Revenue authorities the cost of the land and properties standing thereon which clearly established that the land was not acquired for any public purpose but for a private company, such steps have been taken at the cost of livelihood of the petitioners which is malafide, illegal and violates the fundamental rights guaranteed under Articles 14 and 21 so also Article 300-A of the Constitution of India.

It is the further case of the petitioners that information supplied under RTI Act vide Annexure-5 indicated that the cost of acquisition out of public revenues in respect of the land acquisition case for village Siriapali was not available in the office of the opp. party no.3, Special Land Acquisition Officer, Jharsuguda as it was a private project which made it clear that the land of the petitioners were acquired for a private project and not for any public purpose of the Government and the entire expenses for acquisition of land was funded by the private company i.e. opp. party no.5. In view of the infirmities in the land acquisition procedure as pointed out above, it was prayed to quash the notification under Annexure-1, declaration under Annexure-3 and the entire proceeding in L.A. Case No.07 of 2006.

The writ petition was filed on 12.05.2014 and an additional affidavit was filed on 10.07.2014 on behalf of the petitioners indicating therein that the opp. party no.3, Special Land Acquisition Officer, Jharsuguda issued notices on dated 08.06.2011 and 07.05.2014 to the petitioners to receive the compensation amount in the said land acquisition proceeding, copies of which were annexed to such affidavit.

3. On 30.07.2014 notices were issued to the opp. parties on the question of admission and an interim order was passed in Misc. Case No.8447 of 2014

that any construction made on the case land shall be subject to the result of the writ petition.

4. A counter affidavit was filed on behalf of opp. parties nos.1, 2, 3 and 6 indicating therein that all the statutory provisions as envisaged under sections 4, 5-A and 6 of 1894 Act have been followed meticulously with wide publication in the newspapers and not only in the conspicuous place of the locality but also by issuing individual notices inviting objections. The lands were unproductive and barren and there was no irrigation facility in the area. The lands were acquired by IDCO through Government for public purpose for establishment of industry and the IDCO has deposited the award amount which was passed in the year 2010. It is further indicated that no reason has been assigned by the petitioners in approaching this Court after a long lapse of six to seven years. No individual objection by any of the petitioners was filed indicating the land particulars. In the acquisition process, highest cost for the lands with 30% solatium and 12% interest was given to the land owners and there was no malafide intention on the part of the Government to grab the agricultural land of the farmers. It is further indicated in the counter affidavit that the petitioners have suppressed material facts in the writ petition inasmuch as the notification under section 4(1) of 1894 Act was published in two Odia daily newspapers i.e. 'Matrubhasa' and 'Utkal Mail' on dated 25.07.2007 and 26.07.2007 respectively and the notification was published in the village and Panchayat Office on 10.08.2007 and finally the notification was published in the Odisha Gazette vide no.1802 dated 29.09.2007. The copies of the newspapers were annexed to the counter affidavit. It is further mentioned in the counter affidavit that no objection under section 5-A of 1894 Act was made within the statutory period of thirty days from the date of publication of the notification under section 4(1) and the representation under Annexure-2 has been created for the purpose of this writ petition and the signature of the recipient of such representation is a fabricated one. Most of the signatories to such representation have already received their due compensation. Specific stand was taken in the counter affidavit that out of sixty nine signatures in the representation, ten of them are not land losers and numbers of signatures were repeated and fifteen out of the sixty nine signatories have already received their compensation. Specific date wise publication of notification under section 4(1) of 1894 Act was indicated so also the publication of declaration under section 6(1). It is mentioned that the last publication of the notification under section 4(1) was made in the Odisha Extraordinary Gazette vide no.1802 dated 29.09.2007 and the

declaration under section 6(1) was made by the Government in Revenue and Disaster Management Department vide no.35278 dated 14.08.2008 which is within statutory period of one year. It is further indicated that the declaration under section 6(1) was published on dated 27.09.2008 in two daily Odia newspaper namely 'Bharat Darsan' and 'Sambad Kalika' and copies of such publication were annexed to the counter affidavit. It is further mentioned that the land have been acquired by the Government of Odisha for IDCO, a corporation owned by the Government for establishment of industries which is as per section 3(f)(iv) of 1894 Act which speaks that 'public purpose' includes the provision of land for a corporation owned or controlled by the State. A further stand was taken that the Government of Odisha signed an MOU with Vedanta Aluminium Ltd. (now Vedanta Ltd.) for establishment of Aluminium Smelter and Captive Power Plant in the district of Jharsuguda, Odisha and the land was to be provided through IDCO on long term lease basis as industrial development was to be expedited in the interest of the State. The land cost and other administrative charges were deposited by the IDCO and the action of the opp. party-Government authorities was fair, bonafide and in the public interest. It is further indicated that the land was handed over to IDCO as per possession letter dated 23.06.2015 and deed dated 21.01.2017 after compliance of due process under Land Acquisition Act.

5. The opp. party no.4 IDCO filed counter affidavit contending therein that it is a State owned statutory corporation and the object under the statute i.e. Odisha Industrial Infrastructure Development Act, 1980 (Orissa Act 1 of 1981), is to secure and assist rapid industrialization in the State including identification of land for industry and facilitation to the entrepreneur to establish industry. IDCO filed requisition for acquisition of private land measuring Ac.200.98 dec. in village Siriapali with the Special Land Acquisition Officer, Jharsuguda (opp. party no.3) and the opp. party no.3 requested IDCO to deposit money towards payment of establishment cost for acquisition of private land and accordingly, IDCO deposited the same on 15.12.2006 with the opp. party no.3 whereafter the notification under 4(1) and declaration under section 6(1) of 1894 Act were made in due time. It is further indicated that when the opp. party no.3 requested IDCO to deposit a sum of Rs.9,63,41,542/-, such deposit was made on 24.11.2009 under intimation to the Collector, Jharsuguda. The opp. party no.5 Vedanta Aluminium Ltd. submitted its withdrawal proposal for land measuring Ac.15.82 dec. out of Ac.200.93 dec. and accordingly a request in that respect

was made by IDCO to the opp. paty no.3 which was ultimately done by the Government and possession of Ac.185.11 dec. of land was handed over to IDCO on 23.06.2015. The A.D.M., Jharsuguda in its letter dated 07.12.2015 requested IDCO for reflection of the revised estimates for the acquired area of Ac.185.11 dec. in village Siriapali in the lease deed to be executed between the Collector, Jharsuguda with IDCO and accordingly, the required papers were submitted before the Collector for execution of the lease deed. It is further indicated that the allegations made by the petitioners are baseless and fabricated.

6. The opp. party no.5 Vedanta Aluminium Ltd. filed counter affidavit wherein it is indicated that the opp. party no.5 is not a 'State' within the meaning of Article 12 of the Constitution of India and hence not amenable to writ jurisdiction of this Court. Averments were taken reiterating the stand taken by the Government that the notification under section 4(1) was published in two regional daily newspapers and declaration under section 6(1) was published within one year from the date of notification under section 4(1) of 1894 Act. The land losers except a few have already received their compensation and others are not coming up to receive the compensation even after intimation/reminder by the authority. The stand taken by the State Government relating to publication of declaration in the daily newspapers under section 6(1) was also reiterated. It is further stated that the land acquisition for IDCO was for public purpose and IDCO has paid the cost assessed by the Special Land Acquisition Officer and the villagers have received their compensation. The Government of Odisha and Vedanta entered into an MOU for setting up Aluminium Smelter with Captive Power Plant in the district of Jharsuguda on 04.04.2007 and the Government agreed for allotment of the required land for setting of the project to IDCO. The Government conferred the responsibility to IDCO for allotment of land to the project as the IDCO has been made the nodal agency by the State of Odisha for acquisition of land for setting up industrial project in Odisha. After acquisition of land, the Collector, Jharsuguda transferred the ownership of land to IDCO under a long term lease for ninety nine years and on getting possession of the land, IDCO transferred the ownership of the land to Vedanta under a lease agreement for ninety years following necessary process. It is pointed out that when the award was passed in the land acquisition proceeding on 30.06.2010 and compensation has been received by the villagers to a large extent and there is inordinate delay in filing the writ petition and there are disputed questions of facts, the writ petition should be dismissed.

7. A rejoinder affidavit was filed on behalf of the petitioners to the counter affidavit filed by the opp. parties elaborating as to how the declaration under section 6(1) was made after expiry of the prescribed period of the publication of the notification under section 4(1). Reliance was placed on the audit report (G & SS) Volume 3 for the year ending March 2012 of the Government of Odisha which indicated that the IDCO was acquiring land for private promoters and the entire cost of acquisition was borne by the concerned promoters. It is further indicated that 95% of the land acquired are fertile agricultural land and their status were reflected in the record of rights. A further stand was taken that after notification under section 4(1) on dated 10.08.2007, the objection dated 05.09.2007 was sent to all the authorities including the opp. party no.3 by registered post and it was also personally received by the opp. party no.3. It is further stated that when there was objection relating to the acquisition of land, the opp. party no.6, Sub-Collector, Jharsuguda issued notice to the villagers and a public meeting was held on 16.07.2011 in the presence of IDCO Authorities, Vedanta Authorities, Tahasildar, Jharsuguda and Special Land Acquisition Officer and the villagers stated about their objection under section 5-A but the authorities maintained indifferent attitude towards the grievances of the petitioners and they were unmindful about the livelihood of the petitioners which was affected due to such acquisition of land. Disputing the publications of the notification under section 4(1) and declaration under section 6(1) in the newspapers, a further stand was taken that if the ash pond plant is installed in the village, there would be serious environmental pollution causing health hazard to the mankind as well as the animals.

8. Mr. A.K. Nanda, learned counsel appearing for the petitioners contended that the acquisition of land of the petitioners for 'public purpose' as reflected in the notification under section 4(1) and declaration under section 6(1) of 1894 Act is completely false and contrary to the records. The Memorandum of Understanding under Annexure-6 between the Govt. of Odisha and the opp. party no.5 would establish that the land was acquired to be handed over to a private company i.e. opp. party no.5 and the cost of the land was to be paid by the opp. party no.5 to the IDCO/Revenue Authorities which in turn to be disbursed to the land owners and therefore, the project involving L.A. Case No.7 of 2006 in village Siriapali is a private project. He placed reliance on the report of CAG wherein it is indicated that acquisition of land for public purpose does not include acquisition of land for companies. Since IDCO was acquiring the land for a private promoter and the cost of

acquisition was borne by the concerned promoter, it cannot be held to be an acquisition for 'public purpose'. Therefore, the action of the Government is a fraud on the power conferred upon it by the 1894 Act and thus the proceeding is liable to be quashed. Reliance was placed on the decision of the Hon'ble Supreme Court in case of **Devinder Singh -Vrs.- State of Punjab reported in A.I.R. 2008 S.C. 261**. It is further argued that the last date of publication of the notification under section 4(1) was 29.09.2007 and the last date of declaration under section 6(1) was 10.06.2009 and as such the declaration was made one year and nine months after the notification which is beyond the mandatory period of one year and therefore, the land acquisition proceeding is vitiated. Reliance was placed in cases of **Ashok Kumar -Vrs.- State of Haryana reported in A.I.R. 2007 S.C. 1411** and **Devender Kumar -Vrs.- State of U.P. reported in J.T. 2011 (9) S.C. 390**. It was further argued that sections 4(1) and 6(2) of 1894 Act mandate that the notification and the declaration respectively shall be published in two daily newspapers circulating in the locality in which the land is situated and at least one of such publication shall be in the regional language but the opp. party no.3 under Annexure-5 disclosed that the copies of the newspapers in the said proceeding were not available in the office and therefore, such publications as alleged are completely false. Highlighting the provision under section 5-A of 1894 Act, it was argued that when the petitioners submitted their objection under Annexure-2 which was received in the office of the opp. party no.2 and copies of the same were also sent to different authorities including the opp. party no.3 by registered post, opportunity of hearing should have been provided to the petitioners and for non-compliance of the mandatory provisions, the proceeding is vitiated in the eye of law. Reliance was placed in case of **Surinder Singh Brar -Vrs.- Union of India reported in (2013) 1 Supreme Court Cases 403**. Repeated representations/objections were stated to have been submitted by the petitioners to the authorities to drop the land acquisition proceeding and the petitioners are continuing in cultivating possession of the case lands till date and since there is no change in the status of land, the writ petition cannot be dismissed on the ground of delay. Reliance was placed on the decision of the Hon'ble Supreme Court in case of **Vyalikaval House Building Co-op. Society -Vrs.- V. Chandrappa reported in A.I.R. 2007 S.C. 1151**.

Mr. Rajat Kumar Rath, learned Senior Advocate appearing for the opp. party no.5 on the other hand raised preliminary objection to the maintainability of the writ petition contending that the self-same relief was

sought for by some of the petitioners i.e. petitioners nos.2, 4, 6 and 11 in W.P.(C) No.2132 of 2010 which was disposed of on 15.11.2016 and direction was issued to the petitioners of such writ application to approach the Special Land Acquisition Officer, Jharsuguda for getting the compensation amount. During pendency of such writ petition, this writ application has been filed suppressing the earlier filing and therefore, on account of suppression of material fact, the writ petition is liable to be dismissed. Reliance was placed in case of **K.D. Sharma -Vrs.- SAIL reported in (2008) 12 Supreme Court Cases 481**. It was argued that declaration under section 6(1) of 1894 Act was made on 14.08.2008 as per Annexure-3 which is within one year from the last date of notification under section 4(1) which was published in the Odisha Gazette on 29.09.2007. Reliance was placed in case of **Urban Improvement Trust -Vrs.- Bheru Lal reported in (2002) 7 Supreme Court Cases 712**. It was argued that no objection under section 5-A of 1894 Act has been filed and Annexure-2 is a forged document and therefore, the question of giving opportunity of hearing to the petitioners does not arise and when notification under section 6(1) has already been made and award has already been published, the proceeding cannot be challenged at this stage. Reliance was placed in case of **State of Tamil Nadu -Vrs.- L. Krishnan reported in (1996) 1 Supreme Court Cases 250**, **Andhra Pradesh Industrial Infrastructure Corpn. Ltd. -Vrs.- Chinthamaneni Narasimha Rao reported in (2012) 12 Supreme Court Cases 797** and **Municipal Corporation -Vrs.- I.D.I. Co. Pvt. Ltd. reported in (1996) 11 Supreme Court Cases 501**. It was further argued that since the notification under section 4(1) was made in the year 2007 and declaration under section 6(1) was made in the year 2008 and the first writ application filed in the year 2010, this second writ application filed in the year 2014 is not maintainable on the ground of delay. Reliance was placed in case of **Swaika Properties (P) Ltd. -Vrs.- State of Rajasthan reported in (2008) 4 Supreme Court Cases 695**. While concluding his argument, Mr. Rath highlighted that the acquired land was for the 'public purpose' as a power plant is going to function and the power generated is to be utilized in the interest of general public and therefore, this Court should not interfere with such a project.

Mr. K.K. Mishra, learned Addl. Govt. Advocate supported the contentions raised by Mr. Rath and placed the counter affidavit and contended that all the procedural formalities as envisaged under Part-II of the 1894 Act were duly followed and since the petitioners have not approached

this Court with clean hands and knocked at the portals of this Court at a belated stage, the writ petition should be dismissed. Reliance was placed in case of **Sawaran Lata -Vrs.- State of Haryana reported in (2010) 4 Supreme Court Cases 532** on the point of delay.

Mr. Jaganath Patnaik, learned Senior Advocate appearing on behalf of the opp. party no.4 filed a short note of submission supporting the stand taken by the opp. party no.5.

9. Adverting to the rival contentions raised at the bar, the following points are required to be adjudicated:-

(i) Whether the notification under section 4(1) and declaration under section 6(1) of 1894 Act relating to acquisition of land of the petitioners in Mouza Siriapali were made for 'public purpose' or there was any malafideness in the act of the opposite parties?

(ii) Whether the declaration under section 6(1) of 1894 Act was made within stipulated period after the notification under section 4(1)?

(iii) Whether the notification and the declaration relating to acquisition of land were published in the daily newspapers as prescribed under the statute?

(iv) Whether objection relating to acquisition of land was filed under section 5-A of 1894 Act by the petitioners and if so, whether opportunity of hearing has been afforded to the objectors?

(v) Whether the writ petition is liable to be dismissed on the ground of delay and suppression of facts?

Discussion on point no.(i)

10. Mr. Nanda contended that the land in Mouza Siriapali was not acquired for any 'public purpose' but it was for a private project of the opposite party no.5. He has relied upon the Memorandum of Understanding under Annexure-6 between the Governor of Orissa and the opposite party no.5, Vedanta Aluminium Ltd., a company registered under the Companies Act, 1956. There is no dispute that as per clause (A) of the MOU, the cost of the land and properties (if standing thereon) etc. is to be paid by the opposite party no.5 to IDCO or the Revenue Authorities.

In the counter affidavit filed by the State, a specific stand has been taken that the land has been acquired by the Govt. of Odisha for IDCO, a corporation owned by the State Govt. for establishment of industries and Govt. Odisha signed an MOU with Vedanta Aluminium Ltd. for establishment of Aluminium Smelter and Captive Power Plant in the district

of Jharsuguda, Odisha. The IDCO has deposited the cost before the authority as assessed by the Special Land Acquisition Officer.

The expression 'public purpose' as per section 3(f)(iv) includes the provision of land for a corporation owned or controlled by the State. There is no dispute that IDCO is wholly owned and controlled corporation of Govt. of Odisha and it has been made nodal agency for acquisition of land for setting up industrial projects in Odisha. It appears that after acquisition of land, the Collector, Jharsuguda transferred the ownership of land to IDCO under a long term lease for ninety nine years and on getting possession of the land, IDCO transferred the ownership of land to Vedanta under a long term lease arrangement.

In case of **Sooraram Pratap Reddy -Vrs.- District Collector reported in (2008) 9 Supreme Court Cases 552** while analysing the expression 'public purpose' as defined under clause (f) of section 3 of 1894 Act, it is held that the expression 'public purpose' is of very wide amplitude. It is merely illustrative and not exhaustive. The inclusive definition does not restrict its ambit and scope. The expression is incapable of precise and comprehensive definition. It is used in a generic sense of including any purpose wherein even a fraction of the community may be interested or by which it may be benefited. A 'public purpose' is thus wider than a 'public necessity'. Purpose is more pervasive than urgency. That which one sets before him to accomplish, an end, intention, aim, object, plan or project, is purpose. A need or necessity, on the other hand, is urgent, unavoidable and compulsive. Public purpose should be liberally construed not whittled down by logomachies.

The notification under Annexure-1 and the declaration under Annexure-3 clearly indicate that for the public purpose, the land is to be acquired in Mouza Siriapali for establishment of industry by IDCO. As per the policy decision of the Government, the land acquisition proceeding was completed and the land acquisition for IDCO was for a public purpose and the policy decision of the Government has not been challenged. It is the settled proposition of law that in absence of illegality or violation of law, a Court of law will not interfere in policy matters of the Government.

Section 4(1) of 1894 Act expressly authorises the appropriate Government to issue the preliminary notification for acquisition of land likely to be needed for any public purpose *or* 'for a company'. Likewise section 6(1) declares that when the appropriate Government is satisfied that a

particular land is needed for a public purpose *or* 'for a company', a declaration shall be made to that effect. It is thus clear that the appropriate Government may acquire land if such land is needed for any public purpose *or* 'for a company'. If it is so, acquisition will be governed by Part-II of 1894 Act and the procedure laid down in the said Part has to be followed. Part-VII, on the other hand, deals with acquisition of land for companies. In such cases, previous consent of appropriate Government and execution of agreement for transfer of land are necessary and procedure laid down in that Part is sine qua non for the acquisition. 1894 Act contemplates acquisition for (i) public purpose and (ii) for a company; thus, conveying the idea that acquisition for a company, is not for a public purpose. The purposes of public utility, referred to in sections 40 and 41 of 1894 Act are akin to 'public purpose'. Hence, acquisition of land for a 'public purpose' as also acquisition 'for a company' are governed by consideration of public utility. Procedure for the two kinds of acquisition is different and if it is for a company, then acquisition has to be effected in accordance with the procedure laid down in part-VII. Not only Annexures 1 and 3 indicate the public purpose behind the acquisition of land but also the Memorandum of Understanding under Anneuxre-6 and the counter filed by the opposite party no.5 indicate that the opposite party no.5 required the land for the purpose of setting up Aluminum Smelter and Captive Power Plant. Establishment of such an industry in Odisha will speed up the developmental activities of the State with enlightenment of employment. It is stated that such establishment is inevitable for the prosperity of the State and it is the policy decision of the Government and also in the public interest. Economy of a nation and its development depends upon the growth of industrialization. Industries serve the livelihood of the citizens. Poverty and unemployment get eradicated through industrialization. Whether the acquisition is for 'public purpose' or not, prima facie Government is the best Judge. Normally, in such matters, a writ Court should not interfere by substituting its judgment for the judgment of the Government.

Mr. Nanda relied upon the decision of the Hon'ble Supreme Court in case of **Devinder Singh** (Supra) wherein it is held that when an order is passed without jurisdiction, it amounts to colourable exercise of power. Formation of opinion must precede application of mind. The authorities must act within the four–corners of the statute. A statutory authority is bound by the procedure laid down in the statute. We do not find in the case in hand that there is any lack of jurisdiction with the authorities who have passed the

impugned notification under section 4(1) or made declaration under section 6(1) of 1894 Act. The procedural aspect as laid down under Part-II of the Act has been duly followed.

Therefore, we are not inclined to accept the submission made by the learned counsel for the petitioners that no 'public purpose' is involved in the acquisition of land by the Government for establishment of industries by the IDCO in mouza Siriapali or there is any malafideness in the act of the opp. parties.

Discussion on point no.(ii)

11. Section 6 of 1894 Act deals with declaration that the land is required for a public purpose, or for a company. Such a declaration is to be made by the appropriate Government only after considering the report, if any made under section 5-A. The proviso (ii) to section 6(1) indicates that no declaration in respect of any particular land covered by a notification under section 4(1) shall be published after the expiry of one year from the date of publication of the notification.

Section 4(1) of 1894 Act lays down that whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company, then notification to that effect is required to be published in (i) the official gazette; (ii) two daily newspapers having circulation in that locality of which, one shall be in the regional language; and (iii) it is also incumbent on the part of the Collector to cause public notice of the substance of such notification to be given at convenient places in the locality . It is relevant to mention that the last of the dates of such publication and the giving of such public notice is treated as the date of publication of the notification. The purpose of publication of the notification is two-fold, first, to ensure that adequate publicity is given so that land owners and persons interested will have an opportunity to file their objections under section 5-A of the Act, and second, to give the land owners/occupants a notice that it shall be lawful for any officer authorized by the Government to carry out the activities enumerated in sub-section (2) of section 4 of the Act (**Ref:-V.K.M. Kattha Industries Pvt. Ltd. -Vrs.- State of Haryana reported in A.I.R. 2013 S.C. 3557**).

The materials available on record indicates, as per Anneuxre-1 that the notification under section 4(1) was issued on 04.07.2007 and apart from publication in the newspapers, it was published in Mouza Siriapali for public

notice on 10.08.2007 and the notification was finally published in Odisha Gazette vide No.1802 dated 29.09.2007. Since the last of the dates of such publication and giving of such public notice is to be treated as the date of publication of the notification, we hold that the date of publication of such notification under section 4(1) of 1894 Act is 29.09.2007.

The words "publish" and "from the date of publication of the notification" occurring in proviso (ii) to section 6(1) of 1894 Act refer to the publication of section 4(1) notification and have no reference to the publication of any notification under section 6. Under section 6(1), it is only a declaration which is required to be made, the time limit being within one year of the publication of section 4(1) notification. The main purpose for the issuance of declaration under section 6 is provided by sub-section (3), that the declaration shall be conclusive evidence that the land is needed, inter alia, for a public purpose and after the making of the declaration, the appropriate Government may acquire the land in the manner provided by the Act. Sub-section (2) requires the declaration to be published in the Official Gazettee and in two daily newspapers circulating in the locality in which the land is situated and in addition thereto, the Collector is also required to cause public notice of the substance of the declaration to be given in the convenient places in the said locality. Sub-section (2) of section 6 does not prescribe any time limit within which the declaration made under section 6(1) is to be published. It is well known that after an order or declaration is made, there can be a time gap between the making of the order or a declaration and its publication in the Official Gazette. Whereas the time limit for the making a declaration is provided under section 6(1), the legislature advisedly did not provide for any such time limit in respect of steps required to be taken under sub-section (2) of section 6.

In case of **Devender Kumar Tyagi** (Supra), it is held that the notification under section 4 has to be published in the manner laid down therein. As against this, under section 6, a declaration has to be first made and that declaration is then to be published in the manner provided in section 6(2) of the Land Acquisition Act. Also, the proviso (ii) to section 6(1) lays down a time-limit within which declaration has to be made. The said proviso (ii) significantly only provides a time-limit for a declaration and not for publication as it has been incorporated in sub-section (1) of section 6 of the Land Acquisition Act.

If the contention of Mr. Nanda, learned counsel for the petitioners that the last of the dates of such declaration through publication is to be accepted

as the relevant date for the purpose of proviso (ii) to section 6(1) of 1894 Act then the effect would be that not only the declaration would have to be made within the time prescribed under the proviso(ii) to section 6(1) but all other steps, like publication in the daily newspapers and the Collector causing public notice of the declaration to be given at convenient places in the locality, must also be completed within a period of one year of section 4(1) notification. This could certainly not be a consequence contemplated by the legislature. The purpose of section 6 notification being to give a final declaration with regard to the need of the land for public purpose, the interest of the land owners was sufficiently safeguarded with the requirement of the making of the declaration under section 6(1) within a prescribed period. It is difficult for us to read into sub-section (2), the provisions of the proviso (ii) to section 6(1) which relates to the time limit for making a declaration from the date of publication of notification under section 4. (**Ref:- S.H. Rangappa -Vrs.- State of Karnataka : A.I.R. 2001 S.C. 3863**).

In the case in hand, the declaration under section 6(1) was made on 14.08.2008 as per Annexure-3. Though it was published subsequently in the Extraordinary Gazette of the State Government and two daily newspapers and public notice of such declaration was also made after the declaration under Annexure-3 but we are of the view that the relevant date of declaration for the purpose of the proviso (ii) to section 6(1) is 14.08.2008. As we have already hold that the date of publication of the notification under section 4(1) was 29.09.2007, since declaration under section 6(1) was made on 14.08.2008, it is within the prescribed period of one year.

The decision cited by the learned counsel for the petitioner in case of **Ashok Kumar -Vrs.- State of Haryana reported in A.I.R. 2007 S.C. 1411** states that the proviso appended to sub-section (1) of section 6 is in the negative term. It is, therefore, mandatory in nature. Any declaration made after the expiry of one year from the date of publication of the notification under sub section (1) of section 4 would be void and of no effect. An enabling provision has been made by reason of the explanation appended thereto, but the same was done only for the purpose of extending the period of limitation and not for any other purpose. The purport and object of the provisions of the Act and in particular the proviso which has been inserted by Act 68 of 1984 and which came into force w.e.f. 24.09.1984 must be given its full effect. The said provision was inserted for the benefit of the owners of the land.

The decision relied upon by Mr. Rath in case of **Urban Improvement Trust -Vrs.- Bheru Lal reported in (2002) 7 Supreme Court Cases 712** states that section 6(1) does not require that such declaration could not be published in the Official Gazette after expiry of one year from the date of publication of the notification under section 4(1). Time-limit of one year is prescribed to a declaration to be made that land is needed for a public purpose under the signature of a Secretary or authorised officer to such Government.

Therefore, the contention of the learned counsel for the petitioners that the declaration under section 6(1) was made beyond the prescribed period from the date of publication of the notification under section 4(1) is baseless and cannot be accepted.

Discussion on point no.(iii)

12. Mr. Nanda, learned counsel for the petitioners contended that there was no paper publication as required under section 4(1) and 6(2) of 1894 Act is difficult to be accepted.

In the writ petition, in paragraph no.3, it is mentioned that there was no newspaper publication in the petitioners' village/locality in respect of the notification. In the rejoinder affidavit dated 10.04.2018, it is mentioned that the report obtained under the RTI Act under Annexure 5 indicates that no newspaper was available publishing 4(1) notification and 6(1) declaration. It is further mentioned that the newspapers like 'Matrubhasa' and 'Utkal Mail' are not at all in circulation in the village of the petitioners and the publication of 6(1) notification in newspapers like 'Bharat Darshan' and 'Sambad Kalika' is a false and fabricated story.

The counter filed by the State Government clearly indicates that the notification under section 4(1) was published on 25.07.2007 and 26.07.2007 in two daily Oriya newspapers namely 'Matrubhasa' and 'Utkal Mail' and the copies of the newspapers were annexed as Annexure-A/1 and A/2 to the counter affidavit. Similarly, it is mentioned that the declaration under section 6(1) was published on 27.09.2008 in two Odia newspapers namely 'Bharat Darshan' and 'Sambad Kalika' and the copy of the news paper is annexed as Annexure- B.

In view of the stand taken by the State Government in the counter affidavit that there has been paper publications in accordance with the procedure prescribed under 1894 Act and after going through the paper

publications annexed to the counter affidavit and since disputed questions of facts cannot be adjudicated in the writ petition, we are unable to accept the contention raised by Mr. Nanda that there was no paper publication of the notification and the declaration in the two daily newspapers circulating in the locality.

Discussion on point no.(iv)

13. Mr. Nanda, learned counsel for the petitioners contended that the petitioners submitted their objection under Annexure-2 on 05.09.2007 objecting to the acquisition of land in their locality but no opportunity of hearing was given to the petitioners which is mandatory in view of section 5-A of 1894 Act and therefore, the proceeding should be quashed. He relied upon a decision of the Hon'ble Supreme Court in case of **Surinder Singh Brar** (supra) wherein it was held that section 5-A embodies the most important dimension of the rules of natural justice. What needs to be emphasized is that hearing required to be given under section 5-A (2) to a person who is sought to be deprived of his land and who has filed objection under section 5-A(1) must be effective and not an empty formality. The Collector who is enjoined with the task of hearing the objectors has the freedom of making further enquiry as he may think necessary. In either eventuality, he has to make report in respect of the land notified under section 4(1) or make different reports in respect of different parcels of such land to the appropriate Government containing his recommendations on the objections and submit the same to the appropriate Government along with the record of the proceedings held by him for the latter's decision. The appropriate Government is obliged to consider the report, if any, made under section 5-A (2) and then record its satisfaction that the particular land is needed for a public purpose. This exercise culminates into making a decision that the land is needed for a public purpose. Any violation of the substantive right of the land owners and/or other interested persons to file objections or denial of opportunity of personal hearing to the objector(s) vitiates the recommendations made by the Collector and the decision taken by the appropriate Government on such recommendations. The recommendations made by the Collector without duly considering the objections filed under section 5-A(1) and submissions made at the hearing given under section 5-A(2) or failure of the appropriate Government to take objective decision on such objections in the light of recommendations made by the Collector will denude the decision of the appropriate Government of statutory finality.

In the writ petition in paragraph 3, it is mentioned that when the petitioners and similarly affected farmers submitted representation to the opposite party no.2 to drop the land acquisition proceeding in respect of their agricultural lands which is annexed as Annexure-2, no opportunity of hearing has been afforded to them. Annexure-2 is dated 05.09.2007 and someone seems to have received the copy on the very day. The State Government in its counter affidavit has specifically mentioned that no objection has been received within stipulated period after publication of notification under section 4(1) as prescribed under law and the document/representation under Annexure-2 has been created with a sole intention to be annexed to the writ petition and the petitioners have also fabricated the signature on the receipt part of the representation and there is no record of receipt or filing of such document in the office of the Special Land Acquisition Officer.

Being cornered with such a stand taken by the State Government, the petitioners in their rejoinder affidavit have stated in paragraph 5 that after the public notice of 4(1) notification vide Annexure-1, they submitted their objection on 05.09.2007 which was not only personally received by the Special Land Acquisition Officer but also copy of the same was sent to all the authorities including opp. party no.3 by registered post and the copies of the postal receipts were annexed. In the written note of submission filed by the petitioners, it is stated that the petitioners submitted their objection under Annexure-2 on 05.09.2007 which was received by the office of opp. party no.2 and on the same day, the petitioners also sent representation/objection to all other authorities including opp. party no.3 by registered post.

Therefore, it appears that inconsistent stand has been taken by the petitioners relating to filing of written objection to the acquisition of the land in their locality. The submission of objection to different authorities including opp. party no.3 by registered post has not been averred in the writ petition. A stand has been taken in the rejoinder affidavit that the objection dated 05.09.2007 was personally received by the Special Land Acquisition Officer (opposite party no.3) whereas in the note of submission, it is stated that the objection under Annexure-2 was submitted on 05.09.2007 which was received in the office of opposite party no.2. The Special Land Acquisition Officer filing a counter affidavit has denied about such aspect. In the counter affidavit, it has also been pointed out that out of sixty nine signatories in the representation under Annexure-2, ten are not land losers as their land was not considered for acquisition and some of the signatures have been repeated in different orders and in different languages.

Since disputed questions of facts cannot be adjudicated in the writ petition and the stand taken by the petitioners relating to filing of objection under section 5-A of 1894 Act is inconsistent, we are of the view that it cannot be said that any objection was filed by the petitioners and therefore, the question of giving opportunity of hearing to them does not arise.

Discussion on point no.(v)

14. The notification under section 4(1) was made in the year 2007 and the declaration under section 6(1) was made in the year 2008. It appears from the disposed of writ petition i.e. W.P.(C) No.2132 of 2010 that the petitioners nos.2, 4, 6 and 11 along with others filed such petition earlier challenging the self-same notification under section 4(1). The said writ petition was disposed of on 15.11.2016 as some of the petitioners received compensation amount and others were given liberty to approach the Special Land Acquisition Officer, Jharsuguda for getting the compensation amount. In the present writ petition, the filing of the earlier writ petition has not been mentioned.

In case of **K.D. Sharma –Vrs.- SAIL reported in (2008)12 Supreme Court Cases 481**, it is held that the party who invokes the extraordinary jurisdiction of the Supreme Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if those are against him. He cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of the writ Courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because "the Court knows law but not facts".

Any one who takes recourse to method of suppression in a Court of law, is, actuality, playing fraud with the Court, and the maxim suppressio veri, expression falsi i.e. suppression of the truth is equivalent to the expression of falsehood, gets attracted. (**Ref:- (2013) 55 Orissa Criminal Reports (SC) 881, Moti Lal –Vrs.- Prem Prakash**).

We are of the humble view that at the time of filing this writ petition, the petitioners have suppressed about the filing of the earlier writ petition which was subjudiced at that time.

Moreover, this writ petition which was filed in 2014 which is after six years of the declaration made under section 6 and after the award was published.

In case of **State of Tamil Nadu -Vrs.- L. Krishnan reported in (1996) 1 Supreme Court Cases 250**, it is held that when the declarations under section 6 were made in the year 1978 and the writ petitions were filed sometime in the year 1982-83 when the awards were about to be passed, the laches of this nature was held to be fatal to the writ petitioners.

In case of **Andhra Pradesh Industrial Infrastructure Corpn. Ltd. -Vrs.- Chinthamaneni Narasimha Rao reported in (2012) 12 Supreme Court Cases 797**, it was held that the declaration under section 6 of the Act was made on 07.08.1996 and the award was made on 07.01.1998 and a petition challenging the validity of the declaration under section 6 of the Act was filed in November 1998 which were held to be a belated stage and it was further held that if the land owners were really aggrieved under section 6 of the Act, they ought to have challenged the same immediately after the declaration under section 6 was made and there was no reason for the land owners to wait a few years for challenging the declaration and for that reason the Hon'ble Court did not interfere with the acquisition proceedings.

In case of **Municipal Corporation -Vrs.- I.D.I. Co. Pvt. Ltd. reported in (1996) 11 Supreme Court Cases 501**, it is held that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceeding have become final, the Court should be loath to quash the notifications. When the award was passed and possession was taken, the Court should not exercise its power to quash the award.

In case of **Swaika Properties (P) Ltd. -Vrs.- State of Rajasthan reported in (2008) 4 Supreme Court Cases 695**, it is held that a writ petition challenging the notification for acquisition of land, if filed after the possession having been taken, is not maintainable.

In case of **Sawaran Lata -Vrs.- State of Haryana reported in (2010) 4 Supreme Court Cases 532**, it is held that the when a person challenges section 4 notification on any ground, it should be challenged within a reasonable period, and if the acquisition is challenged at a belated stage, the petition deserves to be dismissed only on this count.

Though Mr. Nanda placed reliance in case of **Vyalikaval House Building Co-op. Society** (supra), wherein it is held that when the acquisition

has been found to be totally malafide and not for bonafide purpose, the ground of delay and acquiescence has no substance but we do not find any malfideness in the conduct of the opp. parties in acquiring the land in mouza Siriapali for public purpose.

It appears that after the declaration under section 6(1) was made in the year 2008, award was passed in 2010. The compensation amount has been received by the villagers of mouza Siriapali to a large extent. The possession of Ac.185.11 dec. of land was handed over to IDCO on 23.06.2015 and deed was executed on 21.01.2017. When the petitioners have approached this Court six years after the declaration under section 6(1), we are of the view that the writ petition suffers not only on the ground of laches but also on the ground of suppression of material facts.

15. In view of the foregoing discussions, we find no merit in the writ petition which is accordingly dismissed. The petitioners whose land have been acquired and not received the compensation amount as yet are at liberty to approach the opposite party no.3 Special Land Acquisition Officer, Jharsuguda for getting the compensation amount. No costs.

2019 (I) ILR - CUT- 278

S. PANDA, J & S. K. SAHOO, J.

O.J.C. NO. 4414 OF 2001

WORKMEN OF BOLANI ORES MINES REPRESENTED THROUGH KEONJHAR MINING WORKERS UNION .....Petitioner

.Vs.

REGIONAL LABOUR COMMISSIONER (CENTRAL) & ORS. .....Opp. Parties

THE MINIMUM WAGES ACT, 1948 – Section 20 – Provision under – Power of Labour Commissioner to adjudicate the dispute relating to the claims arising out of payment of less than the minimum rates of wages – Application filed by workmen who are trainees having specific terms of appointment on a consolidated and fixed pay, claiming minimum wages – Whether they are entitled to the benefits of wages

and allowance? – Commissioner came to observe that the case does not involve any question of less payment of minimum rate of wages or otherwise, but it is a question of dispute whether the trainees whose specific terms of appointment were on a consolidated and fixed pay, are entitled to the benefits of wages and allowance accruing out of national wages statement signed in 1995 and effective from 01.01.1992 and further held that he is not competent to decide the issue and the proper course would be an application under Section 33 (C) 2 of the Industrial Dispute Act,1947 – Whether the finding of the Labour Commissioner is correct? – Held, no. there was no lack of jurisdiction with the Labour Commissioner to decide the issue – Reasons indicated. (Para 6 to 10)

Case Laws Relied on and Referred to :-

1. 1994 Supp. (2) SCC 508 : Kanta Devi .Vs. State of Haryana.
2. (2015) 4 SCC 334 State of Punjab .Vs. Rafiq Masih.

For petitioner : M/s. Pradeep Kumar Das & Sachidananda Nayak

For Opp. Party : M/s. Jaganath Patnaik, (Senior Advocate)
B. Mohanty, T.K. Patnaik

ORDER Date of Order : 25. 01. 2019

Heard learned counsel for the petitioner as well as learned counsel for the opposite parties.

2. The petitioner workmen of Bolani Ores Mines represented through Keonjhar Mining Workers Union have filed this writ application challenging the order dated 15.01.2001 of the Regional Labour Commissioner (Central), Bhubaneswar and authority under the Minimum Wages Act, 1948 in Application No.MWA/64/2000 which is an application under section 20(2) of the Minimum Wages Act, 1948 (hereafter 'M.W. Act') in holding that he is not competent to decide the matter and the appropriate remedy would be to take recourse to the provisions of section 33C(2) of the Industrial Disputes Act, 1947. The petitioner has further prayed to declare the action of opp. party no.2 i.e. the Management of Bolani Ores Mines, by not granting benefits under the M.W. Act to the forty one workmen as per list under Annexure-1 in view of the notification dated 12.07.1994 of the Ministry of Labour, Government of India under Annexure-7 and NJCS (National Joint Committee for Steel Industry) agreement of 1995 under Annexure-4 as illegal and arbitrary. The petitioner has further prayed to release the said benefits under the M.W. Act to the workmen from the respective dates of their

appointment and to declare the action of the opp. party no.2 by making deduction and recovery of paid 10% interim relief as illegal and arbitrary with a further prayer to refund of such dues to the workmen.

3. It is the case of the petitioner that the group of workmen number forty one were appointed in Bolani Ores Mines in the year 1992 in different capacities such as Senior Operative trainees, Junior Operative trainees and trainees (un-skilled) and they were performing their duties sincerely and faithfully and receiving payments of wages as per their appointment letters in three different scale of pay along with other allowances as admissible time to time to the other similar category of employees. As per All India Level Revision of 1989 Agreement, the Management extended the interim relief @ 10% rise in wages to all its employees and accordingly, these forty one workmen were also paid arrear wages from their respective date of joining till 31.05.1994 towards interim relief and their monthly wages were revised accordingly. Subsequently the SAIL Authority issued a circular under Annexure-5 in the year 1995 clarifying the provision for proper implementation of NJCS Agreement wherein it was held the adhoc monthly payment @ 10% of basic plus FDA as on 01.01.1992 is admissible to the employees who were on rolls as on 01.01.1992 and 16.02.1994 and those who joined on or after 01.01.1992 till 16.06.1994 and the employees who had joined the company after 15.05.1994 are not eligible for receipt of the adhoc payments. Basing on the Government of India notification dated 12.07.1994 and 1995 NJCS Agreement, the petitioner Union demanded before the opp. party no.2-Management to release the less payment of Rs.3,88,257/- (rupees three lakhs eighty eight thousand two hundred and fifty seven only) to the forty one workmen. The claim application under section 20(2) of the M.W. Act was registered before the Labour Enforcement Officer (Central), Barbil which was then forwarded to the opposite party no.1 i.e. Regional Labour Commissioner (Central), Bhubaneswar as per letter dated 09.02.2000 for payment of claim amount of Rs.3,88,257/- as less payment and Rs.38,82,570/- as compensation.

It is the further case of the petitioner that the minimum wages as per notification of the Govt. of India and NJCS settlement were not paid to the forty one workmen rather the opposite party no.2 Management whimsically and arbitrarily deducted and recovered 10% interim relief which had already been paid to the workmen in spite of the pendency of the Minimum Wages proceeding before the Regional Labour Commissioner. The request of the Union to the Management to refrain from unfair labour practice and refund of

illegally deducted money was not considered. The Union challenged the action of the Management relating to the illegal deduction made from the wages of the workmen which was registered as OJC No.9644 of 2000. This Court disposed of the writ application on 18.10.2000 with a direction to the Union to approach the competent authority before whom the proceeding is pending and further directed the competent authority to pass necessary order within stipulated time. In pursuance of the direction of this Court, the petitioner Union filed an application on 27.10.2000 before the opposite party no.1 for declaring that the deduction/recovery made by the Management to be illegal and further to stop such deduction/recovery and to refund the deducted/recovered amount. The opposite party no.1 passed an order on 27.11.2000 suggesting the Management not to deduct such amount till finalization of the case.

4. The opposite party no.1, Regional Labour Commissioner (Central), Bhubaneswar in its impugned order held as follows:-

> "After going through the statements put forth by respective parties as well as hearing them, the following position is revealed. The listed workers in the present case were appointed as Senior operative trainees, Junior operative trainees and trainees (un-skilled) on different dates in 1992. According to the appointment letters issued to them, the SOT, JOT and trainees (un-skilled) were appointed on a consolidated/fixed pay of Rs.1550/-, Rs.1415/- and Rs.1350/- per month respectively. These trainee workers were regularized and put in their regular scale after completion of one year of training. The contention of the management is that this consolidated pay was nothing, but a stipend during the period of training. As per the terms of their appointment accepted by the trainees, their training period was one year after which they have been regularized and they have been paid their scale of pay along with allowances due from their respective date of regularization. The management contended that during the training period these employees were not entitled to any other payment than consolidated pay of Rs.1550/-, Rs.1415/- and Rs.1350/- respectively per month for the categorizes SOT, JOT and trainee (un-skilled).
>
> The statement of Annexure to the present application by the applicant however does not reflect any calculation of the alleged less payment except that an amount is indicated against each of the 41 workers under the heading "less wages claimed during the period of training of one year of the employees.
>
> xxxx xxxx xxxx xxxx
>
> The employer has to pay such notified wages without any deduction except as may be authorized. The explanation-5 of the notification No. S.O.514 E dtd.12.07.1994 provides that any higher wages in terms of contract or agreement or otherwise shall be protected and treated as the minimum rates of wages for the purpose of the

> notification. As per the decision of the Hon'ble Supreme Court of India in Civil Appeal No.769 & 770 of 1984, their lordship observed that "Labour Law-Minimum Wages Act, 1948- Ss.3 and 12-Even if an industry creates a different category of workers outside the recognized categories of workers in respect of whom minimum wages are fixed under the Act such as the category of 'learners' created in this case, held, it will not be permitted to pay less than the minimum for the lowest level employee in that industry viz. un-skilled workmen- Basic objective is to avoid exploitation by management- Hence, irrespective of whether relationship of master and servant comes into being, persons placed in the category of 'learners' in an industry are entitled to minimum wages prescribed for an un-skilled workers in that industry.
>
> In view of the said judgment, the un-skilled workers, Junior Operative trainees, Senior Operative trainees cannot be paid less than the regular worker. Further these category of workers do not find place in certified standing orders of the Company."

The opposite party no.1 after holding thus came to observe that the case does not involve any question of less payment of minimum rate of wages or otherwise, but it is a question of dispute whether the trainees whose specific terms of appointment were on a consolidated and fixed pay, are entitled to the benefits of wages and allowance accruing out of national wages statement signed in 1995 and effective from 01.01.1992. Accordingly, the opposite party no.1 came to hold that he is not competent to decide the application and the appropriate remedy would be to take recourse to section 33C(2) of I.D. Act.

5. Challenging the impugned order, the learned counsel for the petitioner submitted that it is not in dispute that the forty one workmen have worked under the opp. party no.2 Management in different capacity i.e. Senior Operative trainees, Junior Operative trainees and trainees (un-skilled) on different dates in the year 1992 on a consolidated/fixed pay of Rs.1,550/-, Rs,1,415/- and Rs.1,350/- per month respectively. They were then regularized after completion of one year training period and therefore, they are entitled to get wages as per the notification dated 12.07.1994 of the Ministry of Labour, Government of India under Annexure-7 and NJCS agreement of 1995 under Annexure-4. It is further argued that after payment of 10% wages hike as interim relief, it was unjustified on the part of the Management to deduct the wages as a measure of recovery process. It is further submitted that the decision of the opposite party no.1 as per the impugned order advising the workmen to take recourse to section 33C(2) of the I.D. Act is not proper and justified which is liable to be set aside. He relied upon the decision of the Hon'ble Supreme Court in case of **Kanta Devi -Vrs.- State of Haryana reported in 1994 Supp. (2) Supreme Court Cases 508**.

6. Learned counsel appearing for the opp. party no.2 Management on the other hand supported the impugned order. He submitted that the letter issued to the trainees specifically indicated that during the training period, they would be paid consolidated stipend per month and after successful completion of training, they would be taken in regular employment. During such training period, they were not eligible for getting their pay revised as regular employees of the company. The notification of the Government of India dated 12.07.1994 and NJCS agreement are not applicable to them. Since the group of workers was paid excess dues due to inadvertent fixation of wages as regular employees, the excess amount was deducted and recovered after re-fixing their wages. He further submitted the opposite party no.1 rightly held that the case does not involve any question of less payment of minimum rate of wages.

7. Section 20(1) of the Minimum Wages Act, 1948 authorizes the Labour Commissioner to adjudicate the dispute relating to the claims arising out of payment of less than the minimum rates of wages. After hearing the applicant and the employer and making such inquiry which may be necessary, the Commissioner being satisfied that there has been payment of less than the minimum rates of wages, can direct the employer for payment of amount to the employee the minimum wages payable to him exceed the amount actually paid. Of course, the section does not provide machinery for recovery of arrears of wages independently of any dispute arising from controversy as regards the minimum wage payable. Proceedings under this section can be commenced where a dispute exists as regards the rate of wage payable. Section 33C of the Industrial Disputes Act, 1947 on the other hand is a provision conferring jurisdiction to deal with a dispute relating to a claim for recovery of money due to a workman from an employer under a settlement or an award, or under the provisions of Chapter VA and Chapter VB of the Industrial Dispute Act. Chapter VA deals with lay off and retrenchment and Chapter VB makes special provisions relating to law of retrenchment and closure in certain establishments. Prima facie, it cannot be said that the claim herein comes under the purview of Chapter VA or VB of the Industrial Disputes Act. This was not a claim based on settlement or award. Even if the claim could have been agitated under Section 33C of the Industrial Disputes Act, so long as there is no exclusion of jurisdiction of the authority under the Minimum Wages Act from entertaining a claim which might also come within the purview of the Industrial Disputes Act or Payment of Wages Act, it cannot be held that the authority under the Minimum Wages Act has no jurisdiction to entertain the claim.

In the present case, the grievances of the petitioner workmen is that they were not paid minimum rates of wages for a particular period in spite of the notification under Annexure-7 and NJCS agreement under Annexure-4 rather after payment of minimum rates of wages for some time, the employer recovered a portion of it by way of deduction from their wages. Therefore, we are of the view that there was no lack of jurisdiction with the opposite party no.1 to decide the dispute.

8. From the factual position narrated above, it is not disputed that forty one workmen were appointed under the opposite party no.2 Management as Senior Operative trainees, Junior Operative trainees and trainees (un-skilled) on different dates in the year 1992 on a consolidated/fixed pay of Rs.1,550/-, Rs.1,415/- and Rs.1,350/- per month respectively and they were regularized after completion of one year training period. It is also not in dispute that basing on the notification dated 12.07.1994 of the Ministry of Labour, Government of India under Annexure-4, the wages of the forty one workmen were refixed and payment were made.

The contention of learned counsel for the opp. party no.2 Management that during the training period, the employees were not entitled to any other payment than the consolidated pay is not sustainable in the eye of law. In case of **Kanta Devi** (supra), the Hon'ble Supreme Court held that under the provision of the Minimum Wages Act, the category of learners has not been included therein. If an industry creates such a category, it will not be permitted to pay less than the minimum for the lowest level employee in that industry, namely, an unskilled workman. The basic idea is to avoid exploitation by the management by creating different category outside the recognized categories of workers in respect of whom minimum wages are fixed under the law. Therefore, there was no justification on the part of the opposite party no.2 Management to deprive the forty one workmen the benefits of wages as per the notification dated 12.07.1994 of the Ministry of Labour, Government of India under Annexure-7 and NJCS agreement of 1995 under Annexure-4 by issuing a circular under Annexure-5.

9. Learned counsel appearing for the opposite party no.2 Management does not dispute about the deduction being made from the wages of the workmen by way of a recovery process.

In case of **State of Punjab -Vrs.- Rafiq Masih reported in (2015) 4 Supreme Court Cases 334**, it is held as follows:-

> "18. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
>
> (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
>
> (ii) Recovery from retired employees, or the employees who are due to retire within one year, of the order of recovery.
>
> (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

In view of such ratio laid down by the Hon'ble Supreme Court, we are of the view that the recovery which has been made from the petitioner forty one workmen was not proper and justified and therefore, the entire deducted amount of wages by way of a recovery process should be refunded by the opposite party no.2 Management to the respective workmen within a period of eight weeks from today.

10. Similarly since the forty one workmen who are working in different capacities during the relevant period as Senior Operative trainees, Junior Operative trainees and trainees (un-skilled) and they are entitled to the payment of minimum rate of wages in view of the notification dated 12.07.1994 of the Ministry of Labour, Government of India under Annexure-7 and NJCS agreement of 1995 under Annexure-4 and it is stated that less payment to the tune of Rs.3,88,257/- (rupees three lakh eighty-eight thousand two hundred fifty seven) has been made, the opp. party no.2 shall compute their legitimate dues and make necessary payment to the workmen within a period of eight weeks from today. With the aforesaid observation, the writ petition is disposed of.

2019 (I) ILR - CUT- 286

S.K. MISHRA, J & DR. A.K. MISHRA, J.

MATA NO.111 OF 2017
Misc. Case No. 168 of 2017

SMT. ADITI DAS ……..Appellant

.Vs.

SESHADEV DAS ……..Respondent

(A) LIMITATION ACT, 1963 – Section 5 – Condonation of delay – Appeal under Section 28 of Hindu Marriage Act challenging the ex parte order of divorce – Delay of more than two years in filing the appeal – Plea that sufficient cause to be shown for condoning the delay – Circumstances for such delay examined vis-a-vis the settled principles on the issue discussed in detail.

(B) LIMITATION ACT, 1963 – Section 5 – Condonation of delay – Appeal under Section 28 of Hindu Marriage Act challenging the ex parte order of divorce – Delay of more than two years – Plea that sufficient cause to be shown for condoning the delay – Principles – Held, a meritorious matter should not be allowed to be hipped at the bud in order to perpetuate injustice in favour of a party. (Para 6 to 10)

Case Laws Relied on and Referred to :-

1. AIR 1987 SC 1353 :Collector, Land Acquisition, Anantnag & Anr, Vs. Mst. Katiji & Ors.
2. (2010) 5 SCC 459 : Oriental Aroma Chemical Industries Vs. Gujarat Industrial Development Corporation & Anr.
3. 2013 AIR SCW 6158 : Isha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy & Ors.
4. AIR 2014 SC 746 : Basawaraj and another Vs. The Special Land Acquisition Officer.
5. 2014 AIR SCW 1831 : Brijesh Kumar and others Vs. State of Haryana & Ors.

For Appellant : M/s. Santanu Ku. Sarangi, A.K.Nayak, S.K.Sarangi , S.Pattnaik , S.Chakraborty & B.R. Das

For Respondent : Mr. Yeeshan Mohanty, Md.K.Khan, M/s. Kashinath Pattanaik, A.K.Bhanja, S.K.Lenka, T. Ram, Mr. S.Pradhan & Mr. S.Pradhan.

ORDER Date of Order : 20. 12. 2018

Heard learned counsel for the appellant-petitioner and learned counsel for the respondent-opposite party.

2. This is an application under Section 5 of the Limitation Act, 1963 to condone a delay of 2 years, 2 months and five days in preferring the MATA against the judgment and ex-parte decree passed by the learned Judge, Family Court, Cuttack in Civil Proceeding No.287/2009, as per the order dated 27.03.2015.

3. The impugned judgment was passed on 27.03.2015 and accordingly the appeal should have been preferred within 90 days but the same is filed after a delay of 2 years, 2 months and 5 days. The reason for delay is stated to be due to the fact that the respondent all through was assuring the appellant that he would make provision for the children both financially and otherwise. As the petitioner did not have sufficient means to maintain herself and the children, she could not pursue the matter.

When the opposite party stopped paying the amount as ordered by the learned Magistrate in the domestic violence case, the petitioner moved for execution of the order and there was also assurance from the side of the opposite party regarding reunion and to show his bonafide, the opposite party maintained the daughter from her 10^{th} standard till completion of +2 examination from DPS, Damanjodi. It is stated by the petitioner that being swayed away with the assurance of the opposite party, the petitioner did not pursue the legal proceedings. Due to her ill-luck, the opposite party neglected the appellant and the children and even neither paid the monthly maintenance nor took care of the children. Having no recourse, considering the future of the children and her day-to-day expenses, the petitioner constrained to enter into legal profession at a belated stage for her survival and maintenance of the children. When she tried to pursue with the execution case for realization of the maintenance amount passed in the PWDV Act, to her utter surprise, the opposite party disclosed about passing of decree of divorce in his favour. Thereafter, when the petitioner made enquiry, she came to know that the opposite party was able to snatch away an ex-parte decree against her for dissolution of marriage in the aforesaid civil proceeding behind her back by perpetrating fraud on her.

Thereafter, the appellant obtained certified copy of the ex-parte decree and confronted the matter to the opposite party, who again assured to provide her adequate maintenance and to bear all the expenses of the children and requested the appellant not to proceed further in the matter.

In the meantime, the opposite party was arrested in connection with vigilance case and was in custody for 25 days. The opposite party gave

assurance that he would make amicable settlement of the dispute and would provide adequate maintenance to the appellant and the children. Because of that she did not pursue the matter to file appeal, she bestowed her effort to get the opposite party released from the jail. However, after the opposite party was released from the jail instead of fulfilling his commitment, he started to play hide and seek with the petitioner. Finally, when the opposite party turned down his request to pay a single pie either towards maintenance or education of the children, the petitioner decided to file the present appeal. The petitioner is facing immense difficulty in maintaining herself and the children with her scanty income from legal profession. The petitioner is completely dependent upon her old parents for survival. She was earnestly pursuing the matter and in the circumstances which are beyond her control, there has been delay in filing the appeal which was neither deliberate nor intentional. It is further submitted that it is expedient and in the interest of justice and equity that delay should be condoned. The petitioner submits that she has a good prima facie case and balance of convenience lies in her favour and there is every possibility of success in the appeal.

4. A detail counter has been filed by the opposite party. He claims that the petitioner was well aware of the said order dated 27.03.2015 and preferred to challenge the same by filing MATA after 2 years 2 months and 5 days with ulterior motive and malafide intention to exploit the opposite party. The petitioner has not assigned any cogent and just cause to condone the delay and each day of delay has not been explained with supported evidence, for which the application is liable to be dismissed. The opposite party further claims that the petitioner is an Advocate and busy practitioner and cannot be believed to have no knowledge about the civil proceeding. On receipt of the notice from the Family Court, the petitioner had entered appearance but she did not prefer to contest the case for which she was set ex-parte. Once again, she moved the court below to get the ex-parte order set aside which was allowed on contest. But, again she defaulted to contest the proceeding. For such intentional abstention, the petition under Section 13 of the Hindu Marriage Act was allowed on 27.03.2015 after lapse of long six years of its filing.

It is also averred that the appellant was regularly attending the Family Court for her other matters as a practitioner. After a year i.e. 22.3.2016, she applied for the certified copy of the impugned order which she received on 06.04.2016 but did not challenge the same for more than one year. Subsequently on 01.09.2017 i.e. after about 1 ½ years, after obtaining

certified copy she has filed the aforesaid MATA with a petition under Section 5 of the Limitation Act to condone the delay.

The opposite party further states that the settled principles of law is each day of delay must be satisfactorily explained with documentary evidence but the petitioner has not given sufficient reasons for such inordinate delay in filing the MATA. It is submitted by the opposite party that the petitioner has taken a ground that opposite party was neglecting her and did not pay maintenance in compliance with the order passed in the D.V. proceeding, which is false and baseless. Rather, the opposite party has been paying the maintenance regularly.

As far as the contention of the petitioner that assurance was given by the opposite party-husband for re-union, it is stated that he has never given any such assurance to the present appellant, rather the petitioner has left no stone unturned to harass the opposite party. Even in the year, 2016, due to some unavoidable circumstances, the opposite party could not pay the compensation to the appellant for which non-bailable warrant was issued against the opposite party. Then, the petitioner approached the Superintendent of Police, Boudh personally to execute the warrant. As the opposite party was posted at Boudh, it is mentioned that she met the Commissioner to put him under suspension. However, the opposite party admits that he has got his daughter admitted for +2 examination in D.P.S., Damanjodi under the guidance of his own sister. In that view of the matter, it is submitted that the appeal should be dismissed.

5. Mr. Sadangi, learned counsel for the petitioner argued that the fact of the opposite party giving assurance at belated stage for re-union as well as the maintenance is sufficient cause for not preferring the appeal in time. Mr. Pradhan, learned counsel for the opposite party, on the other hand, submits that it is not a sufficient cause for not preferring appeal. In this connection, he cited several judgments in which delay has been condoned and the same is liable to be discussed later.

6. Section 5 of the Limitation Act, 1963 provides for extension of prescribed period in certain cases and is extracted below:-

> " **5. Extension of prescribed period in certain cases.**—Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

A plain reading of the aforesaid provision leaves no doubt in the mind of the Court that the Court has to determine on consideration of the various aspects of the case as to whether there is sufficient cause for not preferring appeal in time. The Hon'ble Supreme Court in the case of ***Collector, Land Acquisition, Anantnag and another, Appellants vs. Mst. Katiji and others, respondents,*** AIR 1987 SC 1353, while laying down certain principles, has observed that it is common knowledge that the Supreme Court has always been justifiably advocating for adoption of a liberal approach in delay condoning matters but the message does not appear to have percolated down to all the Courts in the hierarchy. Such a liberal approach is adopted on the principle as it is realized that:-

> " 1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
>
> 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
>
> 3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay ? The doctrine must be applied in a rational common sense pragmatic manner.
>
> 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
>
> 5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
>
> 6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

To counter this Judgment, the learned counsel for the opposite party relies on four judgments, in which the delay has not been condoned or in some cases, delay condoned has been set aside by the Supreme Court in appeal. 1st one is the case between ***Oriental Aroma Chemical Industries vs. Gujarat Industrial Development Corporation and another,*** (2010) 5 SCC 459. It is a case of delay of three years, to be exact 1067 days. At paragraphs 14, 15 and 16, the Hon'ble Supreme Court has dealt with the aspect of condonation of delay and the meaning of expression "sufficient cause". The Hon'ble Supreme Court has held that the law of limitation was founded on public policy and the legislation does not prescribe limitation with the object

of destroying rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the Hon'ble Supreme Court has held that the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time.

The Hon'ble Supreme Court further held that the expression "sufficient cause" employed in Section 5 of the Limitation Act, and similar other statutes is elastic enough to enable the court to apply the law in a meaningful manner which sub-serves the ends of justice. Although, no hard-and-fast can be laid down in dealing with the applications for condonation of delay. The Apex Court has justifiably advocated adoption of a liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate.

In the case of ***Isha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and others,*** 2013 AIR SCW 6158, the Hon'ble Supreme Court has laid down thirteen principles to be followed while dealing with an application for condonation of delay. We find it appropriate to quote the same.

> "**15.** From the aforesaid authorities the principles that can broadly be culled out are:
>
> i) There should be a liberal, pragmatic, justice-oriented, non- pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.
>
> ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact- situation.
>
> iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.
>
> iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.
>
> v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.
>
> vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

16. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are: -

a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

d) The increasing tendency to perceive delay as a non- serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters."

This judgment has a strong bearing in this case. At Clause (xi), the Hon'ble Supreme Court has held that no one gets away with fraud,

misrepresentation or interpolation by taking recourse to the technicality of law of limitation.

7. In the case of ***Basawaraj and another vs. The Special Land Acquisition Officer,*** AIR 2014 SC 746, the Hon'ble Supreme Court has held that sufficient cause means that a party should not have acted in a negligent manner and there was a want of bonafide on its part in view of the facts and circumstances of a case and or it cannot be alleged that the party has not acted diligently or remained inactive. However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise the discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. The applicant must satisfy the Court that he was prevented by any sufficient cause from prosecuting his case, and unless a satisfactory explanation is furnished, the court should not allow application for condonation of delay. The Hon'ble Supreme Court further at Paragraph-12 has held that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds.

8. In the case of ***Brijesh Kumar and others vs. State of Haryana and others,*** 2014 AIR SCW 1831, the Hon'ble Supreme Court refused to condone the delay of 10 years two months and 29 days in filing appeal. At paragraph-11 of the aforesaid judgment, the Hon'ble Supreme Court has held that the Court should not adopt an injustice oriented approach in rejecting the application for condonation of delay. However, the Court while allowing such application has to draw a distinction between delay and inordinate delay for want of bonafide of inaction or negligence would deprive a party of the protection of Section 5 of the Limitation Act, 1963. Sufficient cause is a condition precedent for exercise of discretion by the Court for condoning the delay. The Court has time and again held that when mandatory provision is not complied with and that delay is not properly, satisfactorily and convincingly explained, the Court cannot condone the delay on sympathetic grounds alone.

The Hon'ble Supreme Court further held that if a person has taken a relief approaching the Court just or immediately after the cause of action has arisen, other persons cannot take benefit thereof approaching the Court at a belated stage for the reason that they cannot be permitted to take the impetus of the order passed at the behest of some diligent person.

9. This being the settled principles of law, we have given anxious thought to it. From the facts and circumstances of the case, it is clear that the opposite party is a Inspector of Excise and the petitioner is an Advocate making entry into the profession at a belated stage. Though, the learned counsel for the petitioner submits that there is a delay of 51 days, the office has pointed out that there is a delay of 2 years 68 days in preferring the appeal.

10. From the aforesaid judgments cited by the learned counsel for the parties and the judgment rendered by the Hon'ble Supreme Court in the case of ***Collector, Land Acquisition, Anantnag and another*** (Supra), we are of the opinion that it is not necessary to explain each days of delay and moreover, the Courts in India exists and known for its ability to dispense justice and not hide behind technicality. Though the petitioner has filed this petition along with an affidavit, in other words, her petition is supported by annexing affidavit, the counter filed by the opposite party is not supported by any affidavit. Rather, it has been signed by the counsel for the opposite party only. From the aforesaid aspect, it is clear that there was no bonafide and meaningful assurance made by the opposite party. This Court is inclined to believe that the opposite party was giving false assurance to the petitioner that matter would be settled and he would provide all the facilities and that is reason, the petition should be allowed. Moreover, it is seen that in ex-parte decree, a judgment has been passed in favour of the opposite party. There is no order regarding permanent alimony or monthly alimony. Only on this score, we are of the opinion that a meritorious matter should not be allowed to be nipped at the bud in order to perpetuate injustice in favour of a party. Hence, the application is allowed. We condone the delay of 2 years, 2 months and 5 days in filing appeal. There shall be no orders as to the costs. The Misc. Case is disposed of.

2019 (I) ILR – CUT- 295

S.K. MISHRA, J.

CIVIL REVISION PETITION NO. 2 OF 2018

BEDABYAS BARIK ……..Petitioner

.Vs.

SUKANTI BARIK ……Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Section 115 read with Sections 16 and 37 of the Arbitration and Conciliation Act, 1996 – Civil Revision – Challenge is made to the order rejecting an application filed under section 16 of the Arbitration and Conciliation Act, 1996 – The question arose as to whether civil revision is maintainable? – Held, No. – Reasons discussed.

"A plain reading of sub-section (2) of Section 37 of the Act reveals no doubt in the minds of the Court that an appeal shall also lie to a Court from an order of the arbitral tribunal accepting the plea referred to in sub-section (2) or sub-section (3) of section 16 of the Act. In this case, a petition was filed by the petitioner before the arbitral tribunal under subjection (2) read with sub-section (1) of Section 16 of the Act and, therefore, it should have filed an appeal under Section 37(2) to the learned District Judge." *(Para 9 to 15)*

Case Laws Relied on and Referred to :-

1. 2014(1) OLR-287 : M/s.Trafalgar v. Government of Orissa.
2. AIR 2002 SCC 2308 : M/s.I.T.I. Ltd. V. M/s. Siemens Public Communications Network Ltd.
3. 2018 (II) OLR-781 : M/s. KCS Private Limited V. Rosy Enterprises.
4. (2007) 1 SCC 467 : M/s.Pandey and Co. Builders Pvt. Ltd. –vrs.- State of Bihar. the Hon'ble SCC.
5. (2015) 1 SCC 32 : State of West Bengal and others V. Associated Contractors.

For Petitioner : M/s. Bibhuti Bhusan Mishra-2, B.Mohanty & S.Barik.
For Opp.Party : M/s. Janmejaya Ray, S.C.Mohanty, B.Saha & G.R. Rout.

JUDGMENT Date of Judgment: 16.01.2019

S.K.MISHRA, J.

In this Civil Revision Petition filed under Section 115 of the Code of Civil Procedure (hereinafter referred to as the "Code" for brevity) the petitioner (respondent before the sole arbitrator), has challenged the order dated 09.12.2017 passed by the Sole Arbitrator in M.P. No.1/2017 arising out of ARBP No.1/2017 whereby the learned Arbitrator rejected the prayer of the petitioner-respondent to close/terminate the arbitral proceeding on the ground that it is initiated wrongly and illegally.

2. Though no provision has been mentioned in the application that has been filed by the respondent, who is petitioner in this revision, it is obvious that this application has been made under Section 16 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act" for brevity), which provides for competence of arbitral tribunal to rule on its jurisdiction. It is appropriate to take into consider the exact provision:

> "16. Competence of arbitration tribunal to rule on its jurisdiction – (1) The arbitral may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-
>
> (a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
>
> (b) A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.
>
> (3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
>
> (4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.
>
> (5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.
>
> (6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

3. A bare reading of this provision reveals that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, i.e. (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Sub-section (2) of Section 16 of the Act provides that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be

precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

4. Thus, it is apparent that the present petitioner, who was the respondent before the Sole Arbitrator, has filed the application under Section 16 of the Act that application was contested by the present opposite party, who was claimant before the Sole Arbitrator. The Sole Arbitrator came to the conclusion that the arbitration proceeding is based on the agreement dated 11.10.2014 entered into by the respondent with the claimant. The respondent is a party, signatory and author of the aforesaid agreement and he is in possession of the agreement and as such he is well aware of the contents of the agreement. The respondent has received and acknowledged the claimant's notice and he has send the reply date 15.10.2017, and, therefore, he is in possession of the aforesaid notice and reply notice. Accordingly, the aforesaid agreement, notice and reply notice are all in his possession and he is well aware of the contentions and disputes raised therein.

5. The learned Sole Arbitrator further held that clause-6 of the agreement provides that all the disputes if any arising out of this agreement shall be referred to the Sole Arbitrator, within jurisdiction, Bhubaneswar, whose decision is being final and binding among the parties. Thus, holding the same the learned Sole Arbitrator has rejected the application of the petitioner-respondent. Such order is challenged in this Civil Revision Petition.

6. At the initial state, the learned counsel for the opposite party raises objection regarding maintainability of the revision petition whereas the learned counsel for the petitioner submits that in view of the judgment rendered by this Court in the case of ***M/s.Trafalgar v. Government of Orissa***; 2014(1) OLR-287 (W.P.(C) No.6989/2009; wherein a question arose whether the writ petition is maintainable or a revision petition is maintainable against the order passed by the learned District Judge under Section 37(2)(a) of the Act. Before the Tribunal the petitioner in the arbitral proceeding filed an application under Section 16(3) of the Act, which was rejected. Challenging that order the said party filed a writ petition and a Bench of this Court having taken into consideration various aspect of the case, came to hold that a civil revision is maintainable and the writ petition is not maintainable. Therefore, the writ petition was dismissed.

7. The facts of the case are different. In the reported case, an application was filed before the arbitral tribunal, but on the rejection thereof the

petitioner filed an appeal, to the learned District Judge, under Section 37 of the Act. On dismissal of the same a writ petition was filed. The Court held that the revision application is maintainable and in view of the existence of an alternative remedy the Court refused to entertain the writ petition.

8. In the case of ***M/s.I.T.I. Ltd. V. M/s. Siemens Public Communications Network Ltd***.; AIR 2002 SUPREME COURT 2308, the Hon'ble Supreme Court has held that a revision petition under Section 115 of the Code lies to the High Court as against the order made by a Civil Court in an application preferred under Section 37 of the Act.

9. However, in this case without approaching the District Judge under Section 37 of the Act, the petitioner has approached this Court directly under Section 115 of the Code. Section 37 of the Act provides for appealable orders, which reads as follows:-

> "37. Appealable orders.- (1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:-
>
> (a) Refusing to refer the parties to arbitration under section 8;
>
> (b) Granting or refusing to grant any measure under section 9;
>
> (c) Setting aside or refusing to set aside an arbitral award under section 34.
>
> (2) An appeal shall also lie to a Court from an order of the arbitral tribunal-
>
> (a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
>
> (b) granting or refusing to grant an interim measure under section 17.
>
> (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

10. A plain reading of sub-section (2) of Section 37 of the Act reveals no doubt in the minds of the Court that an appeal shall also lie to a Court from an order of the arbitral tribunal accepting the plea referred to in sub-section (2) or sub-section (3) of section 16 of the Act.

11. In this case, a petition was filed by the petitioner before the arbitral tribunal under subjection (2) read with sub-section (1) of Section 16 of the Act and, therefore, it should have filed an appeal under Section 37(2) to the learned District Judge, Khurdha at Bhubaneswar.

12. This Court in the case of ***M/s. KCS Private Limited V. Rosy Enterprises***; 2018 (II) OLR-781 has held the definition of "court" in Section 2(1)(e) in the 1996 Act fixes "court" to be the Principal Civil Court of Original Jurisdiction in the district or the High Court in exercise of its ordinary original civil jurisdiction. Section 2(1)(e) further goes on to say that a court would not include any civil court or a grade inferior to such Principal Civil Court, or a Small Cause Court. The definition is an exhaustive one as it uses the expression "means and includes". It is settled law that such definitions are meant to be exhaustive in nature".

13. In the case of ***M/s.Pandey and Co. Builders Pvt. Ltd. –vrs.- State of Bihar***; (2007) 1 SCC 467, the Hon'ble Supreme Court has ruled thus:-

> "16. Unlike the 1940 Act, the Arbitrator is entitled to determine his own jurisdiction. In the event, the Arbitrator opines that he has jurisdiction in the matter, he may proceed therewith, which order can be challenged along with the award in terms of Section 34 of the 1996 Act. If the Arbitrator opines that he has no jurisdiction to hear the matter, an appeal lies before the court. "Court" has been defined in Section 2(1) (e) of the 1996 Act in the following terms:
>
> "2(1)(e) 'court' means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;"
>
> 17. It is not disputed before us that the Patna High Court does not exercise any original civil jurisdiction. The definition of "court" as noticed hereinbefore means the Principal Civil Court of original jurisdiction in a district and includes the High Court which exercises the original civil jurisdiction. If a High Court does not exercise the original civil jurisdiction, it would not be a 'court' within the meaning of the said provision. Constitution of the courts vis-à-vis the hierarchy thereof is governed by the 1887 Act, Section 3 whereof reads as under:
>
> "3. Classes of Courts – There shall be the following classes of Civil Courts under this Act, namely:-
>
> (a) The Court of the District Judge;
> (b) The Court of the Additional Judge;
> (c) The Court of the Subordinate Judge; and
> (d) The Court of the Munsif."
>
> 18. Chapter III of the 1887 Act relates to ordinary jurisdiction of the civil courts. Section 18 provides for extent of original jurisdiction of District and Sub-ordinate Judge in the following terms;

> "18. Extent of original jurisdiction of District or Subordinate Judge. Save as otherwise provided by any enactment for the time being in force, the jurisdiction of a District Judge of Subordinate Judge extends, subject to the provisions of Section 15 of the Code of Civil Procedure, 1908 to all original suits for the time being cognizable by Civil Courts". "

A three Judge Bench of the Hon'ble Supreme Court in the case of ***State of West Bengal and others V. Associated Contractors***; (2015) 1 SCC 32 has held that Section 2(1) (e) contains an exhaustive definition marking out only the Principal Civil Court of Origin al Jurisdiction in the district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part 1 of the Act. Hon'ble Supreme Court further held that "where a High Court exercises ordinary original civil jurisdiction over a district, the High Court will have preference to the Principal Civil Court of Original jurisdiction in that District. Firstly, the very inclusion of the High Court in the definition would be rendered nugatory if the above conclusion was not to be accepted, because the Principal Civil Court of Original Jurisdiction in a district is always a court lower in grade than the High Court, and such District Judge being lower in grade than the High Court would always exclude the High Court from adjudicating upon the matter. Secondly, the provisions of the Arbitration Act leave no room from any doubt that it is the superior most court exercising original jurisdiction which has been chosen to adjudicate disputes arising out of arbitration agreements." It was a case of Calcutta High Court which exercised original civil jurisdiction. Hence, the Hon'ble Supreme Court have held that the High Court of Calcutta is the Principal Civil Court exercising Original Civil Jurisdiction.

14. Thus, it is clear that the High Court of Patna is not the 'Court' and that the High Court of Calcutta is the Court within the meaning of Section 2(1) (e) of the Act. This Court further held that the High Court of Orissa does not exercise the original civil jurisdiction. Sub-section (2) of Section 2 of the Orissa Civil Courts Act, 1984 provides that the court of the District Judge shall be the principal court of original civil jurisdiction in the district and the explanation provides that for the purpose of this sub-section the expression 'District Judge' shall not include an Additional District Judge. Thus, for the State of Odisha, the District Judge is the 'Court' within the definition of the aforesaid Section and not the High Court.

15. In that view of the matter, the Civil Revision Petition is not maintainable and, therefore, this Court is not inclined to interfere with the

order passed by the learned Sole Arbitrator. Accordingly, the Civil Revision Petition is dismissed as not maintainable. There shall be no order as to costs.

2019 (I) ILR - CUT- 301

S.K. MISHRA, J & J.P. DAS, J.

JCRLA NO. 45 0F 2010

SUMAN BISWAL ……..Appellant

.Vs.

STATE OF ORISSA ……..Respondent

INDIAN PENAL CODE,1860 – Section 302 – Offence under – Conviction – The convict-appellant did not use any weapon of offence, rather he had used his bare hands to push the deceased on the ground, as a result of which her head struck on the ground and she sustained head injury and died – Held, the convict-appellant had no requisite intention to commit murder of the deceased, but he was aware of the fact that his action is so immensely dangerous that it may result in death of the deceased, therefore the offence under Section 302 of the I.P.C. is not made out, rather offence under Section 304, Part-I of the I.P.C. is made out – Conviction and sentence altered to one under Section 304, Part-I of the I.P.C. with ten years sentence. (Para 7 & 8)

For Appellant : M/s.R.R.Chhotaray, B.R.Mohapatra, R.K.Mallick and A. Rout.

For Responden : Mrs. S.Pattnaik, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 07.01.2019

S.K.MISHRA, J.

This appeal is preferred by way of a prisoner's petition assailing the judgment of conviction and order of sentence dated 29.3.2010 passed by learned Sessions Judge, Cuttack in S.T. Case No.242/2008 convicting the appellant under Section 302 of the Indian Penal Code 1860 (hereinafter referred to as "I.P.C." for brevity) and sentencing him to undergo imprisonment for life and pay a fine of Rs.10,000/- (rupees ten thousand) in default to undergo R.I. for one year.

2. The case of the prosecution in short is that the convict-appellant on 10.3.2008 at 5.00 P.M. abused Kharika Bewa, the deceased who is the

grand-mother of the informant Jitendranath Biswal in obscene words and told that she should record the lands in his name. It is further alleged that when the deceased refused to accede to the demand of the convict-appellant, the convict-appellant being enraged lifted the deceased and threw her on the ground and also had hit the head of the deceased by twisting her neck on the ground. It is further alleged that after the deceased returned back from the hospital after treatment, again on the same day the convict-appellant further lifted the deceased and smashed her on the ground which resulted in her death. Information was lodged by p.w.1 regarding the occurrence before the O.I.C., Baideswar Police Station in writing vide Ext.1 and Police on receipt of the said information took up investigation of the case and after completion of investigation filed charge sheet against the convict-appellant under Section 302 of the I.P.C.

3. The plea of the convict-appellant is that of complete denial of the occurrence and false implication in this case.

4. The prosecution in order to bring home its case has examined as many as seven witnesses. Out of them, P.W.1 is the informant, P.Ws.2,3 and 5 are the eye witnesses to the occurrence. P.W.4 is the witnesses to the inquest held over the dead body of the deceased by the Police. P.W.6 is the Doctor, who conducted post mortem over the dead body of the deceased and P.W.7 is the Investigating Officer.

5. The convict-appellant, on the other hand, did not examine any witness on his behalf. Mr.R.K.Mallick, learned counsel for the convict-appellant submits that offence under Section 302 of the I.P.C. is not made out, rather at best offence under Section 304 Part-II of the I.P.C. is made out as the occurrence took place in the spur of moment.

6. Learned Addl. Government Advocate, on the other hand, submits that the conviction under Section 302 of the I.P.C. is proper and should not be interfered with.

7. We have examined the impugned judgment as well as depositions of witnesses and from the aforesaid materials, it is apparent that the convict-appellant did not use any weapon of offence, rather he had used his bare hands to push the deceased on the ground, as a result of which her head struck on the ground and she sustained head injury and died. In that view of the matter the convict-appellant had no requisite intention to commit murder of the deceased, but he was aware of the fact that his action is so immensely dangerous that it may result in death of the deceased.

8. In that view of the matter, we are of the opinion that offence under Section 302 of the I.P.C. is not made out, rather offence under Section 304, Part-I of the I.P.C. is made out. Therefore, we allow the appeal in part, set aside the judgment and order of conviction dated 29.3.2010 passed by learned Sessions Judge, Cuttack in S.T. Case No.242/2008 under Section 302 of the I.P.C. and alter the conviction to Section 304, Part-I of the I.P.C. and sentence the convict-appellant to undergo R.I. for ten years. The period undergone shall be set-off against the substantive imprisonment and he be set at liberty forthwith as he has already undergone more than ten years imprisonment in the mean time unless his detention is not required in any other case.

9. Keeping in view the fact the convict-appellant is not having any means for which a State defence counsel was appointed, we are not inclined to impose any fine. The sentence and fine imposed by learned Sessions Judge, Cuttack is hereby set aside.

10. Accordingly, the JCRLA is allowed in part.

2019 (I) ILR - CUT- 303

DR. A.K.RATH, J.

WP(C) NO.15423 OF 2017

GOPAL DASH .....Petitioner

.Vs.

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

(A) ORISSA FOREST ACT, 1972 – Section 56 – A forest case was registered for violation of Rules 4, 12, 13 and 14 of the Orissa Timber and other Forest Produce Transit Rules, 1980 and the vehicle was seized – Confiscation proceeding – Registered owner's plea that he has sold the vehicle to another person by way of an agreement – Driver of the vehicle not examined – No material to show that the Registered owner had taken adequate precaution to prevent the vehicle for being used for commission of any offence – Held, the master is vicariously liable for any act committed by his agent or servant – The owner would be liable for any act or omission committed by the driver under Sec.56

of the Act – Finding of the appellate court that the petitioner cannot escape the liability of confiscation since the driver who was the agent to use the vehicle knowingly committed the forest offence is justified.

(Para 11)

(B) JUDGMENT OF PRECEDENTS – Essence of – Principles decided to be followed and not every observation found therein – Held, in the State of Orissa v. Sudhansu Sekhar Misra, AIR 1968 SC 647, the Constitution Bench of the apex Court held that a decision is only an authority for what it actually decides – The essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it – It is not a profitable task to extract a sentence here and there from a judgment and to build upon it.

(Para 17)

Case Laws Relied on and Referred to :-

1. 2012 (Supp.-I) OLR 539 : State of Orissa Vs. Pramod Kumar Sahu.
2. 2010 (I) OLR 16 : Monoj Kumar Pattnaik Vs. State of Orissa and 5 Ors.
3. 2003 (II) OLR 530 : Biswakesha Mohapatra Vs. Authorised Officer.
4. 2002 (II) OLR 216 : Malatilata Samal and others Vs. State of Orissa & Ors.
5. 71 (1991) CLT 157 : Range Officer, Khurda, Forest Range Vs. Kiran Sankar Panda & Ors.
6. AIR 2000 SC 2729 : State of Karnataka Vs. K. Krishnan.
7. 2010 (I) ILR – CUT 271: Sk. Ibrahim Vs. State of Orissa & Ors.
8. 2010 (1) OLR 16 : Manoj Kumar Pattnaik Vs. State of Orissa and 5 others.
9. AIR 1968 SC 647 : State of Orissa Vs. Sudhansu Sekhar Misra.

For Petitioner : Dr. Sujata Dash
For Opp. Parties : Mr. Uttam Ku. Sahoo, ASC

JUDGMENT Date of Hearing: 01.12.2018 : Date of Judgment: 07.12.2018

DR. A.K.RATH, J.

By this petition under Article 226 of the Constitution, the petitioner has challenged, inter alia, the judgment dated 14.03.2017 passed by the learned District Judge, Keonjhar in FAO No.07 of 2016. By the said judgment, learned District Judge dismissed the appeal; thereby confirmed the order dated 29.04.2016 passed by the learned Authorized Officer-cum-Asst. Conservator of Forests, Keonjhar Division, Keonjhar in OR Case No.102G of 2013-14 and confiscated the Bolero bearing registration number OR-09-P-0207 along with 42 pieces of sal sizes under Sec. 56 of the Orissa Forest Act, 1972 (in short, "the Act").

2. The issue involved in this appeal lies in a very narrow compass. The necessary facts of the case for deciding the issue are :

On 19.10.2013, the Range Officer of Ghatagaon Range, upon receiving reliable information, conducted patrol duty along with his staff near village Bana Chakulia. At 3.30 A.M, they saw a Bolero bearing registration number OR-09-P-0207 moving towards Dhangardiha. They instructed the driver to stop the vehicle. But then, the driver did not stop the vehicle. The patrolling team chased it for about 200 meters and managed to stop it. There were four occupants. The patrolling staff nabbed three persons. One person escaped. The vehicle was found to be carrying 42 freshly cut sal sizes of 14.00 cft. The occupants of the vehicle could not produce any document for transporting the same. They confessed that they were carrying the timber for the purpose of sale. A forest case was registered for violation of Rules 4, 12, 13 and 14 of the Orissa Timber and other Forest Produce Transit Rules, 1980 (in short, "the Rules"). The vehicle was seized under Sec.56 of the Act. The accused persons were arrested and forwarded to judicial custody. Thereafter, an enquiry was conducted by the Range Officer as per Rule 4(2) of the Orissa Forest (Detection Enquiry and Disposal of Forest Offence) Rules 1980. During enquiry, it was found that the timber in question was being transported with the knowledge of the petitioner, owner of the vehicle and one Sankhali Mohakud, to whom the vehicle had been transferred by means of an agreement. Accordingly, a confiscation proceeding was initiated by the Authorised Officer-cumAsst. Conservator of Forests, Keonjhar Division under Sec.56 of the Act.

3. Pursuant to issuance of notice, the petitioner entered appearance and filed a show cause stating that he is the registered owner of the vehicle. The vehicle was sold to one Sankhali Mohakud by means of an agreement dated 15.4.2013. The petitioner availed the loan. It was agreed upon between the parties that the balance amount shall be paid to the financer by Sankhali Mohakud. The petitioner instructed Sankhali Mohakud not to use the vehicle for illegal transportation of timber or carry any contraband articles. It was further stated that he was not present at the spot. He had no knowledge about the commission of offence. In the confiscation proceeding, five witnesses were examined by the prosecution. The defence had examined four witnesses. The authorized officer came to hold that the forest offence had been committed. The owner of the vehicle had not taken any reasonable precaution against commission of forest offence. He had engaged the vehicle for illegal transportion of the timber. Held so, he directed that the vehicle bearing registration number OR-09-P-0207 and sal sizes 42 pcs. equivalent to 14.0 cft. be confiscated to Government of Odisha. Unsuccessfully petitioner

filed FAO No.07 of 2016 before the learned District Judge, Keonjhar, which was eventually dismissed.

4. Heard Dr. Sujata Dash, learned counsel for the petitioner and Mr. Uttam Ku. Sahoo, learned Addl. Standing Counsel for the State.

5. Dr. Dash, learned counsel for the petitioner submitted that the vehicle was handed over to Sankhali Mohakud by means of an agreement to sale. The petitioner had instructed him and driver not to engage the vehicle for illegal transportation of the timber. The petitioner had no knowledge about the illegal transportation of the timber. She further submitted that the petitioner was not present at the spot. He had taken proper care to use the vehicle for legal activities. The learned appellate court has not considered the matter in its proper perspective. To buttress the submission, she relied on the decisions of this Court in the case of State of Orissa v. Pramod Kumar Sahu, 2012 (Supp.-I) OLR 539, Monoj Kumar Pattnaik v. State of Orissa and 5 others, 2010 (I) OLR 16 and Biswakesha Mohapatra v. Authorised Officer, 2003 (II) OLR 530.

6. Per contra, Mr. Sahoo, learned ASC for the State submitted that the learned appellate court held that the agreement to sale was a self-serving document. The driver has not been examined. It is not enough to discharge the burden cast upon the petitioner to escape the order of confiscation. It must be proved that the owner of the vehicle must have taken reasonable and necessary precaution against the use of the vehicle in respect of commission of forest offence. The petitioner cannot escape the liability of confiscation, since his driver who was the agent to use the vehicle knowingly for commission of forest offence. The driver has been deliberately withheld from the witness box. The judgment of the learned appellate court is perfectly legal and valid. He placed reliance on the decision of this Court in the case of Malatilata Samal and others v. State of Orissa and others, 2002 (II) OLR 216.

7. Sec. 56 (2-c) of the Act which is the hub of the issue reads as follows;

> "(2-c) Without prejudice to the provisions of Sub-section (2- b) no order of confiscation under Sub-section (2-a) of any tool, rope, chain, boat, vehicle or cattle shall be made if the owner thereof proves to the satisfaction of the authorised officer that it was used without his knowledge or connivance or the knowledge or connivance of his agent, if any, or the person in charge of the tool, rope, chain, boat, vehicle or cattle, in committing the offence and that each of them had taken all reasonable and necessary precautions against such use."

8. Sub-Section (2-c) of Sec. 56 of the Act was the subjectmatter of interpretation before a Division Bench of this Court in the case of State of Orissa represented through the Range Officer, Khurda, Forest Range v. Kiran Sankar Panda & others, 71 (1991) CLT 157. A Bench of this Court speaking through Mr. B.L. Hansaria, Chief Justice (as he then was) held as follows;

> "…. so far as confiscation of any tool, rope, chain, boat, vehicle or cattle is concerned, section 56 (2-c) has excluded the conception of mens rea by necessary implication, as already noted. We have said so because this section states that in case of confiscation of such articles, it is the owner who has to prove that the same had been used without his knowledge or connivance or the knowledge or connivance of his agent, if any, or the person in charge of the article in question. This would show that knowledge or connivance is assumed, unless contrary is proved. The knowledge or connivance about which section 56 (2-c) has spoken is not confined to the owner but takes within its fold the knowledge or connivance of the agent, if any, or of the person in charge of the article in question. Not only this, this section further states that to escape the order of confiscation, it must be further proved that each of the concerned persons had taken all reasonable and necessary precaution against the use of the article in question in respect of the commission of the forest offence."

9. In State of Karnataka v. K. Krishnan, AIR 2000 SC 2729, the apex Court held that liberal approach in the matter with respect to the property seized which is liable to confiscation is uncalled for as the same is likely to frustrate the provisions of the Act.

10. On the anvil of the decisions cited supra, the instant case may be examined.

11. Admittedly, the petitioner is the registered owner of the vehicle. Though the petitioner has taken a plea that the vehicle was sold, but the ownership thereof has not been changed. The petitioner has taken a plea that the vehicle has been sold to Sankhali Mohakud. But then, he contested the case. He assailed the order of confiscation dated 29.04.2016 passed by the Authorized Officer-cumAsst. Conservator of Forests, Keonjhar Division, Keonjhar in OR Case No.102G of 2013-14 before the learned appellate court. Since the judgment was not palatable to him, he filed this writ application. The 6 petitioner has taken a prevaricating stand. His left hand doesn't know what the right hand is doing. The learned appellate court has rightly came to

hold that the agreement to sale was a self-serving document prepared and projected by the petitioner only to escape the liability under law. Sankhali Mohakud has stated that the driver, namely, Bapun Behera was driving the vehicle. However, one Bapun Behera was driving the vehicle at the time of detention. The driver has not been examined in the case. Learned appellate court is quite justified in holding that the plea taken by the petitioner and the transferee is difficult to believe. It is not enough to discharge the burden cast upon the petitioner to escape the order of confiscation. The petitioner cannot escape the liability of confiscation since the driver who was the agent to use the vehicle knowingly committed the forest offence.

12. An identical matter came up for consideration before a Division Bench of this Court in the case of Sk. Ibrahim v. State of Orissa and others, 2010 (I) ILR – CUT 271. The Division Bench of this Court reiterated the same view taken in Kiran Sankar Panda (supra) and held thus;

> "In the instant case, the petitioner had given the vehicle to his driver, who admittedly himself knowingly used the vehicle for commission of forest offence. Even assuming for the sake of argument that the petitioner instructed the driver not to use the vehicle for illegal purposes and that he had no knowledge of the illegal user of the vehicle by his driver, he cannot escape the liability of confiscation as his driver, who was the agent in-charge of the vehicle, knowingly used the same for commission of forest offence."

13. In Malatilata Samal (supra), this Court held that the master is vicariously liable for any act committed by his agent or servant. The owner would be liable for any act or omission committed by the driver.

14. The ratio laid down in Sk. Ibrahim and Malatilata Samal (supra) proprio vigore apply to the facts of the case.

15. In Pramod Kumar Sahu (supra), this Court set aside the order passed by the appellate authority holding that the order of confiscation was passed without reference to the evidence on record and the finding of fact recorded by the appellate authority is perverse. In the instant case, the authorised officer as well as the learned appellate court scanned the evidence on record and passed the order. The reason assigned by the learned appellate court cannot be said to be perfunctory or flawed warranting interference of this Court under Article 226 of the Constitution.

16. In Manoj Kumar Pattnaik v. State of Orissa and 5 others, 2010 (1) OLR 16, this Court directed the R.T.O., Balasore to assess the value of the

vehicle and send the same to the Divisional Forest Officer, Balasore. It was directed that the Divisional Forest Officer, Balasore shall release the vehicle to the petitioner on depositing the value of the vehicle as assessed by R.T.O. But then no reason has been assigned. In the facts and circumstances of the case, the order was passed. The same is distinguishable on facts. In Biswakesha Mohapatra (supra), the vehicle was released to petitioner furnishing a cash security of rupees thirty thousand and property security of rupees seventy thousand to the satisfaction of the authorized officer. The order was passed on the facts and circumstances of the said case.

17. In the State of Orissa v. Sudhansu Sekhar Misra, AIR 1968 SC 647, the Constitution Bench of the apex Court held that a decision is only an authority for what it actually decides. The essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it. 18. No law has been laid down in Manoj Kumar Pattnaik and Biswakesha Mohapatra (supra). The orders are not binding precedent.

19. In the wake of the aforesaid, the petition, sans merit, is dismissed. No costs.

2019 (I) ILR - CUT- 309

DR. A.K. RATH, J.

W.P.(C) NO.15658 OF 2018

SMT. TAPASWINI PANDA .....Petitioner

.Vs.

COLLECTOR, SUBARNAPUR & ORS. .....Opp. Parties

ODISHA GRAM PANCHAYATS ACT, 1964 – Section 25(1)(v) and 26 – Provisions under – Application seeking disqualification of the Petitioner as Sarapanch – Petitioner has begotten third child after the cut off date 21.4.1995 – Collector issued notices to various State authorities and verified several documents including the admission register of SGA Nodal Uchha Prathamika Vidyalaya, Sindurpur in presence of the petitioner and found that the third child was born after the cut off date – Plea that there has been violation of the principles of natural justice – Plea not supported by materials – Held, there is

nothing on record to show that the Collector, has refused the petitioner to adduce evidence – Thus sufficient opportunity was provided to the petitioner – Other circumstances of the case – Discussed.

(Para 7 to 10)

Case Laws Relied on and Referred to :-

1. (2008) 12 SCC 481 : K.D. Sharma Vs. Steel Authority of India Limited & Ors.
2. (2005) 5 SCC 337 : Viveka Nand Sethi Vs. Chairman, J&K Bank Ltd. & Ors.
3. (1996) 3 SCC 364 : State Bank of Patiala and others Vs. S.K. Sharma.
4. (2005) 3 SCC 409 Karnataka State Road Transport Corporation & Anr. Vs. S.G. Kotturappa and Anr.
5. AIR 2014 Ori.-138 (FB) : Debaki Jani Vs. The Collector & Anr.
6. AIR 1964 SC 477 : Syed Yakoob Vs. K.S. Radhakrishnan & Ors.
7. AIR 1977 SC 965 : Chairman, Board of Mining Examination & Anr. Vs. Ramjee.

For Petitioner : Mr. Himanshu Sekhar Mishra.
For Opp. Parties : Mr. Ram Prasad Mohapatra, A.G.A.
Mr. Uttam Kumar Sahu, A.S.C.
Mr. Prafulla Kumar Rath, Mr. Adhiraj Behera.

JUDGMENT Date of Hearing: 01.12.2018 Date of Judgment: 07.12.2018

DR. A.K. RATH, J.

This petition challenges the order dated 16.8.2018 passed by the Collector, Subarnapur, opposite party no.1, whereby and whereunder the opposite party no.1 has disqualified the petitioner to hold the office of the Sarpanch, Sindurpur Gram Panchayat in Binika Panchayat Samiti, Dist.-Subarnapur under Sec.25(1)(v) of the Odisha Gram Panchayats Act, 1964 ("Act") on the ground that she begot a third child on 1.11.1998, i.e., after the cut off date.

02. Shorn of unnecessary details, the short fact of the case is that the petitioner was elected as Sarpanch in Sindurpur Gram Panchayat. Maheswar Mahakur, opposite party no.3, filed an application before the opposite party no.1 stating that the petitioner has incurred disqualification under Sec.25(1)(v) of the Act, since she begot a third child on 1.11.1998, i.e., after the cut off date 21.4.1995. It is stated that the petitioner has three children, namely, Jharana, Aruna and Jully. Jharana, Aruna and Jully were born on 20.6.1990, 18.6.1992 and 1.11.1998 respectively. Opposite party no.1 issued notice to the petitioner through the District Panchayat Officer, Subarnapur on 11.7.2018 vide Annexure-2 for appearance. While the matter stood thus, the opposite party no.1 issued notice to the C.D.P.O., Binika, Headmaster, SGA Nodal Uchha Prathamika Vidyalaya, Sindurpur and Medical Officer, CHC,

Binika to appear before him on 27.7.2018 to adduce evidence. Pursuant to the notice, the C.D.P.O., Binika, Headmaster, SGA Nodal Uchha Prathamika Vidyalaya, Sindurpur, Medical Officer, CHC, Binika appeared before the opposite party no.1 on 27.7.2018. The petitioner and the Advocate of opposite party no.3 were present. The opposite party no.1 verified the admission register of SGA Nodal Uchha Prathamika Vidyalaya, Sindurpur in their presence on the same day. It was found that the date of birth of Jharana was 20.6.1990, Aruna was 18.6.1992 and Jully was 1.11.1998. The C.D.P.O., Binika submitted the report stating that the petitioner is living with three children. The Advocate of the petitioner sought time to file objection. On 4.8.2018, the petitioner filed a petition to drop the proceeding, vide Annexure-4, stating inter alia that opposite party no.3 is the husband of Smt. Geetanjali Mahakur. Geetanjali Mahakur filed election dispute under Sec.30 of the Act before the learned Civil Judge (Jr. Divn.), Sonepur. The petitioner has no locus standi to maintain the application. On taking a holistic view of the matter, the opposite party no.1 came to hold that the third child was born on 1.11.1998, i.e., after the cut off date. The petitioner incurred disqualification under Sec.25(1)(v) of the Act.

03. Heard Mr. Himanshu Sekhar Mishra, learned Advocate for the petitioner, Mr. Ram Prasad Mohapatra, learned A.G.A. along with Mr. Uttam Kumar Sahu, learned A.S.C. for the opposite party nos.1 and 2 and Mr. Prafulla Kumar Rath, learned Advocate along with Mr. Adhiraj Behera, learned Advocate for the opposite party no.3.

04. Mr. Mishra, learned Advocate for the petitioner, argued with vehemence and submitted that no opportunity of hearing was provided to the petitioner. No enquiry was conducted in accordance with law. No procedure was followed. The matter was heard on the date of hearing and the order was pronounced on the same date. The C.D.P.O., Binika had issued notice to the petitioner, but not the opposite party no.1. Though the petitioner made an application, but then the copies of the order-sheets as well as the impugned order had not been granted to her. The documents were not verified in the presence of the petitioner. The persons, who produced the records, were not subjected to cross-examination. The complainant was not examined. He further submitted that the enquiry is summary in nature, but then the procedural niceties cannot be thrown into the wind. Though the petitioner was present, but no enquiry was made. The order is an infraction of principles of natural justice. For non-furnishing the entire order-sheet, the petitioner was

prevented from filing a detailed show-cause. The petitioner was not responsible for causing delay, but the order-sheet reflects that she has caused delay. The signature appearing in the photostat copy of the order-sheet does not appear the signature of the Collector.

05. Per contra, Mr. Mohapatra, learned A.G.A., submitted that the petitioner had not adduced any evidence. The officers, who were summoned by the opposite party no.1, had not adduced any evidence. Thus there was no need to cross-examine the officers. Sufficient opportunity was provided to the petitioner. He further submitted that the petitioner had contested the case. In course of hearing, notice was issued by the opposite party no.1 to the C.D.P.O., Binika, Headmaster, SGA Nodal Uchha Prathamika Vidyalaya, Sindurpur, Medical Officer, CHC, Binika. The birth register of the children of the petitioner was verified with reference to the admission register of SGA Nodal Uchha Prathamika Vidyalaya, Sindurpur produced by the Headmaster of the said school in the presence of the petitioner as well as opposite party no.3. It was ascertained that the third child was born after the cut off date, i.e., 21.4.1995. In exercise of power under Sec.26 of the Act, the Collector, Subarnapur had disqualified the petitioner.

06. Mr. Rath, learned Advocate for the opposite party no.3, submitted that the petitioner has begot a third child on 1.11.1998, i.e., after the cut off date. The petitioner incurred disqualification under Sec.25(1)(v) of the Act. The documents were verified by the opposite party no.1 in the presence of the petitioner as well as opposite party no.3. It is too late in the day that principle of natural justice has not been followed. To buttress the submission, he relied on the decisions of the apex Court in the case of *K.D. Sharma vs. Steel Authority of India Limited and others,* (2008) 12 SCC 481, *Viveka Nand Sethi vs. Chairman, J&K Bank Ltd. and others,* (2005) 5 SCC 337, *State Bank of Patiala and others vs. S.K. Sharma,* (1996) 3 SCC 364 and *Karnataka State Road Transport Corporation and another vs. S.G. Kotturappa and another,* (2005) 3 SCC 409.

07. 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.25(1)(v) and 26 of the Act are quoted hereunder.

> "25. Disqualification for membership of Grama Panchayat—(1) A person shall be disqualified for being elected or nominated as a Sarpanch or any other member of the Grama Panchayat constituted under this Act, if he-
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> xxx xxx xxx

(v) has more than two children.

xxx xxx xxx

26. Procedure of giving effect to disqualifications—

(1) Whenever it is alleged that any Sarpanch or Naib-Sarpanch or any other member is or has become disqualified or whenever any such person is himself in doubt whether or not he is or has become so disqualified such person or any other member may, and the Sarpanch at the request of the Grama Panchayat shall, apply to the Collector for a decision on the allegation of doubt.

(2) The Collector may suo motu or on receipt of an application under Sub-section (1), make such enquiry as he considers necessary and after giving the person whose disqualification is in question an opportunity of being heard, determine whether or not such person is or has become disqualified and make an order in that behalf which shall be final and conclusive.

(3) Where the Collector decides that the Sarpanch, Naib-Sarpanch or any other member is or has become disqualified such decision shall be forthwith published by him on his notice-board and with effect from the date of such publication the Sarpanch, Naib-Sarpanch or such other member, as the case may be, shall be deemed to have vacated office, and till the date of such publication he shall be entitled to act, as if he was not disqualified."

8. Sec.26 of the Act was the subject matter of interpretation before a Full Bench of this Court in the case of *Debaki Jani vs. The Collector and another,* AIR 2014 Ori.-138 (FB). The Full Bench held that Sec.26 of the Act is not concerned with either declaring the election void or granting any consequential declaration as to who has been duly elected. It merely enables the person specified in sub-sec.(1) of Sec.26 of the Act to invite a decision on the question of disqualification of a Member. Under sub-sec.(2) of Sec.26 of the Act, the Collector may suo motu or on receipt of an application under sub-sec.(1), make such enquiry as he considers necessary and after giving the person whose disqualification is in question an opportunity of being heard, determine whether or not such person is or has become disqualified and make an order in that behalf which shall be final and conclusive. It further held that many legal systems throughout the world retain the use of Latin words or phrases that originated centuries ago in the legal system of ancient Rome. The term "*suo motu*" is one of those terms. In Collins English Dictionary, the term "*suo motu*" is defined as "on its own motion" and the term generally refers to a situation wherein a judge acts without request by either party to the action before the Court. It held that the Collector has to prima facie satisfy himself and apply his mind before issuing any notice to the person whose disqualification is in question. The only rider is to observe principles of

natural justice. The legislature in its wisdom thought it proper to grant ample power to the Collector to see that purity and sanctity in the election process is maintained and no unqualified person holds the post. The same also does not exclude any other person to bring the notice of the Collector about the disqualification incurred by any Sarpanch or Naib-Sarpanch or any other member of the Grama Panchayat. The Collector exercising the suo motu power is not debarred from obtaining information and materials from various sources.

09. The scope of interference in a writ of certiorari is well known. The Constitution Bench of the apex Court in the case of *Syed Yakoob vs. K.S. Radhakrishnan and others*, AIR 1964 SC 477 held:

> "7. xxx xxx xxx
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> A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

> 8. It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; but it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious mis-interpretation of the relevant statutory provision, or sometimes in ignorance of it or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record.
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> xxx xxx xxx
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> If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened."

10. Reverting to the facts of the case and keeping in view the law laid down in the cases cited supra, this Court finds that the Collector, Subarnapur, opposite party no.1, issued notice to the C.D.P.O., Binika, Headmaster, SGA Nodal Uchha Prathamika Vidyalaya, Sindurpur, Medical Officer, CHC, Binika to remain present on 27.7.2018. The opposite party no.1 verified the records in presence of the petitioner as well as opposite party no.3. Thereafter the petitioner took time to file objection. She filed a petition to drop the proceeding, vide Annexure-4, stating inter alia that opposite party no.3 is the husband of a defeated candidate, namely, Smt. Geetanjali Mahakur. Geetanjali Mahakur filed election dispute before the learned Civil Judge (Jr. Divn.), Sonepur against the petitioner. Thus the petition at the behest of her husband was not maintainable. The petitioner had chosen not to examine her as a witness. The officers, who were summoned to appear before the opposite party no.1, had not been examined. There is nothing on record that the opposite party no.1 has refused the petitioner to adduce evidence. Thus sufficient opportunity was provided to the petitioner.

11. Non-furnishing of certified copy of the order-sheets and impugned order to the petitioner has no bearing on the case in view of the fact that the petitioner has filed the photostat copies of the order-sheets as well as the

impugned order. It reveals that the opposite party no.1 has passed the order on 16.8.2018 and signed on the same.

12. In his inimitable style, Justice Krishna Iyer in *Chairman, Board of Mining Examination & another v. Ramjee*, AIR 1977 SC 965 proclaimed that "natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt--that is the conscience of the matter".

13. In *K.D. Sharma* (supra), the apex Court in paragraph 34 held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. There is no quarrel over the proposition of law.

14. In *Viveka Nand Sethi* (supra), the apex Court in paragraph 22 held that the principle of natural justice is no unruly horse. The same view was taken in *State Bank of Patiala and others* (supra) and *Karnataka State Road Transport Corporation and another* (supra).

15. Resultantly, the petition, sans merit, deserves dismissal. Accordingly, the same is dismissed. No costs.

2019 (I) ILR – CUT- 316

DR. A.K. RATH, J.

MACA NO. 656 OF 2016

DIVISIONAL MANAGER,THE UNITED INDIA INSURANCE COMPANY LTD.,CUTTACK ……..Appellant

.Vs.

RUSINATH MALLIK & ORS. ……..Respondents

MOTOR VEHICLES ACT, 1988 – Section 177 – Appeal – Insurance Company challenges the award – Plea that the deceased was a bachelor of 22 years of age – Tribunal deducted 1/3 amount towards personal expenses – Whether correct? – Held, no. 50% of the income ought to have been deducted towards personal expenses instead of 1/3rd – The appropriate multiplier would be eighteen – *National Insurance Company Limited vs. Pranay Sethi and others,* (2017) 16 SCC 680 followed. (Para 9 & 10)

Case Laws Relied on and Referred to :-

1. (2017)16 SCC 680 : National Insurance Company Ltd. Vs. Pranay Sethi & Ors.

For Appellant : Mr. M.C. Nayak.
For Respondent : Mr. P.K. Das.

JUDGMENT Date of Hearing: 18.12.2018 Date of Judgment: 18.12.2018

DR. A.K. RATH, J.

This appeal is directed against the award dated 19.02.2016 passed by the learned 3rd M.A.C.T., Jajpur in M.A.C. Case No.68 of 2013, whereby and whereunder learned Tribunal awarded an amount of Rs.4,60,000/- and directed the insurer to pay the same along with interest @6% per annum.

02. Respondent nos.1 to 4 as petitioners filed an application under Sec.166 of the M.V. Act before the learned Tribunal pleading inter alia that Dillip Mallik was working as helper in the vehicle TATA 407 bearing Regd. No.OR-04-E-2205. Due to mechanical defect, the vehicle had been parked on the extreme left side of the road. He was going on the left side of the road to purchase some parts of the vehicle. At that time, one unknown vehicle came at a high speed and dashed against him. Thereafter, he was shifted to Dharmasala hospital, where he was declared dead. The petitioners asserted that the deceased was 22 years old at the time of death. He was earning Rs.6,000/- per month. The accident occurred in course and out of his employment.

03. Pursuant to issuance of notice, the owner of the vehicle entered contest and filed a written statement stating inter alia that the deceased was a helper in his vehicle. The accident was occurred due to rash and negligence of an unknown vehicle, when the deceased was going to purchase the parts of the vehicle. He admitted that he was paying Rs.6,000/- per month to the deceased. The vehicle was insured with the United India Insurance Co. Ltd., the appellant herein.

04. The Insurance Company filed a written statement denying the assertions made in the petition. It is stated that the police had not seized the vehicle. The amount claimed is exorbitant.

05. To substantiate the case, the claimants had examined two witnesses and on their behalf eight documents had been exhibited. On behalf of the insurer, four documents had been exhibited. Learned Tribunal came to hold that the accident was occurred in course and out of employment of the deceased. The owner as well as the insurer is liable to pay compensation. The vehicle had been insured with the Insurance Company. It further held that the deceased was 22 years old and his monthly income was Rs.3,000/-. Deducting 1/3rd amount towards personal expenses, learned Tribunal calculated the amount at Rs.4,32,000/-. It added a sum of Rs.10,000/- and Rs.18,000/- towards funeral expenses and love and affection respectively. Held so, it directed the insurer to pay a compensation of Rs.4,60,000/- along with interest @6% from the date of application.

06. Heard Mr. M.C. Nayak, learned Advocate for the appellant-Insurance Company and Mr. P.K. Das, learned Advocate for the respondent nos.1 to 4.

07. Mr. Nayak, learned Advocate for the appellant, submits that the deceased was a bachelor. Learned Tribunal committed a manifest illegality in deducting 1/3rd towards personal expenses of the deceased instead of 50%. He places reliance on the decision of the Constitution Bench of the apex Court in the case of *National Insurance Company Limited vs. Pranay Sethi and others,* (2017) 16 SCC 680.

08. Per contra, Mr. Das, learned Advocate for the respondent nos.1 to 4, supports the award passed by the learned Tribunal.

09. In *Pranay Sethi and others* (supra), the apex Court held:

> "**37**. Before we proceed to analyse the principle for addition of future prospects, we think it seemly to clear the maze which is vividly reflectible from *Sarla Verma*, *Reshma Kumari*, *Rajesh* and *Munna Lal Jain*. Three aspects need to be clarified. The first one pertains to deduction towards personal and living expenses. In paragraphs 30, 31 and 32, *Sarla Verma* lays down:-
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> "30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in *Trilok Chandra*, the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth

(1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

38. In *Reshma Kumari*, the three-Judge Bench agreed with the multiplier determined in *Sarla Verma* and eventually held that the advantage of the Table prepared in *Sarla Verma* is that uniformity and consistency in selection of multiplier can be achieved. It has observed:-

"35. ….. The assessment of extent of dependency depends on examination of the unique situation of the individual case. Valuing the dependency or the multiplicand is to some extent an arithmetical exercise. The multiplicand is normally based on the net annual value of the dependency on the date of the deceased's death. Once the net annual loss (multiplicand) is assessed, taking into account the age of the deceased, such amount is to be multiplied by a "multiplier" to arrive at the loss of dependency."

39. In *Reshma Kumari*, the three-Judge Bench, reproduced paragraphs 30, 31 and 32 of *Sarla Verma* and approved the same by stating thus:

"41. The above does provide guidance for the appropriate deduction for personal and living expenses. One must bear in mind that the proportion of a man's net earnings that he saves or spends exclusively for the maintenance of others does not form part of his living expenses but what he spends exclusively on himself does. The percentage of deduction on account of personal and living expenses may vary with reference to the number of dependent members in the family and the personal living expenses of the deceased need not exactly correspond to the number of dependants.

42. In our view, the standards fixed by this Court in *Sarla Verma* on the aspect of deduction for personal living expenses in paras 30, 31 and 32 must ordinarily be followed unless a case for departure in the circumstances noted in the preceding paragraph is made out."

40. The conclusions that have been summed up in *Reshma Kumari* are as follows:-
"43.1. In the applications for compensation made under Section 166 of the 1988 Act in death cases where the age of the deceased is 15 years and above, the Claims Tribunals shall select the multiplier as indicated in Column (4) of the Table prepared in *Sarla Verma* read with para 42 of that judgment.

43.2. In cases where the age of the deceased is up to 15 years, irrespective of Section 166 or Section 163-A under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the Table in *Sarla Verma* should be followed.

43.3. As a result of the above, while considering the claim applications made under Section 166 in death cases where the age of the deceased is above 15 years, there is no necessity for the Claims Tribunals to seek guidance or for placing reliance on the Second Schedule in the 1988 Act.

43.4. The Claims Tribunals shall follow the steps and guidelines stated in para 19 of *Sarla Verma* for determination of compensation in cases of death.

43.5. While making addition to income for future prospects, the Tribunals shall follow para 24 of the judgment in *Sarla Verma*.

43.6. Insofar as deduction for personal and living expenses is concerned, it is directed that the Tribunals shall ordinarily follow the standards prescribed in paras 30, 31 and 32 of the judgment in *Sarla Verma* subject to the observations made by us in para 41 above."

41. On a perusal of the analysis made in *Sarla Verma* which has been reconsidered in *Reshma Kumari*, we think it appropriate to state that as far as the guidance provided for appropriate deduction for personal and living expenses is concerned, the tribunals and courts should be guided by conclusion 43.6 of *Reshma Kumari*. We concur with the same as we have no hesitation in approving the method provided therein."

10. Reverting to the facts of the case and keeping in view the enunciation of law laid down by the apex Court in the case of *Pranay Sethi and others* (supra), this Court finds that the deceased was a bachelor. He was 22 years old at the time of death. He was earning Rs.3,000/- per month. 50% of the income ought to have been deducted towards personal expenses instead of 1/3rd. The appropriate multiplier would be eighteen. So calculated, the award comes to Rs.3,24,000/-. Besides that, a sum of Rs.30,000/- is payable

towards funeral expenses and loss of love and affection. Thus, the award comes to Rs.3,54,000/-.

11. In view of the above, the appellant-insurer is directed to pay a sum of Rs.3,54,000/- (Rupees Three Lakhs Fifty-four Thousand) along with interest @7.5% per annum to the claimants-respondent nos.1 to 4 from the date of filing of the claim petition till the date of payment. The entire amount of compensation with interest shall be deposited before the learned Tribunal within a period of two months from today, whereafter the same shall be proportionately deposited in the names of the claimants and disbursed to them by the learned Tribunal in terms of its order. The impugned award is modified to the above extent. Accordingly, the appeal is disposed of.

2019 (I) ILR - CUT- 321

DR. A.K. RATH, J.

C.M.P. NO.1455 OF 2018

KUMAR SOUMYAKANTA BISOI .....Petitioner

.Vs.

BANITA PANDA & ANR. .....Opp. Party

CODE OF CIVIL PROCEDURE,1908 – Order 7 Rule 11 – Provision under – Plaintiff instituted suit for declaration of the registered sale deed executed by him as void – Defendant filed petition for a direction that the plaintiff has to pay ad-valorem court fees – Plaintiff objected saying that the sale deed has been executed without consideration and as such he can put his own valuation and pay the court fees – Question arose as to whether the plaintiff, who is a party to the sale deed and seeks declaration of that sale deed to be void, shall pay the ad-valorem court fees or not ? – Held, this Court finds that the plaintiff has executed the sale deed and it is evident that consideration amount has been paid – Plaintiff has to pay ad-valorem court fees. (Para 6 to 8)

Case Laws Relied on and Referred to :-

1. AIR 1971 Calcutta 202 : Smt. Gita Debi Bajoria Vs. Harish Chandra Saw Mill & Ors.
2. AIR 1981 Calcutta 189 : Smt. Ranjani Bala Rakshit Vs. Biswanath Rakshit & Ors.
3. AIR 1977 Ori.161 : Smt. Nakhyatramali Debi Vs. Chandrasekhar Pattnaik & Ors.
4. AIR 2010 SC 2807 : Suhrid Singh @ Sardool Singh Vs. Randhir Singh & Ors.
5. AIR 1986 Ori.196 : Umakanta Das and another Vs. Pradip Kumar Ray & Ors.

For Petitioner : Mr. Samir Kumar Mishra & Mr. S. Rout.

JUDGMENT Date of Hearing: 18.12.2018 Date of Judgment: 18.12.2018

DR. A.K. RATH, J.

This petition challenges the order dated 9.11.2018 passed by the learned Civil Judge (Sr. Divn.), Angul in C.S. No.267 of 2014, whereby and whereunder the learned trial court allowed the application of the defendant no.1 filed under Order 7 Rule 11(c) C.P.C. and directed the plaintiff to pay ad-valorem court fees.

02. Since the dispute lies in a narrow compass, it is not necessary to recount in detail the cases of the parties. Suffice it to say that the plaintiff-petitioner instituted the suit for declaration of title and declaration that the sale deed dated 03.04.2010 executed by him in favour of defendant no.1 as null and void. The defendant no.1 entered contest and filed a written statement denying the assertions made in the plaint. While the matter stood thus, the defendant no.1 filed an application under Order 7 Rule 11(c) C.P.C. stating inter alia that the plaintiff has instituted the suit for declaration that the registered sale deed as void. Though the plaintiff valued the suit at Rs.33,99,000/-, i.e., the consideration amount of the sale deed, but paid declaratory court fees on the plaint instead of ad-valorem court fees. The plaintiff is the executant of the sale deed. He seeks its cancellation. He has to pay ad-valorem court fees. Plaintiff filed objection to the said application. Learned trial court came to hold that the plaintiff is the executant of the sale deed bearing No.10011001803 dated 03.04.2010. He seeks relief of cancellation of the sale deed. Thus he has to pay the ad-valorem court fees. Held so, it directed the plaintiff to pay the ad-valorem court fees.

03. Heard Mr. Samir Kumar Mishra, learned Advocate for the petitioner.

04. Mr. Mishra, learned Advocate for the petitioner, submits that the sale deed is a nominal one. No consideration has been passed. The defendant no.1 has given an undertaking in the presence of the witnesses that the sale deed has been executed without consideration. In view of the same, the plaintiff can put his own valuation and pay the court fees. Learned trial court is not justified in directing the plaintiff to pay the ad-valorem court fees. To buttress the submission, he places reliance on the decisions of the Calcutta High Court in the cases of *Smt. Gita Debi Bajoria vs. Harish Chandra Saw Mill and other,* AIR 1971 Calcutta 202, *Smt. Ranjani Bala Rakshit vs. Biswanath Rakshit and other,* AIR 1981 Calcutta 189 and this Court in the case of *Smt.*

Nakhyatramali Debi vs. Chandrasekhar Pattnaik and other, AIR 1977 Ori.161.

05. The sole question that hinges for consideration as to whether the plaintiff, who is a party to the sale deed and seeks declaration that the sale deed is void, shall pay the ad-valorem court fees or not ?

06. The subject matter of dispute is no more res integra. In *Suhrid Singh @ Sardool Singh vs. Randhir Singh & others*, AIR 2010 SC 2807, the apex Court held:

> "6. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or nonest, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to `A' and `B' -- two brothers. `A' executes a sale deed in favour of `C'. Subsequently `A' wants to avoid the sale. `A' has to sue for cancellation of the deed. On the other hand, if `B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by `A' is invalid/void and non-est/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If `A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If `B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if `B', a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv)(c) of the Act. Section 7(iv)(c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of Section 7.
>
> 7. In this case, there is no prayer for cancellation of the sale deeds. The prayer is for a declaration that the deeds do not bind the "co-parcenery" and for joint possession. The plaintiff in the suit was not the executant of the sale deeds. Therefore, the court fee was computable under section 7(iv)(c) of the Act. The trial court and the High Court were therefore not justified in holding that the effect of the prayer was to seek cancellation of the sale deeds or that, therefore, court fee had to be paid on the sale consideration mentioned in the sale deeds."

07. In *Umakanta Das and another vs. Pradip Kumar Ray and others*, AIR 1986 Ori. 196, this Court held that if the term in the sale deed is not

ambiguous then any external aid to find out the true intention of the parties cannot be availed of and the narration in the document would be the sole determining feature. If the intention of the parties is clear as found from the recitals, passing of title is in presenti and not kept in abeyance till full payment of consideration.

08. Reverting to the facts of this case and keeping in view the law laid down by the apex Court in the case of *Suhrid Singh @ Sardool Singh* (supra), this Court finds that the plaintiff has executed the sale deed. On a cursory perusal of the photostat copy of the registered sale deed produced in Court today, it is evident that consideration amount has been paid. He has to pay ad-valorem court fees.

09. The undertaking given by the defendant no.1 does not come to the rescue of the plaintiff. The recitals of the sale deed are clear and unambiguous. As held by this Court in *Umakanta Das and another* (supra) if the term in the sale deed is not ambiguous then any external aid to find out the true intention of the parties cannot be availed of and the narration in the document would be the sole determining feature.

10. The decision in the case of *Smt. Gita Debi Bajoria* (supra) is distinguishable on facts.

11. In *Smt. Ranjani Bala Rakshit* (supra), the petitioner was given to understand that a power of attorney was being done and she lent her signature on such representation. Later she came to know that it was really a sale deed. The court opined that there was no valid execution of the deed. There was misrepresentation. The transaction was void. In such a suit, it is not necessary to seek a relief of setting aside the document. Ad-valorem court fee is not required to be paid. Law has undergone a sea change after the decision of the apex Court in the case of *Suhrid Singh @ Sardool Singh* (supra).

12. In *Smt. Nakhyatramali Debi* (supra), the plaintiff instituted the suit for partition and delivery of possession. This Court held that the question of court-fee must be considered and determined in the light of the allegations made in the plaint. There is no quarrel over the proposition of law.

13. There being no illegality or infirmity in the order dated 9.11.2018 passed by the learned Civil Judge (Sr. Divn.), Angul in C.S. No.267 of 2014, this Court is not inclined to interfere with the same. Accordingly, the petition is dismissed. No costs.

2019 (I) ILR - CUT-325

DR. A.K. RATH, J.

C.M.P. NO.1570 OF 2018

PREMALATA SAMAL @ MAHAPATRA & ORS. .....Petitioners

.Vs.

STATE OF ODISHA .....Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Section 80 – Notice under – Plaintiff filed the suit after serving the notice upon the Chief Secretary – Trial court returned the plaint on the ground that the notice so served will not fall within the ambit of notice delivered to the officer himself who is being sued or at his office – Effect of – Held, the object of Sec.80 is manifestly to give the Government or the public officer sufficient notice of the case which is proposed to be brought against it or him so that it or he may consider the position and decide for itself or himself whether the claim of the plaintiff should be accepted or resisted – In order to enable the Government or the public officer to arrive at a decision it is necessary that it or he should be informed of the nature of the suit proposed to be filed against it or him and the facts on which the claim is founded and the precise reliefs asked for – State should not bang on technicalities while dealing with its citizen in a litigation.

"Admittedly, notice has been issued to the Chief Secretary of the State. The suit has been instituted against the State of Odisha. Even if the Collector is a necessary party and not arrayed as a party, the same is not per se a ground to return the plaint. When the State deals with a citizen it should not ordinarily rely on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent judges, as an honest person."

Case Laws Relied on and Referred to :-

1. AIR 1960 SC 1309 : State of Madras Vs. C.P. Agencies & Anr.
2. AIR 1969 SC 674 : Raghunath Das Vs. Union of India & Anr.
3. AIR 1983 SC 1188 : Ghulam Rasool & Anr.Vs. State of Jammu & Kashmir & Anr.
4. AIR 1954 Bombay 50 (Vol.41.C.N.8) : Chief Justice Chagla in Firm Kaluram Sitaram Vs. The Dominion of India.
5. AIR 1979 SC 1144 : Madras Port Trust Vs. Hymanshu International by its Proprietor V. Venkatadri (dead) by L.Rs.

For Petitioners : Mr.S.S.K.Nayak-2

For Opp. Party : Ms.Samapika Mishra, A.S.C.

JUDGMENT Date of Hearing & Judgment:03.01.2019

DR.A.K.RATH, J.

This petition challenges the order dated 22.11.2017 passed by the learned Civil Judge (Sr.Division), Bhubaneswar in C.S.No.2413 of 2016, whereby and whereunder, the learned trial court has returned the plaint to the plaintiffs-petitioners for non-compliance of notice under Section 80 (1) CPC on the Collector, Khurda.

2. The dispute lies in a narrow compass. The facts need not be recounted in details. Suffice it to say that the plaintiffs-petitioners instituted the suit for declaration of title. The plaintiffs issued notice under Section 80(1) CPC to the Chief Secretary of the State. The suit has been instituted against the State of Odisha represented by its Chief Secretary. The learned trial court came to hold that notice will not fall within the ambit of notice delivered to the officer himself who is being sued or at his office. Further the Collector, Khurda is a necessary party to the lis. Notice has not been served on him. Held so, it returned the plaint.

3. Heard Mr.S.S.K.Nayak-2, learned Advocate for the petitioners and Ms.Samapika Mishra, learned A.S.C. for the opposite party.

4. Mr.Nayak-2, learned Advocate for the petitioners submits that the land has been leased out by the General Administration Department of the Government. The property situates at Bhubaneswar. In view of the same, notice has been issued to the Chief Secretary of the State under Section 80(1) CPC. The learned trial court travelled beyond its jurisdiction in returning the plaint to the petitioners. He further submits that the Collector is neither necessary nor proper party to the lis.

5. Ms.Mishra, learned A.S.C. submits that issuance of notice on the Secretary to the State or the Collector of the district is a sine qua non for institution of the suit against the State. In the instant case, no notice was issued either to the Secretary of the State or the Collector, Khurda. Notice issued to the Chief Secretary to the Government cannot be termed as sufficient compliance of Sec.80 CPC. She further submits that in the case of a suit against the Government of the State of Jammu and Kashmir, the Code provides issuance of notice to the Chief Secretary to that Government or any other officer authorized by that Government in this behalf. The word Chief Secretary is not there in clause (c). Secretary to the Government means Secretary of the concerned department of the State.

6. Before adverting into the contentions raised by the counsel for both parties, it will be necessary to set out clause (c) of sub-section (1) of Section 80 CPC, which is hub of the issue, is quoted hereunder:

> "80. Notice-(1) (Save as otherwise provided in sub-section (2), no suit (shall be instituted) against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been (delivered to, or left at the office of-
>
> xxx xxx xxx
>
> (c) In the case of suit against (any other State Government), a Secretary to that Government or the Collector of the district;"

7. Sec.80 (1) CPC contains a saving clause. On a bare perusal of the aforesaid provision, it is crystal clear that save as otherwise provided in sub.sec(2), no suit shall be instituted against the Government including the Government of the State of Jammu and Kashmir or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to the Secretary to the Government or the Collector of the district. Sub-sec.(2) of Sec.80 CPC deals with waiver of notice. (Emphasis laid)

8. The apex Court in the case of the State of Madras v. C.P. Agencies and another, AIR 1960 SC 1309 held that Sec.80 CPC is express, explicit and mandatory and admits of no implications or exceptions. Sec.80 peremptorily requires that no suit shall be filed against the Government or a public officer in respect of anything done in his official capacity until after the expiry of two months from the service of a notice in the manner therein prescribed stating the cause of action, the name, description and place of residence of the plaintiff and the reliefs which he claims. The object of Sec.80 is manifestly to give the Government or the public officer sufficient notice of the case which is proposed to be brought against it or him so that it or he may consider the position and decide for itself or himself whether the claim of the plaintiff should be accepted or resisted. In order to enable the Government or the public officer to arrive at a decision it is necessary that it or he should be informed of the nature of the suit proposed to be filed against it or him and the facts on which the claim is founded and the precise reliefs asked for.

9. In Raghunath Das v. Union of India and another, AIR 1969 SC 674, the apex Court held that the purpose of law is advancement of justice. The

provisions in Sec.80 CPC are not intended to be used as boobytraps against ignorant and illiterate persons.

10. In Ghulam Rasool and another v. State of Jammu and Kashmir and another, AIR 1983 SC 1188, the plaintiffs instituted the suit for permanent injunction against the State of Jammu and Kashmir in respect of two items of property-6 kanals appertaining to survey No.192 on the basis of possession from 1946 and 2.10 kanals in survey No.626 on the basis of acquisition of title by purchase. The plaintiffs contended that they had raised plantations over both the lands. When the Block Development Officer started interfering with their possession, the plaintiffs gave notice under Sec.80 CPC to the State and sued for injunction. The trial court as also the appellate court came to find that plaintiffs had title over 2.10 kanals in survey no.626. They also found that plaintiffs were in possession as claimed from 1946 in respect of 6 kanals appertaining to survey no.192 and had raised plantations thereon. On these findings, the learned trial court decreed the suit and granted injunction against the State from interfering with the plaintiffs' possession and enjoyment of the property and that decree was affirmed in appeal. In Second Appeal, the High Court came to find that notice under Sec.80 CPC had not been given to the Block Development Officer and, therefore even if plaintiffs were owner of 2.10 kanals of land appertaining to survey no.626, they could not obtain a decree against the public officer. While affirming the decree of the appellate court in regard to this item of property against the State, the High Court reversed the decree and dismissed the suit as against the Block Development Officer for want of notice. Thereafter the matter travelled to the apex Court. The apex Court held that the suit as framed was one against the State and the Block Development Officer had been impleaded as the State's agency of interference with the plaintiffs' possession. Held so, the apex Court reversed the decision of the High Court and decreed the suit in respect of the said item of the property.

11. The use of the words "a Secretary" in the section is an indicator of the intention of the legislature. The word Secretary is prefixed by an indefinite article. The apex Court in the case of Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd., (2001) 3 SCC 609 had the occasion to interpret the words "a bank" and "the bank" appearing in Sec.138 of the Negotiable Instruments Act. The apex Court held that "The" is the word used before nouns, with a specifying of particularising effect as opposed to the indefinite or generalising force of "a" or "an". It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. "The" is

always mentioned to denote particular thing or a person. A person, who intends to institute the suit against the State, may issue notice either on any of the Secretary of the State or the Collector. The words "The Secretary" appearing in Sec.80 (1)(c) CPC takes within its sweep "Secretary" as well. Thus, when a notice is issued to the Chief Secretary of the State, the same is substantial compliance of Sec.80 (1) CPC.

12. Admittedly, notice has been issued to the Chief Secretary of the State. The suit has been instituted against the State of Odisha. Even if the Collector is a necessary party and not arrayed as a party, the same is not per se a ground to return the plaint.

13. Way back in 1954, the Chief Justice Chagla in Firm Kaluram Sitaram v. The Dominion of India, AIR 1954 Bombay 50 (Vol.41.C.N.8) proclaimed:

> "Now, we have often had occasion to say that when the State deals with a citizen it should not ordinarily rely on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent judges, as an honest person."

14. The same view was echoed in the case of Madras Port Trust v. Hymanshu International by its Proprietor V. Venkatadri (dead) by L.Rs., AIR 1979 SC 1144. The apex Court held :

> "It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens."

15. In the wake of aforesaid, the impugned order is quashed. The petition is allowed. The learned trial court shall accept the plaint and proceed with the matter.

2019 (I) ILR - CUT- 329

BISWAJIT MOHANTY, J.

W.P. (C) NO.16433 OF 2018

THE CHIEF GENERAL MANAGER, TECHNICAL, CESU, BHUBANESWAR & ORS. .....Petitioners

.Vs.

M/S. METRO BUILDERS (ORISSA) PVT.LTD. & ANR. .....Opp. Parties

ELECTRICITY ACT, 2003 – Sub-section (6) of Section 42 – Provisions under – Jurisdiction of Ombudsman in deciding an issue – Petitioner before ombudsman was a land developer seeking relief of electricity connection for other consumers – Whether such a prayer can be considered by Ombudsman? – Held, No.

"Consumer who is aggrieved by non-redressal of his grievance under sub-section (5) may move the Ombudsman. Unless the learned Ombudsman comes to a conclusion that the aggrieved party before it is a consumer as defined under "the Act", he cannot assume jurisdiction to proceed in the matter." (Para 9)

For Petitioners : Mr. S.C.Dash
For Opp. Parties : Mr. Mohit Agarwal

JUDGMENT Date of Judgment: 10.01.2019

B. MOHANTY, J.

The petitioners have filed the present writ application challenging the judgment and order/award dated 13.7.2018 passed by the learned Ombudsman-I of Electricity, Bhubaneswar (opp. party No.2) in Consumer Representation Case No.OM (I) 57 of 2018 under Annexure-9. They have prayed for quashing of said Annexure-9.

2. The case of the petitioners is that opp. party No.1 which is a builder and developer mainly engaged in construction of apartments for residential and commercial use applied for permission on 20.9.2016 in order to avail power supply of 851 K.W. to its project "Metro Satellite City Phase-III" consisting of 172 flats with details of load break-up. Thereafter, it offered the willingness of the contractor for execution of electrical works. Since the required supply of power was/is not available with its supply system, the petitioners wanted to upgrade the existing 5 M.V.A, 33/11 K.V. Power Transformer to 8 MVA, 33/11 K.V. at Naharkanta Primary Sub-statiion. For this purpose, estimate was made and necessary sanction was granted vide Annexure-2 series. Pursuant to this, permission letter dated 19.1.2018 was issued to the opp. party No.1 delineating the terms and conditions therein. The permission letter dated 19.1.2018 has also been filed as a part of Annexure-2 series. In terms of the said letter, the opp. party No.1 completed the work assigned at Serial Nos.3 to 8 but with regard to work covered under Serial Nos.1 and 2, which required 100% deposit of Rs.65,31,637/-, the opp. party No.1 instead of depositing the said amount, approached the Grievance Redressal Forum, for short, 'GRF" on 6.4.2018 by filing Complaint Case No.156 of 2018 making the following prayers:

"1. Direct the O.P.1 to extend immediate line connections/power supply to the Phase-III of Metro Satellite City for 172 number of flats consisting of six blocks for their immediate living and non-harassment.

2. Directing the opposite parties 1 to 3 to consider the additional cost for upgradation of 5 MVA transfermor to 8 MVA transfermor installed by it at Grid Sub-station at Naharkanata to be remunerative.

3. Direct the Opposite Parties 1 to 3 (CESU) not to demand the entire cost of Rs.65, 31,637/- (rupees sixty five lakhs thirty one thousand six hundred thirty seven) only (Gross) as made in (Annexure-X).

4. And any other relief/s as the Hon'ble Court deems fit and proper in the interest of equity and justice.

5. And for which act of your kindness the petitioner shall remain grateful and ever-pray and enquire as to how if the petitioner makes the entire payment of Rs.65,31,637/- for upgradation charges to CESU, will get back the said amount through remunerative scheme, when the flat owners cum prospective consumers will pay the amount directly to CESU."

3. The present petitioners as opp. parties filed their objection under Annexure-4. Upon hearing the parties, Complaint Case No.156 of 2018 was disposed of vide Annexure-5 dated 28.4.2018 by passing the following order:

"If power supply is to be provided individually as per estimate, then Letter No.24881, dated 08.11.2017 of Sr. GM (Tech), CESU to be strictly followed.

Otherwise if complainant agrees, the complainant may be given opportunity to avail power supply at one point at HT & in remunerative calculation capital cost will be only for power transformer upgradation cost & 11 KV line upgradation cost.

Secondly, revenue return at HT tariff may be calculated.

Power supply may be effected confirming to the Regulation i.e. procedure for deteremination of remunerative norms in Appendix-1 where basis will be 1 or 2 above.

Remunerative calculation regarding HT point power supply on the basis of Point No.2 will be submitted by the Licensee to the petitioner within 3 days from the issues of this order so as to enable his willingness to execute the works if agrees.

xxx xxx xxx xxx"

4. Accordingly, vide Annexure-6, the remunerative calculation was given to opp. party No.1 further reiterating how the issue involved was non-remunerative in nature. The opp. party No.1 did not agree to take single point power supply and being aggrieved by the order of learned "GRF", filed Consumer Representation Case No.57 of 2018 before the learned Ombudsman-I (opp. party No.2) with the following prayers:

"That, in view of the above submissions, it is prayed that the Hon'ble Ombudsman (I) be pleased to set aside the Order dated 28.04.2018 of the GRF, CESU, Bhubaneswar and pass Orders as follows:

> (i) Direct the Respondents to meet the expenses towards augmentation of capacity, if required, of Naharakanta 33/11 KV sub-station.
>
> (ii) Direct the Respondents to immediately extend power supply to the individual owners of the flats in Metro Satellite City, Phase-III, who are undergoing severe stress being unable to take possession despite the petitioner having already executed the works under Part-II of Letter dated 08.11.2017 of the Respondent No.1, vide Annexure-2."

There, the petitioners filed their objection and additional objection under Annexure-8 wherein they took the plea that opp. party No.1 is not a 'consumer' and also took the plea as to how opp.party No.1 has changed its prayer before opp. party No.2 vis-à-vis the prayer made by it in Complaint Case No.156 of 2018 before the "GRF". Ultimately on 13.7.2018 the impugned judgment and order/award were passed by the opp. party No.2 under Annexure-9 allowing the prayer of opp. party No.1 and directing the present petitioners to extend the new power supply to 172 number of invidual owners of Metro Satellite City Phase-III after receiving the necessary deposits, charges and fees as applicable to individual consumers.

5. Mr. Dash, learned counsel for the petitioners submitted that though in the impugned judgment under Annexure-9, opp. party No.2 has noted the contentions of the petitioners that opp. party No.1 is only a developer and not a consumer as defined under the Electricity Act, 2003, for short, "the Act", however, the opp. party No.2 without discussing the said objection and without answering the said issue, has gone ahead with deciding the matter for which the impugned judgment is vitiated in law. In this context, he relied on Sub-section (6) of Section 42 of "the Act" which makes it clear that a consumer who is aggrieved by non-redressal of his grievance under sub-section (5) may move the Ombudsman and accordingly contended that unless the opp.party No.1 is a consumer, the opp. party No.2 cannot assume jurisdiction to decide the matter under sub-section (6) of Section 42 of "the Act". He submitted that the opp. party No.2 has gone wrong in ignoring the provisions of a Parliamentary Enactment. He also argued that though it was pointed out in their objection that the prayer made by opp. party No.1 before opp. party No.2 is totally different from the prayer made by it before the "GRF", however, the learned Ombudsman has also not applied its mind to that aspect of the matter and has illegally directed to extend the power supply

to individual owners/individual consumers, who were not parties before it and who have never moved it. In such background, he submitted that the learned Ombudsman (opp. party No.2) has acted with material irregularity and in excess of jurisdiction vested in it. He further submitted that from a perusal of prayer No.3 made before "GRF", it cannot be said that opp. party No.1 was not willing to make any payment rather its grievance was it should not be saddled with the entire cost. With regard to finding of the learned Ombudsman on availability of surplus power supply by making various adjustment of tap positions of two transformers, he submitted that such conclusion is not backed by any expert opinion. In fact with regard to possible parallel operation of transformers, no plea was ever raised by opp. party No.1 in its petitions either before "GRF" or before the opp. party No.2 in order to enable the petitioners to meet such technical points. He also attacked the various findings of the opp. party No.2 found under the heading "Observation" of the impugned judgment by stating that without deciding the objection of the petitioners with regard to status of the opp. party No.1 as consumer, opp. party No.2 illegally directed supply of energy to individual consumers, who were not before it. He also took serious exceptions to the acceptance by the opp. party No.2 of two alternative modes of calculation of remunerative norms as submitted by opp. party No.1 by stating that a reading of such alternataive calculations made at internal pages 12 to 13 of the impugned judgment reveal serious arithmetical errors and further such calculation has not been done in tune with the mode of calculation as provided in Appendix-I referred to in Regulation 13 of O.E.R.C. Distribution (Conditions of Supply) Code, 2004. He particularly pointed out that there two values have been assigned to "X" component without any reason. At one place while value of "X" has been indicated as Rs.86,22,799/- at another place, it has been shown to be Rs.98,86,904/-. He also pointed out the calculation relating to operating surplus (Y-X) is totally faulty. Further while calculating "Y" component, "O" and "R" components as indicated under Appendix-I have not been taken into account. Further, he submitted that while the learned Ombudsman has quoted parts of Section 42 and Section 43 of "the Act", he has completely forgotten Section 46 of "the Act", which speaks of legal permissibility of a licensee to recover the expenses in providing any electric line/electric plant for giving power supply. With regard to observation of learned Ombudsman on Regulation 13 (5) (c) of O.E.R.C. Distribution (Condition of Supply) Code, 2004, he submitted that application of the same will arise only when opp. party No.1 is a consumer not otherwise. But here, despite dispute being raised on the said issue, the opp. party No.2

has remained silent. For all these reasons, he reiterated that the judgment and order of the learned Ombudsman is vitiated and thus liable to be set aside.

6. Mr. Agarwal, learned counsel appearing for opp. party No.1 vehemently defended the impugned judgment and order/award under Annexure-9 and submitted that no exception can be taken to the order passed by the learned Ombudsman as under Section 42 of "the Act", a licensee is under a duty to develop and maintain an efficient distribution system and under Section 43 of "the Act", a licensee is bound to give electricity supply when asked. Secondly, he submitted that there exists two transformers at Naharakanta Primary sub-station, one is of 8 M.V.A. capacity and other is of 5 M.V.A. capacity and as per the load data supplied by the petitioners, the peak load in summer is 10 M.V.A., therefore, balance 3 M.V.A. load is available for supply by load sharing between 2 transformers. Therefore, opp. party No.2 has rightly observed that no upgradation of transformer is required. Thirdly, without prejudice to the above, he submitted that when according to the petitioners 5 MVA transformer at Naharkanta Primary sub-station is over-loaded and requires to be up-graded to 8 MVA, why entire cost of upgradation should be saddled on opp. party No.1 when the demand of opp. party No.1 is only to the tune of 847 K.W. Lastly, he submitted that the remunerative norms apply only in case of single beneficiary or a group of beneficiaries and not in the present case where there are thousands of consumers and proposed upgradation is not for exclusive use of opp. party No.1. Further, he submitted that the petitioners have not moved any application before Odisha Electricity Reforms Commission, "for short, "the O.E.R.C." for getting permission under Regulation 13 (5) (c) of O.E.R.C. Distribution (Condition of Supply) Code, 2004 and hence it cannot demand the charges. Therefore, he submitted that the directions given by the learned Ombudsman for extending new power supply to 172 new individual owners/consumers vide Annexure-9 is legal and justified and should not be intereferred with.

7. Heard Mr. Dash, learned counsel for the petitioners and Mr. Mohit Agarwal, learned counsel for opp. party No.1.

8. Perused the L.C.Rs. and date charts filed by both the petitioners and opp. party No.1.

9. A perusal of records, more particularly the objections of the petitioners under Annexure-8 clearly show that they have raised the plea that

opp. party No.1 is not a consumer as has been defined under "the Act" and though this has been noted by learned Ombudsman in its judgment under Annexure-9, however, it has not rendered any finding on the same either by accepting such contention or rejecting it keeping in mind the relevant provisions under sub-section (15) of Section 2 and sub-section (6) of Section 42 of "the Act". This clearly is an error apparent on the face of the record. The learned Ombudsman ought to have given a finding on the same keeping in mind the grievance of opp. party No.1 relating to extending power supply to 172 flats. Unless the learned Ombudsman comes to a conclusion that the aggrieved party before it is a consumer as defined under "the Act", he cannot assume jurisdiction to proceed in the matter. Secondly, it is not disputed that the individual flat owners/individual consumers have neither approached the learned "GRF" nor approached the learned Ombudsman (opp. party No.2). The grievance of the opp. party No.1 as can be gathered was/is pertaining to non-supply of electricity to the flats, which are to be finally delivered to the allottees after supply of electricity as indicated at para-4 of the grievance petition filed before the "GRF" under Annexure-3. In such background, direction by the learned Ombudsman to extend new power supply to 172 individual owners/consumers on payment of necessary charges defies all logic and is clearly an error apparent on the face of record.

10. Now to various submissions of Mr. Agarwal, learned counsel representing the opp. party No.1. While defending the impugned judgment and order, his first submission was that the learned Ombudsman has committed no error in passing the impugned judgment and order under Annexure-9 as under sub-section (1) of Section 42 and sub-section (1) of Section 43 of "the Act", a licensee is bound to develop and maintain an efficient distribution system and bound to supply electricity on demand. However, a perusal of sub-section (1) of Section 42 of "the Act" makes it clear that the licensee has also to maintain an economical distribution system. Thus, a licensee has to maintain balance and is not expected to suffer economically while supplying electricity and go out of business. For this purpose, Section 46 of "the Act" authorises a licensee to recover expenses incurred in providing any electric line or electric plant used for the purpose of supplying energy. Further as indicated earlier, since the opp. party No.2 has passed the judgment without determining the status of opp. party No.1 as consumer, he had no jurisdiction to proceed in the matter.

So far as the 2nd submission of Mr. Agarwal defending the finding of the learned Ombudsman for supply of energy without upgrading the

transformer by load sharing between the two transformers by doing various adjustments of tap position of both transformers is concerned, a perusal of records shows such things including possible parallel operation of two transformers to get electricity supply were never pleaded by the opp. party No.1 either before the "GRF" or before opp. party No.2. The written submission dated 4.7.2018 filed on behalf of opp. party No.1 shows conflicting stands taken by the parties on the said issue during hearing. The opp. party No.2 has accepted the version of opp. party No.1 without obtaining any expert opinion in the matter. This also makes the finding of opp. party No.2 on the said issue perverse.

With regard to 3rd submission of Mr. Agarwal as to why opp. party No.1 should be saddled with entire cost as it is going to avail supply of only 847 K.W., it seems opp. party No.2 has not applied his mind to that aspect of the matter as he has rejected the remunerative calculation given by petitioners while accepting remunerative calculations given by opp. party No.1 without assigning any reason though those contained wrong arithmetical calculation. Further, as rightly contended by Mr. Dash, even the two alternative calculations do not reflect the same being done keeping in mind requirements of Appendix-1 as referred to in Regulation 13 of O.E.R.C. Distribution (Conditions of Supply) Code, 2004. This again shows non-application of mind by the learned Ombudsman.

With regard to last submission of Mr. Agarwal regarding requirement of petitioners to get permission under Regulation 13 (5) (c) before demanding charges, it can be said that such submission is without any merit as the said Regulation again clearly requires involvement of the consumer in the entire process. Therefore, unless the status of opp. party No.1 as a consumer under "the Act"is decided, the said opp. party cannot advance any plea based on the said provision.

11. For all these reasons, the impugned judgment dated 13.7.2018 passed by the learned Ombudsman-I of Electricity, Bhubaneswar in Consumer Represenation Case No.OM (I) 57 of 2018 under Annexure-9 is set aside and the matter is remitted back to the opp. party No.2 with a direction to take a fresh decision in the matter within a period of six weeks from the date of production of the certified copy of the judgment by giving reasonable opportunity of hearing to both the parties. With the aforesaid observations and directions, the writ application is disposed of. L.C.Rs be sent back forthwith.

2019 (I) ILR – CUT- 337

DR. B.R. SARANGI, J.

OJC NO. 5643 OF 1998

BHASKAR SABAT (DEAD), REPRESENTED BY L.RS .....Petitioner

.Vs.

UNION OF INDIA & ORS. .....Opp. Parties

(A) THE CENTRAL INDUSTRIAL SECURITY FORCE RULES, 1969 – Rule 31 (c) – Provision under for awarding punishment of compulsory retirement which can be awarded for good and sufficient reasons and be imposed on a member of the Force – Disciplinary proceeding for unauthorized absence – Award of punishment of compulsory retirement along with a direction that the pension of the petitioner shall be fixed at the rate of two third subject to other conditions laid down in CCS (Pension) Rules – Whether proper – Held, no. once the petitioner has been imposed with the punishment of compulsory retirement, further direction to fix the pension at the rate of two third subject to other conditions laid down in CCS (Pension) Rules, may amount to double punishment for one cause of action which is not permissible in law, as the same has not been prescribed within the meaning of Rule 31. (Para 8 to 11)

(B) DISCIPLINARY PROCEEDING – Principles of natural justice – Compliance thereof – Held, The basic principle of compliance of natural justice is that the enquiry should be in accordance with law providing due opportunity to the delinquent to produce such documents and witnesses in support of his version – The same having not been followed the punishment awarded quashed – As the petitioner died, his legal representatives, who are on record, are entitled to necessary benefits as per the provisions of the CCS (Pension) Rules admissible to the family of the deceased employee in accordance with law.

"The basic principle of compliance of natural justice is that the enquiry should be in accordance with law providing due opportunity to the delinquent to produce such documents and witnesses in support of his version.Non-examination of the witnesses, as requested by the petitioner, and change of inquiry officer in the midst of inquiry, without affording opportunity of hearing to the petitioner, amounts to violation of principles of natural justice. But the appellate authority, without considering the appeal on merits, has rejected the same on the ground of barred by limitation. That itself caused prejudice to the petitioner, because the rudiment of principle of law requires that when there is violation of principles of natural justice the authority should be very cautious to dismiss the appeal on technical ground of

limitation. In any case, since the petitioner has not been afforded with opportunity of hearing and the punishment has been imposed in a perfunctory manner, without complying with the principles of natural justice, the same cannot sustain in the eye of law." *(Para 12 to 14)*

Case Laws Relied on and Referred to :-

1. (2012) 5 SCC 242 : Vijay Singh Vs. State of Uttar Pradesh.
2. 2016 (7) Supreme 643 : State of Uttar Pradesh. Vs. Dhirendra Pal Singh.
3. (2012) 3 SCC 178 : Krushnakant B. Parmar Vs. Union of India.

For Petitioner : Mr. S.D. Das, Sr. Advocate
M/s. A.K. Nayak, L. Samantray, D.R. Bhokta, H.S. Satapathy, B. Pattnaik, B.K. Sinha, A. Mohanty, D. Dhar and (Ms.) S. Biswal.

For Opp. Parties : Mr. D.R. Swain, Central Govt. Counsel

JUDGMENT Decided On : 11.12.2018

DR. B.R. SARANGI, J.

The petitioner, who was working as "Naik" under the Central Industrial Security Force (CISF), has filed this application challenging the order dated 23.04.1996 under Annexure-4 passed by the disciplinary authority imposing punishment of compulsory retirement from service with the direction to fix pension at the rate of two third subject to other conditions laid down in the CCS (Pension) Rules, and also the order dated 16/17.07.1997 in Annexure-5 passed by the appellate authority rejecting the appeal as barred by time.

2. The factual matrix of the case, in hand, is that the petitioner, being selected by following due procedure of selection, joined as a Constable in the Central Industrial Security Force (in short 'CISF') and posted at Rourkela Steel Plant. Thereafter, he was promoted to the post of "Lance Naik" in the year 1981 and to the post of "Naik" in the year 1982 and posted at NALCO, Damanjodi. While the petitioner was so continuing, his daughter suffered from some disease for which she lost all the hairs from her head and became bald. Suddenly, she met with an accident and sustained severe head injury, for which she was referred from NALCO Hospital, Damanjodi to King Judge Hospital at Vishakhapatanam. As the incident was serious and severe, the petitioner verbally reported the matter at CISF Control Room, NALCO at Damanjodi, where the Headquarter Company Commander, Inspector Sarveswar Das was present along with Sub-Inspector K.N. Rao and Constable N.K. Pati. The condition of his daughter was so serious, the

petitioner was fully unstable to give in writing and obtain permission from his superior. But he was put under suspension by the Commander on 28.10.1994.

2.1 On 05.12.1994, an inquiry officer was appointed, who called upon the petitioner to show cause on the charges levelled against him. In response thereto, the petitioner submitted his reply on 19.11.1995 and requested to examine S.I.-K.N. Rao and Constable-N.K. Pati as witnesses on his behalf. As the same was not considered, subsequently, by letter dated 20.02.1996, petitioner reiterated the aforesaid stand for examination of witnesses, but no opportunity was given to the petitioner to do so. Rather, the inquiry officer submitted his report on 18.03.1996 holding the petitioner guilty of both the charges.

2.2 While the foresaid proceeding was under consideration, the petitioner was removed from service in connection with another proceeding, for which the present proceeding was kept under abeyance. But the petitioner, having preferred appeal, was reinstated in service with certain punishment of reduction in rank for a period of three years in the said proceeding and, on his reinstatement on 25.09.1995, the present proceeding was directed to be re-enquired into. While the present proceeding was continuing, the petitioner was transferred from NALCO to P.T.P.S., Patratu, Hazaribag, Bihar and enquiry was conducted by another officer-R. Manvalan, Asst. commandant, who found him guilty of charges and on that basis, the disciplinary authority, by order dated 23.04.1996, imposed punishment of compulsory retirement from service with the direction to fix the pension at the rate of two third subject to other conditions laid down in the CCS (Pension) Rules. Against the said order of punishment, the petitioner preferred appeal, which was dismissed, vide order dated 11.01.1997, as barred by time. Hence, this writ petition.

3. Ms. S. Biswal, learned counsel appearing on behalf of Mr. S.D. Das, learned Senior Counsel for the petitioner contended that imposition of penalty of compulsory retirement from service with direction to fix the pension at the rate of two third subject to other conditions laid down in the CCS (Pension) Rules is not contemplated under the provisions of the CISF Act and Rules. Therefore, the punishment so imposed by the disciplinary authority, vide order dated 23.04.1996, and consequential rejection of appeal, vide order dated 11.01.1997, are liable to be quashed. On merits it is contended that the penalty imposed does not commensurate the offence of unauthorized absence.

To substantiate his contention, learned counsel for the petitioner has relied upon the judgments of the apex Court in **Vijay Singh v. State of Uttar Pradesh,** (2012) 5 SCC 242; **State of Uttar Pradesh. v. Dhirendra Pal Singh,** 2016 (7) Supreme 643; and **Krushnakant B. Parmar v. Union of India,** (2012) 3 SCC 178.

4. Per contra, Mr. D.R. Swain, learned Central Government Counsel argued with vehemence justifying the orders impugned passed by the authorities concerned and contended that since the petitioner remained unauthorized absence, the action as due, just and proper has been taken against him in imposing penalty by following due procedure and the same does not call for interference of this Court at this stage.

5. This Court heard Ms. S. Biswal, learned counsel appearing on behalf of Mr. S.D. Das, learned Senior Counsel for the petitioner; and Mr. D.R. Swain, learned Central Government Counsel. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. The facts delineated above are undisputed. During pendency of the writ application, the petitioner Bhaskar Sabat died. Therefore, pursuant to order dated 17.07.2017, the legal representatives of the petitioner have been brought on record by amending the writ application. Thereby, the legal representatives of the petitioner have been heard in the matter.

7. The punishment, as imposed against the petitioner, has been contemplated in paragraph 6 of the impugned order dated 23.04.1996 passed by the disciplinary authority, which is extracted hereunder:-

> *"6. Now, therefore, in exercise of the power conferred on me vide rule 29-A, Schedule-II, read in conjunction with Rule-31© of CISF Rules, 1969, I hereby award the penalty of COMPULSORY RETIREMENT FROM SERVICE to N-713190180 Lance Naik Bhaskar Sabat of CISF Unit PTPS, Patratu, with immediate effect. The pension to be granted in this case shall be at the rate of two third subject to the other conditions laid down in the CCS(Pension) Rules."*

The contention raised is that the authority cannot impose punishment beyond what is prescribed under the Act and Rules. The Central Industrial Security Force, Act, 1968 (in short "the Act, 1968") was framed to provide for the constitution and regulation of an armed force of the Union for better protection and security of industrial undertakings owned by the Central

Government, certain other industrial undertakings, employees of all such undertakings and to provide technical consultancy services to industrial establishments in the private sector and for matters connected therewith.

8. Section 22 of the Act, 1968, deals with power to make Rules, and envisages that the Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act. Accordingly, the Central Industrial Security Force Rules, 1969 were framed. Rule 31 of the 1969 Rules reads as follows:-

> *"31. Nature of penalties – The following penalties may, for good and sufficient reasons and as hereinafter provided be imposed on a member of the Force, namely :-*
>
> *(a) dismissal;*
>
> *(b) removal:*
>
> *(c) compulsory retirement:*
>
> *(d) reduction to a lower class or grade or rank or to a lower time scale or to a lower stage in the time-scale of pay:*
>
> *(e) withholding of increment or promotion;*
>
> *(f) removal from any office of distinction or deprivation of special emolument;*
>
> *(g) fine to any amount not exceeding 7 day's pay;*
>
> *(h) censure."*

Sub-Rule(c) of Rule 31 mentioned supra indicates compulsory retirement, which is one of the penalties, which can be awarded for good and sufficient reasons and be imposed on a member of the Force. Therefore, the imposition of penalty under Rule 31(c) of Rules, 1969 awarding compulsory retirement from service may come within the purview of the said Rules. But the subsequent direction given by the disciplinary authority on 23.04.1996, that the pension of the petitioner shall be fixed at the rate of two third subject to other conditions laid down in CCS (Pension) Rules, has not been contemplated within the meaning of Rule 31(c) of Rules 1969. Once the petitioner has been imposed with the punishment of compulsory retirement, further direction to fix the pension at the rate of two third subject to other conditions laid down in CCS (Pension) Rules, may amount to double punishment for one cause of action against the petitioner, which is not permissible in law, as the same has not been prescribed within the meaning of Rule 31, the nature of penalties, as indicated above.

9. A similar question had come up for consideration by the apex Court in the case of ***Vijay Singh***, mentioned supra, where punishment was imposed on a police personnel under the provisions of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991, the Rule 4 of which Rules contemplated punishment. The competence of the disciplinary authority to impose punishment not prescribed under the statutory rules. So far as withholding of the integrity certificate was not stipulated under Rule 4. The apex Court held that punishment, having not prescribed under the Rules, cannot be awarded, and that the integrity certificate can be withheld for sufficient reasons at the time of filing of annual confidential report or if statutory rules so prescribed as punishment. Thereby, the order passed by the disciplinary authority withholding integrity certificate was held to be without jurisdiction, since the same could not be termed as punishment under the Rules, hence a nullity and was accordingly quashed.

For the purpose of just and proper adjudication of the case, the relevant paragraphs of the aforesaid judgment are quoted below:-

> ***"11.*** *Admittedly, the punishment imposed upon the appellant is not provided for under Rule 4 of the 1991 Rules. Integrity of a person can be withheld for sufficient reasons at the time of filling up the annual confidential report. However, if the statutory rules so prescribe, it can also be withheld as a punishment. The order passed by the disciplinary authority withholding the integrity certificate as a punishment for delinquency is without jurisdiction, not being provided under the 1991 Rules, since the same could not be termed as punishment under the Rules. The Rules do not empower the disciplinary authority to impose "any other" major or minor punishment. It is a settled proposition of law that punishment not prescribed under the Rules as a result of disciplinary proceedings cannot be awarded.*
>
> ***12.*** *This Court in State of U.P. v. Madhav Prasad Sharma [(2011) 2 SCC 212 : (2011) 1 SCC (L&S) 300] dealt with the aforesaid 1991 Rules and after quoting Rule 4 thereof held as under: (SCC p. 216, para 16)*
>
> *"16. We are not concerned about other rule. The perusal of major and minor penalties prescribed in the above Rule makes it clear that 'sanctioning leave without pay' is not one of the punishments prescribed, though, and under what circumstances leave has been sanctioned without pay is a different aspect with which we are not concerned for the present. However, Rule 4 makes it clear that sanction of leave without pay is not one of the punishments prescribed. Disciplinary authority is competent to impose appropriate penalty from those provided in Rule 4 of the Rules which deals with the major penalties and minor penalties. Denial of salary on the ground of 'no work no pay' cannot be treated as a penalty in view of statutory provisions contained in Rule 4 defining the penalties in clear terms."* *(emphasis added)*

> ***13.*** *The authority has to act or purport to act in pursuance or execution or intended execution of the statute or statutory rules. (See Poona City Municipal Corpn. v. Dattatraya Nagesh Deodhar [AIR 1965 SC 555]; Municipal Corpn., Indorev. Niyamatullah [(1969) 2 SCC 551 : AIR 1971 SC 97] ; J.N. Ganatra v. Morvi Municipality, Morvi [(1996) 9 SCC 495 : AIR 1996 SC 2520] and Borosil Glass Works Ltd. Employees' Union v. D.D. Bambode [(2001) 1 SCC 350 : 2001 SCC (L&S) 997 : AIR 2001 SC 378] .)*
>
> ***14.*** *The issue involved herein is required to be examined from another angle also. Holding departmental proceedings and recording a finding of guilt against any delinquent and imposing the punishment for the same is a quasi-judicial function and not administrative one. (Vide Bachhittar Singh v. State of Punjab [AIR 1963 SC 395] , Union of India v. H.C. Goel [AIR 1964 SC 364] , Mohd. Yunus Khan v. State of U.P. [(2010) 10 SCC 539 : (2011) 1 SCC (L&S) 180] and Coal India Ltd. v. Ananta Saha [(2011) 5 SCC 142 : (2011) 1 SCC (L&S) 750] .)*
>
> ***15.*** *Imposing the punishment for a proved delinquency is regulated and controlled by the statutory rules. Therefore, while performing the quasi-judicial functions, the authority is not permitted to ignore the statutory rules under which punishment is to be imposed. The disciplinary authority is bound to give strict adherence to the said rules. Thus, the order of punishment being outside the purview of the statutory rules is a nullity and cannot be enforced against the appellant."*

10. In ***Dhirendra Pal Singh*** **(supra)**, the apex Court held that when conducting departmental inquiry for misconduct, no proceeding having been drawn under Article 351A, direction given for withholding the pension amount cannot sustain in the eye of law. The said case has been considered taking into consideration the U.P. Civil Service Regulations governing the field. The apex Court in paragraphs 7 and 11 of the said judgment, observed as follows:-

> ***"7.*** *Admittedly, no departmental enquiry was initiated in the present case against the respondent for the misconduct, if any, nor any proceedings drawn as provided in Article 351-A of the U.P. Civil Service Regulations. The learned Single Judge of the High Court has observed that the document which is the basis of enquiry and relied upon by the State authorities, copy of which was Annexure CA-1 to counter-affidavit filed in the writ petition, itself reflected that the document showing discrepancy in the stock was dated 26-12-2009 i.e. after about more than five months of retirement of the respondent. In the circumstances, keeping in view Article 351-A of the U.P. Civil Service Regulations, we agree with the High Court that the orders dated 23-7-2015 and 6-8-2015 were liable to be quashed and, to that extent, we decline to interfere with the impugned order.*
>
> ***11.*** *In the light of the law laid down by this Court, as above, and further considering the facts and circumstances of the case, we modify the impugned order [State of U.P. v. Dhirendra Pal Singh, 2016 SCC OnLine All 971] passed by the*

High Court in respect of interest directed to be paid on the amount of withheld gratuity and pension. We direct that the appellants shall pay interest @ 6% p.a. on the unpaid amount of pension from the date it had fallen due and interest @ 8% p.a. on the unpaid amount of gratuity from the date of retirement of the employee."

11. In the case of ***Krushnakant B. Parmar***, mentioned supra, the question of absence from duty unauthorizedly had come up for consideration. Whether absence is willful or because of compelling circumstances, that was taken into consideration and, while causing judicial review, the apex Court held that the reasons for absence was due to compelling circumstances and, thereby, the impugned order of dismissal passed by the judicial authority and confirmed by the appellate authority, CAT and High Court were set aside and considering the fact that the appellant had suffered a lot since 1999, when the proceeding was initiated against him, the matter was not remitted to the disciplinary authority and direction was given to reinstate the appellant therein and pay 50% back wages to him. The detailed reasons, in support of such finding, have been assigned in paragraphs 16 to 20 of the said judgment, which are extracted below:-

*"**16.** In the case of the appellant referring to unauthorised absence the disciplinary authority alleged that he failed to maintain devotion to duty and his behaviour was unbecoming of a government servant. The question whether "unauthorised absence from duty" amounts to failure of devotion to duty or behaviour unbecoming of a government servant cannot be decided without deciding the question whether absence is wilful or because of compelling circumstances.*

***17.** If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.*

***18.** In a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in the absence of such finding, the absence will not amount to misconduct.*

***19.** In the present case the inquiry officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold that the absence was wilful; the disciplinary authority as also the appellate authority, failed to appreciate the same and wrongly held the appellant guilty.*

***20.** The question relating to jurisdiction of the court in judicial review in a departmental proceeding fell for consideration before this Court in M.V. Bijlani v.*

Union of India [(2006) 5 SCC 88 : 2006 SCC (L&S) 919] wherein this Court held: (SCC p. 95, para 25)

"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

12. It is further contended that in the instant case, while imposing penalty against the petitioner, no opportunity of hearing was given to him and, thereby, there is non-compliance of the principles of natural justice. Meaning thereby, the petitioner wanted to examine S.I.- K.N.Rao and Constable-N.K.Pati as witnesses on his behalf, which was not acceded to by the inquiry officer. Further, there was change of inquiry officer, as because the petitioner was transferred from NALCO to P.T.P.S., Patratu, Hazaribag, Bihar. Though request was made to examine the witnesses, but relying upon the evidence of Inspector-S.S.Das, the petitioner was held guilty of the charges. Though Sub-Inspector-K.N.Ray was summoned by the Deputy Commandant, but his evidence was not recorded. The basic principle of compliance of natural justice is that the enquiry should be in accordance with law providing due opportunity to the delinquent to produce such documents and witnesses in support of his version. Non-examination of the witnesses, as requested by the petitioner, and change of inquiry officer in the midst of inquiry, without affording opportunity of hearing to the petitioner, amounts to violation of principles of natural justice. But the appellate authority, without considering the appeal on merits, has rejected the same on the ground of barred by limitation. That itself caused prejudice to the petitioner, because the rudiment of principle of law requires that when there is violation of principles of natural justice the authority should be very cautious to dismiss the appeal on technical ground of limitation. In any case, since the petitioner has not been afforded with opportunity of hearing and the punishment has been imposed in a perfunctory manner, without complying with the principles of natural justice, the same cannot sustain in the eye of law.

13. Applying the above discussed ratio, as decided by the apex Court in the judgments cited above, to the present context, under Rule 31(c) compulsory retirement may be one of the punishments prescribed under the Rules, but so far as direction for fixing the pension at the rate of two third subject to other conditions laid down in C.C.S. (Pension) Rules, has not been contemplated under Rule 31(c) so as to be imposed on the petitioner by way of major punishment. Therefore, imposition of such punishment, being contrary to Rule 31 of the Rules, 1969, cannot sustain in the eye of law.

14. In view of such position, since the order of punishment imposed by the disciplinary authority in Annexure-4 dated 23.04.1996 and consequential order of the appellate authority in Annexure-5 dated 16/17.07.1997 are liable to be quashed and accordingly the same are hereby quashed. Consequentially, the petitioner is entitled to get the service benefits as due and admissible to him in accordance with law. As the petitioner died, his legal representatives, who are on record, are entitled to necessary benefits as per the provisions of the CCS (Pension) Rules admissible to the family of the deceased employee in accordance with law. The same shall be calculated and paid within a period of four months from the date of communication of the judgment.

15. The writ application is thus allowed. No order to cost.

2019 (I) ILR - CUT- 346

DR. B.R. SARANGI, J.

OJC NO. 17283 OF 2001

GOVERNING BODY OF KHUNTA MAHAVIDYALAYA, KHUNTA .....Petitioner

.Vs.

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

ORISSA EDUCATION ACT, 1969 – Section 7 read with Rules 25 and 26 of the Orissa Education (Establishment, Recognition and Management of Private Colleges) Rules, 1991 – Constitution of Managing Committee

or Governing Body of the educational institution and its validity – Governing body was constituted on 04.08.1997, the tenure was for a period of three years, which expired on 03.08.2000 – Director was to allow the governing body, whose term expired to continue the Office till a new governing body is reconstituted – Therefore, the continuance of the existing governing body till reconstitution is made, shall be allowed by the prescribed authority by an express permission, but not automatically – In absence of any order passed by the prescribed authority allowing the existing governing body to continue till reconstitution, it cannot at all be said that automatically the old governing body has to continue till the new governing body is reconstituted – Writ petition filed by the Governing body whose term has expired and no express permission has been granted to continue its function – Whether maintainable – Held, No.

"The present writ application was filed on 21.12.2001, when the governing body was not in existence and its tenure had already been expired. But subsequently, the governing was reconstituted on 26.03.2002. Therefore, prior to the reconstitution of the governing body, the present writ application was filed. Thereby, at the instance of a non-existent governing body, the present writ application has been filed. In such circumstances, this Court is of the considered opinion that the petitioner, who is a non-existent governing body, is not competent and had no authority to take a decision and participate in the proceeding by filing the instant writ application and, as such, at its instance, the writ application is not maintainable". *(Para 9)*

Case Laws Relied on and Referred to :-

1. 2014 (II) ILR- CUT-178 : Governing Body of Bahanaga College Vs. State of Orissa & Ors.

For Petitioner : M/s. D.N. Rath & P.K. Rout.
For Opp. Parties : Mr. P. Pattnaik, Addl. Govt. Advocate
M/s. S.Jena, S. Das, S.P.Nath and S.D. Routray.

JUDGMENT Date of Hearing : 13.12.2018 Date of Judgment:18.12.2018

DR. B.R. SARANGI, J.

The governing body of Khunta Mahavidyalaya, Khunta has filed this application to quash the order passed by the Director Higher Education, Odisha, opposite party no.2, which was communicated to the petitioner vide memo dated 04.08.2001 in Annexure-4, whereby the appeal preferred by Surya Narayan Singhbabu and six others, namely, opposite parties no. 3 to 9, has been allowed and direction has been issued that the services of opposite parties no. 3 to 9 were not terminated and the governing body of the college should allow them to resume their duty with immediate effect.

2. The petitioner, governing body is constituted and is functioning in accordance with the provisions of the Orissa Education Act, 1969 and Rules framed thereunder and, as such, the same was registered under the Societies Registration Act. Due to financial crisis, the college could not function till 1990. The educational agency applied under Section 5 of the Orissa Education Act to opposite party no.1 for grant of permission for establishment of the college from the session 1991-92, which was granted. Thereafter, the college in question after getting concurrence from the State Government, as well as affiliation from the Council of Higher Secondary Education, Orissa started functioning from the session 1991-92. For management of the institution, governing body was constituted, which was duly approved by the Director, Higher Education, Orissa from time to time.

2.1. The petitioner institution is a recognized educational institution within the meaning of Section 3(b) of the Orissa Education Act, 1969. Consequentially, it has to follow the provisions contained under the Orissa Education Act and Rules framed thereunder. When the college was functioning in accordance with the rules framed by the State Government, notice was served on the governing body by the Director Higher Education, Orissa, opposite party no.2 directing the governing body to appear before him in the matter of appeal filed by opposite parties no. 3 to 9, as per the orders passed by this Court in OJC No. 1831 of 1999. The petitioner had no knowledge about the writ application filed by the opposite parties no. 3 to 9 before this Court, since no notice was served by this Court. On enquiry, the petitioner could came to know that the opposite parties no. 3 to 9 had filed a writ application before this Court challenging the action of the governing body to the effect that they, having been appointed by the governing body, were prevented to discharge their duties, therefore, prayed for a declaration that the action of the petitioner preventing the opposite parties no. 3 to 9 to discharge their duty as illegal and further sought for reinstatement in service. Vide order dated 15.12.1999, since there was availability of alternative remedy, this Court directed the Director Higher Education to consider the appeal within a period of two months from the date of communication of the order of this Court. Consequentially, the Director instituted the appeal and in compliance of order passed by this Court in OJC No. 1831 of 1999, took up the appeal and consequentially issued notice to the petitioner. The petitioner contended that opposite parties no. 3 to 9 were appointed by the Secretary of the approved governing body of the college, but they voluntarily deserted their posts for which they ceased to be the employee of the college. As such,

opposite parties no.3 to 9 were never prevented by the management from discharging their duties nor were their services terminated, rather they had voluntarily abandoned their services. But the Director did not believe the contention of the petitioner stated inter alia that there is nothing on record to prove the allegation made by the Secretary of the governing body against willful abandonment of service by the opposite parties no. 3 to 9. Assuming that the opposite parties no. 3 to 9 had voluntarily remained absent from duty, it is not understood as to what prevented the management from issuing formal order of termination. The orders of termination were not issued and served on the opposite parties no. 3 to 9 in order to deprive them of any opportunity to make appeal before the prescribed authority against such termination. Therefore, the Director disbelieved the contention of the petitioner regarding voluntary abandonment of service by the opposite parties no. 3 to 9 and allowed the appeal and directed the petitioner to allow the opposite parties no. 3 to 9 to resume their duties with immediate effect. Hence this writ application.

3. Mr. D.N. Rath, learned counsel for the petitioner though argued the matter on merits, but Mr. S. Jena, learned counsel for opposite parties no. 3 to 9 raised a preliminary objection with regard to the maintainability of the writ application at the instance of the present petitioner and contended that the governing body of the college, who had filed this application, has no locus standi, in view of the fact that the said governing body was constituted on 04.08.1997 and, after three years, its tenure expired on 03.08.2000. As the writ application was filed by the said governing body on 21.12.2001, at the instance of such defunct governing body, the writ application is not maintainable.

4. Mr. D.N. Rath, learned counsel for the petitioner contended that in view of the provisions contained under Section 7(6) of the Orissa Education Act, the prescribed authority can allow the governing body, whose term has been expired. It is further contended that in view of sub-Section (4) of Section -7, even if the tenure of the governing body is three years, but the same can continue till its reconstitution in accordance with Rule 25 of the Orissa Education (Establishment, Recognition and Management of Private Colleges) Rules, 1991, if the prescribed authority allows to continue.

5. In view of the preliminary objection being raised by Mr. S.Jena, learned counsel appearing for opposite parties no. 3 to 9, this Court considered it to be decided as a preliminary question instead of going to the

merits of the case. In the event the maintainability of the writ application at the instance of the present petitioner is allowed, then the Court may consider the merits of the case.

6. This Court heard Mr. D.N. Rath, learned counsel for the petitioner, Mr. B. Senapati, learned Addl. Government Advocate and Mr. S. Jena, learned counsel appearing for opposite parties no. 3 to 9. Pleadings having been exchanged, the matter has been heard and disposed of at the stage of admission by giving opportunity of hearing to all the parties.

7. The facts, delineated above, are admitted. So, on that basis, the question of maintainability is to be taken as preliminary objection raised by the opposite parties no. 3 to 9 for just and proper adjudication of the case. The relevant provisions of the Orissa Education Act, 1969 are quoted below:-

> *"**7. Managing Committee or Governing Body of the educational institution-***
>
> *Xx xx xx*
>
> *(4) A Managing Committee or the Governing Body, as the case may be, shall continue in Office for a term of three years from the date of its approval by the Prescribed Authority under Sub-sec.(2) and shall be reconstituted in accordance with the rule.*
>
> *Xx xx xx*
>
> *(6) The Prescribed Authority may allow the Governing Body or the Managing Committee, as the case may be, whose term has expired under sub-sec. (4) or Sub-sec.(2) of Section 7-A to continue in office till the Governing Body of the Managing Committee is reconstituted or appoint any person or persons to exercise the powers and discharge the functions of the Governing Body or the Managing Committee during the intervening period:*
>
> *Provided that the State Government may reconstitute the Governing Body or the Managing Committee, as the case may be, not withstanding that the term of such Governing Body or Managing Committee has not expired on such reconstitution, the existing Managing committee or Governing Body, as the case may be, shall stand dissolved."*

Rules 25 and 26 of the Orissa Education (Establishment, Recognition and Management of Private Colleges) Rules, 1991, which are also relevant for the purpose of answering the question raised in this case, read thus:-

> *"**25. Governing Body of Aided Colleges –** (1) Notwithstanding anything contained in these Rules as soon as the College becomes an aided College, the Governing Body of the college shall be reconstituted in the following manner:*
>
> *(i) a person interested in that field of education who may be nominated by the government or, in the absence of such nomination, the Collector/Additional District Magistrate/ Sub Collector or concerned District/Sub-division in which the College is situated shall be the President;*

(ii) the Principal or the teacher I charge of the Principal of the college shall be a member, who shall be the ex-officio Secretary.

(iii) two senior most teachers of the College shall be members, of whom, one shall be woman and on the event no woman member is available, the membership shall remain vacant till a woman teacher is posted.

(iv) one member shall be elected by, and from among the non-teaching staff;

(v) local Member or Legislative Assembly of his/her nominee shall be a member;

(vi) the Chairman/Chairperson of Panchayat Samiti/Urban Local Body having the local jurisdiction over the College, as the case may be, shall be a member;

(vii) one person shall be nominated by the local Member of Parliament as member;

(viii) one person shall be nominated by the Vic-Chancellor of the University having jurisdiction, who shall be a woman;

(ix) one person shall be nominated as member by the Director, Higher Education, who shall be a woman;

(x) five persons shall be nominated by the President referred to in clause (i), shall be members, of whom, one shall be Donor who donates more than fifty thousand rupees or in absence of a Donor of a person having interested in field of education, one person shall be belonging to the Scheduled Castes or Scheduled Tribes community, one person shall be belonging to the minority community and two shall be women.

(2) The Constitution of the Governing Body and any change in the membership shall be intimated by the Secretary of the Governing Body to the Director.

(3) The Director, on receipt of the intimate from the Secretary may either approve the list or suggest changes, with reasons within thirty days from the date of its receipt:

Provided that if no communication is received from the Director in this regard within a period of thirty days, it shall be deemed to have been approved:

Provided further that change, if any, suggested by the Director shall be considered by the President of the Governing Body who shall re-submit the list either accepting the change or not, to the Director, within fifteen days from the date of receipt of the Communication, after which the Director shall approve the same.

Provided also that no meeting of the Governing Body convened during the intervening period (from the date of intimation till the date of ratification) by the Director, shall be invalid for the reason of any vacancy in the membership or any defect in the constitution of the Governing Body.

"26. Duty of the outgoing Secretary of a Governing body –

Until the Governing Body of the aided College has been reconstituted by the Director in accordance with these Rules, the existing Governing Body of the College shall continue to function.

Provided, however: that as soon as the College becomes an aided college, the Secretary of the existing Governing Body shall cease to hold the office as such and the Principal of the college in his ex officio capacity shall become the Secretary of the Governing Body and shall discharge all the functions of the Secretary:

Provide further that the outgoing Secretary shall continue to be a member of the Governing Body until its reconstitution."

8. Sub-section (4) of Section 7 of the Odisha Education Act, 1969, as extracted hereinabove, fixed a time limit for functioning of the governing body. Meaning thereby, the governing body shall continue in Office for a term of three years from the date of its approval by the prescribed authority. The "prescribed authority" has been defined under Section 3(m)(m-1) to mean, the authority to be notified by the State Government from time to time in the official Gazette. In the present case, the Director has been notified as the prescribed authority, on whose approval the governing body is constituted/re-constituted in accordance with the Rules. Under Rule-25 of the Orissa Education (Establishment, Recognition and Management of Private Colleges) Rules, 1991 (in short "Rules, 1991") the governing body is to be constituted. Under Rule-26, the duty of the outgoing Secretary of the governing body has been mentioned. Until the governing body of the aided College has been reconstituted by the Director in accordance with the Rules, the existing governing body of the College shall continue to function, provided however, that as soon as the College becomes an aided college, the Secretary of the existing Governing Body shall cease to hold the office as such and the Principal of the college in his ex officio capacity shall become the Secretary of the Governing Body and shall discharge all the functions of the Secretary, provided further that the outgoing Secretary shall continue to be a member of the governing body until its reconstitution.

9. Admittedly, in the present case, the governing body was constituted on 04.08.1997, the tenure of which was for a period of three years, which expired on 03.08.2000. Therefore, under Sub-section (6) of Section -7, the prescribed authority, namely, the Director was to allow the governing body, whose term expired under Sub-Section (4), to continue the Office till a new governing body is reconstituted. Therefore, the continuance of the existing governing body till reconstitution is made, shall be allowed by the prescribed authority by an express permission, but not automatically, otherwise the

provisions contain in sub-section (6) of Section 7 will become nugatory. If no such express permission is granted to the existing governing body to function till reconstitution of the new governing body, then with expiry of the 3 years period, automatically the governing body becomes functus officio. In absence of any order to be passed by the prescribed authority, allowing the existing governing body to continue till reconstitution, it cannot at all be said that automatically the old governing body has to continue till the new governing body is reconstituted. Rule 26 of the Rules, 1991 also contains that until the governing body of an aided college has been reconstituted by the Director in accordance with the rules, the existing governing body of the college shall continue to function, but that continuance is subject to prescribed authority allowing such governing body to continue in Office till new governing body is reconstituted and such allowing has to be done by an express permission but not automatically. If there is no express permission allowing the outgoing governing body to function, then continuance of such governing body and managing the affairs of the institution is without any authority of law.

10. Similar question had come up for consideration before this Court in **Governing Body of Bahanaga College v. State of Orissa & others,** 2014 (II) ILR- CUT-178. In that case, the services of the opposite party no.3 were terminated by the governing body, but the governing body was approved by the Director on 17.10.1997, wherein the opposite party no.3 in the said case was also approved as member of the staff representative. The governing body and its Secretary, whose term had already been over, could not have taken any action against opposite party no.3. Therefore, when the illegal action of termination was taken place on 15.07.2008, after expiry of the tenure of the governing body, as such, there was no governing body in the College. The said termination, being set aside, was challenged before this Court in the aforesaid case. But this Court, while deciding the matter, observed in paragraph-9 and 10 of the aforesaid judgment as follows:-

> *"9. Admittedly, it appears that the opposite party no.3 was appointed against the First post of Lecturer in History in Bahanaga College, Bahanaga, in the district of Balasore by following due procedure of selection by the Governing Body of the College, which is the appointing authority under the provisions of Act and Rules governing the field. The then Secretary appointed one Sri Surendra Kumar Das who happens to be his bother as against the 2nd post of Lecturer in History even though the same was not permissible as per the workload prescribed at the relevant point of time. In order to facilitate the said Sri Surendra Kumar Das to continue in the First post of Lecturer in History to receive grant-in-aid, the then Secretary took such step against the opposite party no.3 for his termination. The term of the*

Governing Body, which was constituted on 27.10.1997, has expired on 26.10.2000 after completion of three years. After expiry of the term of the Governing Body, the outgoing Governing Body continued to function and manage the affairs of the College without any authority of law.

10. On perusal of Section 7(5) and Section 7(6) of the Orissa Education Act, it appears that after expiry of the term of the existing Governing Body, the Governing Body shall be continued in accordance with Rules for carrying out the provisions of this Section as amended by the Orissa Education (Amendment) Act, 1989 within a period of one year from the date of commencement of the said Rules and every such existing Managing Committee or Governing Body shall cease to continue in office on and from the date on which it is so reconstituted. Therefore, applying the ratio decided by this Court in FAO No. 133 of 2005 disposed of on 07.01.2010, it is stated by the date of termination of the service of opposite party no.3, the outgoing Governing Body was in Management, the Governing Body not being reconstituted, the order of termination is wholly and fully justified. This contention cannot hold good in view of the fact that it is admitted case that there is no approved Governing Body continuing at the relevant point of time after expiry of the period of reconstitution and the petitioner-Governing Body was allowed to function in conformity with the provisions of law. Therefore this Court is of the view that the reliance placed on the order dt.07.01.2010 passed in FAO No. 133 of 2005 is based on its own facts and circumstances of that case and the same is not applicable to the present context."

11. Applying the said principle to the present context, it appears that the governing body of the instant case was approved by the Director of Higher Education on 04.08.1997 and, on expiry of three years period, its tenure was over on 03.08.2000. The present writ application was filed on 21.12.2001, when the governing body was not in existence and its tenure had already been expired. But subsequently, the governing was reconstituted on 26.03.2002. Therefore, prior to the reconstitution of the governing body, the present writ application was filed. Thereby, at the instance of a non-existent governing body, the present writ application has been filed. In such circumstances, this Court is of the considered opinion that the petitioner, who is a non-existent governing body, is not competent and had no authority to take a decision and participate in the proceeding by filing the instant writ application and, as such, at its instance, the writ application is not maintainable.

12. Since this Court holds that at the instance of the present petitioner the writ application is not maintainable, this Court now refrains from going into the merits of the writ petition, which thus stands dismissed as not maintainable. There shall be no order as to costs.

2019 (I) ILR – CUT-355

DR. B.R.SARANGI, J.

W.P.(C) NO. 16810 OF 2016

BASUDEV GURU & ORS. .....Petitioners

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 &27 – Writ petition challenging the clarification issued by Council of Higher Secondary Education on the question of vocational training qualification and seek for direction to consider their vocational certificates for all practical purposes including their service prospects – Petitioners primarily acquired intermediate qualification and after that they pursued the vocational course – After completion of vocational course they are serving as 'Gomitras' – While continuing as 'Gomitras' applied for the post of Live Stock Inspector – Consideration of their applications – Authority while considering their applications held that, one person can't hold two equivalent qualification in same time presuming vocational course as similar to the intermediate course – The examination committee passed resolution to the extent that, vocational qualification shall be cancelled/withdrawn thereby debarring the petitioners to hold the post of 'Gomitra' as well as applying to the post of Live Stock Inspector – Action of the authority on the basis of such clarification challenged – Provisions of Orissa Education Act and Orissa Higher Secondary Regulation, 1982 – Held, there is no such bar in the regulations debarring a candidate from applying to the vocational course of the council, after acquiring the certificate of +2 Arts/Science & Commerce – In absence of any statutory restriction, the decision of the Committee can't be sustained in the eye of law as because on acquisition of vocational qualification a right has already been accrued in favour of the petitioners – Mere passing of a resolution cannot take away the right, which has already been accrued in favour of the petitioners, and the same cannot have any justification and, as such, such decision has been taken on the caprice and whims of the committee, which is arbitrary, unreasonable and contrary to the provisions of law.

"Admittedly, the petitioners have passed HSC examination conducted by the board of secondary education and thereafter they have prosecuted two years +2 Arts/Science/Commerce examination and after acquisition of +2 H.S. qualification, they have gone for vocational training qualification by producing necessary CLC by admitting themselves into the vocational course. Since the

provisions contained in the Regulations do not put any restriction to have such qualification, the examination committee cannot and should not have passed such resolution and, as such, the same is contrary to the Regulations, which are statutory one and governing the field. As such, the resolution so passed on 20.11.2015, being an outcome of a discussion of eight nos. of cases referred to CHSE, Orissa, of which W.P.(C) No.15319 of 2015 is one of them, does not speak about acquisition of vocational course after completion of +2 qualification of Arts/Science/commerce. It is apt to indicate that the students have acquired +2 qualification in Arts/Science/Commerce and if they have been permitted by the authority to prosecute vocational course for a period of two years on production of relevant documents, they cannot subsequently turn around and say that the first qualification of +2 Arts/Science/Commerce is genuine and subsequent acquisition of vocational training qualification is rejected/cancelled. Such resolution rejecting/cancelling acquisition of vocational qualification, without complying with the principles of natural justice, cannot sustain in the eye of law. Apart from the same, the authority is estopped from taking such stand, as on the basis of such certificate the petitioners are continuing as Gomitras in various Gram Panchayats of the Jagatsinghpur district. Thereby, such decision is in gross violation of principles of estoppels.

The CHSE, Odisha has its own Act and Regulations, as mentioned above, and on perusal of various provisions, it reveals that there was no bar in such Regulations debarring a candidate from appearing in the vocational course of the Council, if he/she has passed +2 Arts/Science/Commerce course earlier. But the examination committee on 20.11.2015 passed the resolution debarring the candidates from appearing in vocational course examination, after passing higher secondary course in any stream. In absence of any statutory restriction, the decision taken by the examination committee cannot sustain in the eye of law, as because on acquisition of vocational qualification a right has already been accrued in favour of the petitioners. Mere passing of a resolution cannot take away the right, which has already been accrued in favour of the petitioners, and the same cannot have any justification and, as such, such decision has been taken on the caprice and whims of the committee, which is arbitrary, unreasonable and contrary to the provisions of law. More particularly, the CHSE, being a statutory body, cannot play with the lives of the students according to its own caprice and whims. As such, the said act of the Council is not acceptable, thereby the applicability of such resolution whether prospective or retrospective cannot have any consideration at this stage. More particularly, the examination committee has no authority or power to change or add anything in the statutory Regulations framed by the CHSE, rather power has been vested with academic committee of the Council, which may recommend for any change in recognition of certificate, subject etc., which is subject to acceptance by the Council. Therefore, for amendment of the Regulations of the CHSE, power is vested with executive committee. More so, the resolution having been passed by the examination committee, which has no authority to do so, cannot be made

applicable so as to debar the students to get benefit of the certificates they have acquired. To have an illustration in the nature of clarifications that a candidate, even after passing B.Sc. examination, which is a graduate course in science, was allowed to take admission into B.Tech course, which is also a graduate course in technical qualification. Therefore, the vocational course is a training given to a student unlike technical trainings/courses such as ITI, Diploma and B.Tech etc. Thereby, even if a candidate acquires +2 Arts/Science/Commerce qualification, prior to its acquisition of vocational qualification, that itself cannot preclude him to havesuch qualification,after acquisition of the traditional +2 Arts/Science/Commerce qualification, because the vocational course qualification is a course for the students to become self employed. With the same aim and object if the course was introduced, the decision taken by the examination committee rejecting/cancelling such qualification, after acquisition of +2 Arts/Science/Commerce qualification, cannot have any justification. Thereby, the said resolution dated 20.11.2015 cannot sustain in the eye of law."

(Para 13 & 14)

Case Laws Relied on and Referred to :-

1. 2014 (I) OLR 226 : Dr.(Smt.) Pranaya Ballari Mohanty v. Utkal University & Ors.

For Petitioners : M/s. S.K. Das, S.K. Mishra ,P.K. Behera.

For Opp.Parties : Mr. B. Senapati, Addl. Govt. Advocate
M/s. S.B. Jena & A. Mishra,

JUDGMENT Date of Hearing: 12.12.2018 : Date of Judgment : 18.12.2018

DR. B.R.SARANGI, J.

The petitioners, who are continuing as Gomitras, have filed this application to quash the clarifications to the following effect:-

> "(i) after passing +2 H.S. examinations in any stream one cannot pursue +2 H.S. studies in an other stream including vocational stream. The student passed in vocational stream cannot appear at the +2 H.S. examinations again;
>
> (ii) if a candidate fails in +2 H.S. examinations, she/he can pursue +2 H.S. course in any other stream and can appear at the +2 H.S. examinations after completion of the said course in that stream; and
>
> (iii) since a student can pass the +2 H.S. course only once, if anybody has pursued and passed the 2nd +2 H.S. course fraudulently, the 2nd course certificate is to be rejected."

issued by Council of Higher Secondary Education, Odisha (in short "CHSE")-opposite party no.5, vide order dated 12.07.2016 in Annexure-6, and further seek for direction to the opposite parties to consider their vocational certificates for all practical purposes including their service prospects.

2. The factual matrix of the case, in hand, is that petitioner no.1, after passing +2 Arts examination from S.S.J. Mahavidyalaya, Nimol in the year 1996, took admission in Government Vocational Junior College K.C. Pur, Erasama in the year 2011 and passed the course in the year 2013. Petitioner no.2 passed +2 Arts from H.B. Mahavidyalaya, Borikina in the year 2000 and subsequently, in order to have the vocational training qualification, admitted in Government Vocational Junior College K.C. Pur, Erasama and passed the course in the year 2011. Similarly, petitioner no.3 appeared +2 Arts from H.B. Mahavidyalaya, Borikina in the year 2004 and acquired vocational training from Government Vocational Junior College K.C. Pur, Erasama in the year 2011. As the petitioners acquired vocational training qualification, they were selected for the post of Gomitra under the National Project for Cattle and Buffalo Breed under the Chief District Veterinary Officer (CDVO), Jagatsinghpur and consequentially were sent for training at the government cost and now continuing as such in different Gram Panchayats under Jagatsinghpur district. While they were so continuing, the Collector-cum-District Magistrate, Jagatsinghpur issued an advertisement in the year 2013, which was published in Odia daily "The Samaj" on 24.07.2015 to fill up about 46 posts of Livestock Inspectors. The advertisement indicated that only 50% of the vacancies are reserved for Gomitras and so far as the upper age limit is concerned, there was no relaxation in upper age limit for the Gomitras. The State functionaries issued guidelines to select only the +2 science candidates, within the age group of 18 to 32 years, for the post of Gomitra. So, if a candidate is selected/appointed as Gomotra at the age of 32 years, then for appointment of Livestock Inspector he/she shall have to complete three years of service as Gomitra to become eligible. Therefore, a Gomitra, after 35 years of age, can only be eligible for the post of Livestock Inspector, subject to availability of vacancy. Such action of the authority was even though challenged before the State Administrative Tribunal, the State Government subsequently took a policy decision enhancing the upper age limit to 45 years and accordingly the case of the petitioners was considered for selection and their names were found placed in the select list at serial nos.11, 2 and 1 respectively.

2.1 When the petitioners were waiting for their appointment and to join as Livestock Inspector as per the select list, the Collector-cum-District Magistrate-opposite party no.3 issued another draft select list for engagement of Livestock Inspector on contractual basis on 01.08.2016, wherein the petitioners name did not find place. On inquiry, it was informed that the

petitioners have dual +2 certificates, one +2 Arts and the other +2 vocational, for which the second qualification in vocational course was not acceptable. Objection was raised by CDVO, Jagatsinghpur and the same was placed before the State Government for clarification. The State Government, on consideration of the CHSE Regulation and other guidelines, clarified in letter dated 05.07.2016 that even the candidates, possessing dual certificates of +2, have genuine vocational certificate, their case shall be considered for engagement as Livestock Inspector. Therefore, it is stated that the genuineness of vocational certificate of the petitioners should have been examined by the Collector, as clarified by the Government. Instead of doing so, on the basis of the query being made by the CDVO, Jagatsinghpur dated 28.06.2014, the Secretary, CHSE, Odisha in letter dated 12.07.2016 issued clarifications, as already extracted hereinbefore, and consequentially the petitioners' case for engagement as Livestock Inspector was not considered. Hence this application.

3. Mr. S.K. Das, learned counsel for the petitioners contended that the impugned clarification/decision communicated by the Secretary, CHSE, Odisha is not only illegal but also misleading and an outcome of non-application of mind of the authority concerned. It is further contended that neither the CHSE Act nor Regulation puts any restriction or bar debarring a candidate from prosecuting the vocational course of the Council, if he has passed +2 Arts/Science/Commerce earlier. But on the basis of the resolution passed by the examination committee on 20.11.2015, no restriction can be imposed for acquiring vocational qualification, even after acquisition of +2 qualification. Such resolution cannot supersede or override the statutory regulation governing the field. More particularly, the examination committee is not competent to pass such resolution debarring the candidates, who have acquired such qualification prior to the date, when such decision was taken, i.e., 20.11.2015, and if at all such decision would be given effect to, it may have prospective application but not retrospective. As a consequence thereof, the acquisition of qualification by the petitioners will not be affected and more particularly on the basis of acquisition of vocational qualification if the petitioners are continuing as Gomitra, the right so accrued cannot be taken away and, as such, the action of the authority is hit by principle of estoppel. To substantiate his contention, he has relied upon the judgment of this Court rendered in the case of ***Dr.(Smt.) Pranaya Ballari Mohanty v. Utkal University and others,***, 2014 (I) OLR 226.

4. Mr. B. Senapati, learned Addl. Government Advocate appearing for opposite parties no.1 to 4, referring to the counter affidavit, contended that Government has enhanced the upper age limit for Gomitra applicants to 45 years, vide gazette notification dated 01.12.2015, and admitted that in accordance with the decision taken on 30.07.2016 by the selection sub-committee for recruitment of Livestock Inspector in Jagatsinghpur district for the years 2013 and 2015, in pursuance of advertisements dated 23.09.2013 and 24.07.2015, second provisional draft merit list has been prepared and web-hosted in the District Portal of Jagatsinghpur on 01.08.2016 and, as such, the said decision was taken basing upon the clarification received from CHSE, Odisha, vide letter dated 12.07.2016, on the issue of dual qualification of some of the applicants at +2 higher secondary stage. Therefore, the reasons for exclusion of names of the petitioners is based on clarification received from CHSE, Odisha dated 12.07.2016 in which it has been mentioned that:-

> (i) after passing +2 H.S. examinations in any stream one cannot pursue +2 H.S. studies in another stream including vocational stream. The student passed in vocational stream cannot appear at the +2 H.S. examinations again;
>
> (ii) if a candidate fails in +2 H.S. examinations, she/he can pursue +2 H.S. course in any other stream and can appear at the +2 H.S. examinations after completion of the said course in that stream; and
>
> (iii) since a student can pass the +2 H.S. course only once, if anybody has pursued and passed the 2nd +2 H.S. course fraudulently, the 2nd course certificate is to be rejected.

But the Government, on consideration of CHSE, Odisha Regulations and other guidelines, clarified in letter dated 05.07.2016, that even the candidates, possessing dual certificate of +2, have genuine vocational certificates, their cases shall be considered for engagement as Livestock Inspector. But when clarification was received from CHSE, Odisha, the selection sub-committee took a different view and published second provisional draft merit list, where the name of the petitioners were not available, as they have acquired dual +2 qualification. Thereby, no illegality or irregularity has been committed by the authority in preparing second provisional draft merit list for recruitment of Livestock Inspector.

5. Mr. S.B. Jena, learned counsel for opposite party no.5 has justified the letter issued on 12.07.2016 and contended that admission to vocational stream was done as per Regulation-123, according to which any registered student of the Council may be admitted to the annual examination in

vocational course, if he/she has completed, in any Higher Secondary School/Junior College, recognized by the Council as a vocational centre a regular course in a vocational subject for not less than two academic years, after passing the high school certificate examination of the Board of Secondary, Orissa or some other examination recognized by the council as equivalent thereto, and has been promoted to the second year class. Further, in view of Regulation 164, a student passing +2 Arts/Science/Commerce course by registering his name after his admission on passing of Board of Secondary Education on equivalent to that he or she could not have taken admission in +2 vocational course afresh passing +2 Arts/Science/Commerce without submission of School Leaving Certificate. Therefore, subsequent acquisition of vocational qualification cannot be said to have any justification. Thereby, the authorities are well justified in issuing letter dated 12.07.2016. It is further contended that the student has to enroll his name in Council by producing School Leaving Certificate and a student who has passed +2 examination for appearing vocational examination is not permissible.

6. This Court heard Mr. S.K. Das, learned counsel for the petitioners, Mr. B. Senapati, learned Addl. Government Advocate and Mr. S.B. Jena, learned counsel for opposite party no.5. Pleadings having been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. The facts, narrated above, are not in dispute. The only question to be considered by this Court is whether the CHSE is justified in issuing the letter dated 12.07.2016 on the basis of the resolution passed by the examination committee on 20.11.2015, in the nature of a clarification not to hounour the vocational certificate or +2 certificate obtained after passing +2 examination earlier on the principle that a student can appear +2 course only once.

8. To provide for the establishment of a council to regulate, control and develop higher secondary education in the State of Orissa, "The Orissa Higher Secondary Education Act, 1982" has been enacted by the Orissa Legislative Assembly and got the assent of the Governor on 23.10.1982. For just and proper adjudication of the case, in hand, relevant provisions of the said Act are quoted below:-

> ***"Definitions:***
>
> *2. In this Act, unless the context otherwise requires:-*

(a) *xxx* *xxx* *xxx*

xxx *xxx* *xxx*

(d) "Committee" means a Committee of the Council;

(e) "Council" means the Council of Higher Education constituted under Section 3;

xxx *xxx* *xxx*

(q) "Registrations" means the regulations made under Act;

xxx *xxx* *xxx*

Constitution of Council:-

3.(1) Government shall constitute a council called the council of higher secondary education.

(2) The council shall be a body corporate with perpetual succession and a common seal with power to acquire and hold property, both movable and immovable, and subject to the provisions of this Act, to transfer any property held by it and to contract and do all other things necessary for the purpose of its constitution and may sue or be sued in its corporate name.

(3) The council shall consists of the following members, namely:-

(a) Ex-Officio Members-

i. Chairman

ii. Vice-Chairman (if appointed)

iii. Director of Public Instruction (Higher Education), Orissa.

iv. Director of Public Instruction (Schools), Orissa.

v. President, Board of Secondary Education Orissa

vi. Director of Technical Education and Training, Orissa

vii. Principal, Regional College of Education, Bhubaneswar

viii. Director, State Council of Educational Research and Training Orissa.

ix. Principal, College of Physical Educational, Cuttack

x. Director, National Cadet Corps or his nominee

(b) Members to be nominated by Government.

i. a representative of the Education and Youth Services Department not below the rank of a Deputy Secretary.

ii. a representative of the Finance Department not below the rank of a Deputy Secretary.

iii. ten Principals of Colleges, including Junior Colleges, if any,

iv. Five headmasters of higher secondary schools, to the extent available.

v. ten registered teachers of recognized colleges including Junior Colleges.

vi. five registered teachers of higher secondary schools to the extent available.

vii. three Circle Inspectors of Schools

viii. not more than ten specialists in vocational subjects prescribed for the higher secondary course.

(c) **Elected Members:-**

i. three members of the Orissa Legislative Assembly to be elected from amongst themselves.

ii. one representatives from each of the Universities in the State to be elected by the members of the respective Academic Councils from among themselves.

iii. one representative of Board of Secondary Education to be elected by the members of the Board.

(4) The council may co-opt persons not exceeding five, as extraordinary members for any special purpose.

(5) Notwithstanding anything contained in this Act, for the purpose of constituting the council for the first time, the members specified in clause (c) of sub section (3) shall be nominated by the Government so far as may be from among persons belonging to the categories specified in items (i) to (iii) of that clause and the members so nominated shall hold office for a period of two years.

xxx xxx xxx

11. **Powers and function of the council***:- Subject to the provisions of this Act, the council shall have following powers and functions, namely:-*

a. to prescribe courses of instruction for recognized institutions in such branches of higher secondary education as it may think fit.

b. to take steps to coordinate higher secondary education with university education on the one side and secondary education on the other.

c. to make regulations for the purpose of prescribing and recommending any book as a text book or a hand book or to undertake compilation and publication of such book;

d. to make regulations for imposing penalties for acts of misconduct of students, teachers, examiners, examinees, printers of text books or question papers or persons connected with the examinations of the council.

e.to conduct examinations based on such courses as may be prescribed;

f.to admit candidates to its examinations in accordance with the regulations;

g. to publish the results of its examinations;

h. to grant diplomas and certificates to successful candidates.

i. to establish, control, regulate or administer any Junior college or any higher secondary school subject to the approval of the government.

j. to bring about practical coordination between State owned Industrial institutes, Factories or workshops or vocational institute. Agricultural farms, animal husbandry centres or pisciculture institutes and the higher secondary schools or junior colleges providing for vocational courses by way of providing adequate and systematic practical training which will be complementary to the theoretical instruction at the schools or colleges;

k. to call for reports from the Directorate of Public Instruction on the conditions of the recognized institutions or of institutions, applying for recognition and to direct inspection of such institutions;

l. to recognize institutions for the purpose of admitting them to the privileges of the council including examinations conducted by it;

m. to lay down the qualifications of teachers required to teach the subjects included in the courses of study in different branches of higher secondary education, the work load of such teachers and the number of working days in an academic year and other matters incidental thereto;

n. to adopt measures to promote the intellectual, physical, moral and social welfare of the students of the recognized institutions and to supervise and control the condition of their residence, health and discipline;

o. to institute and award scholarships, medals and prizes according to a scheme or schemes framed by the council;

p. to demand and receive such fees as may be prescribed;

q. to administer funds places at its disposal for the purposes for which they are intended or generally for the purposes of the council;

r. to submit annual accounts and balance sheet together with the annual report of the council to the government and publish the audited accounts and balance sheet in the Gazette;

s. to submit to government its views on any matter with which it is concerned;

t. to take measures to provide para military educations, opportunities to organize social services and such other activities as the council considers necessary to inculcate in the minds of the students enrolled in recognized institutions a high sense of citizenship and to train and prepare them to discharge their civic obligations effectively;

u. to furnish to government such reports and returns and statements as may be prescribed by regulations and such other information relating to any matter under the control of the council as the government may require;

v. to maintain a library of its own;

w. to have an Information Cell for dissemination of information about the activities of the council, employment opportunities of different vocations and fields in higher general and professional studies;

x. to acquire, hold and dispose of property, both movable and immovable; for the purposes of the council and enter into agreements therefore;

y. to maintain register of teachers and register of students admitted to the higher secondary course.

xxx xxx xxx

21. **Committees:**-

(1) The council shall have the following committees, namely,

a. Academic Committee
b. Executive Committee
c. Recognition Committee
d. Examination Committee
e. Finance Committee
f. Syllabus Committee
g. Such other Committee; and

(2) Every such committee shall consist of such number of members as may be prescribed

(3) The members of Committees except ex-officio members, shall hold office far a period of three years.

(4) The members of the syllabus committee shall be appointed by the Executive Committee and members of all other committees shall be appointed by the council. All such appointments shall be made in the prescribed manner.

(5) When a person ceases to be members of the council he shall automatically cease to a member of the committee if he held membership of such committee by virtue of his being a member of the council.

(6) The powers and functions of the committees shall be as may be prescribed.

(7) Save as otherwise provided, the provisions contained in sections 6, 7, 8, 9 and 10 shall apply, mutatis mutandis, to the Committees in regard to disqualification for membership, removal from membership registration and casual vacancies.

22. **Exercise of Power delegated by the council to the Committee***:-*

If the Council exercise any powers conferred on it by this Act in any matter which have been delegated, by the council to a committee by a regulation, the council before exercising any such power shall receive and consider the report of the committee with respect to the matter in question.

xxx *xxx* *xxx*

30. **Regulations:**- *(1) Subject to provisions of this Act, the regulation may provide for all or any of the following matters-*

xxx *xxx* *xxx*

(2) The first Regulations shall be framed by the Government.

xxx *xxx* *xxx"*

9. In pursuance of sub-section (2) of section 30 of the Orissa Higher Secondary Education Ordinance, 1982, the State Government framed Regulation to provide for the matters enumerated under sub-section (1) of the said section called "The Orissa Higher Secondary Education Regulations, 1982". Chapter-VII deals with admission to the higher secondary examination in the vocational stream. Regulations 123 and 164 read as follows:-

"Regulation-123 : Any registered student of the council may be admitted to the annual examination in vocational courses, if he/she has completed in any higher secondary school/junior college, recognized by the council as a vocational centre a regular course in a vocational subject for not less than two academic years after passing the high school certificate examination of the Board of Secondary, Orissa or some other examination recognized by the council as equivalent there to, and has been promoted to the second year class.

xxx *xxx* *xxx*

Regulation-164: (1) No person whose name has not been entered in the register of students shall be permitted to appear for any examination of the council.

(2) Before being admitted to an examination, a candidate must have been registered. A candidate shall be registered afresh on each occasion of presenting himself for examination, and he shall register an application in the prescribed form either to the Controller of the examination direct or through the head of the institution paying he fees prescribed.

(3) Every candidate for examination shall produce a certificate of having previously passed the qualifying examination if any, prescribed by law.

(4) He shall also, unless exempted by special order of the Examination Committee, submit the certificate of attendance.

(5) No candidate shall be permitted to sit for an examination unless his term and annual certificate of attendance, certificate of conduct, progress or order of exemption, if any, granted to him have been received by the controller before the commencement of the examination.

(6) The conditions of exemption, if any, may be given enable the candidate to appear for any examination of the Council as prescribed from time to time in the regulations and no exemption from the production of attendance certificates and/or

progress and conduct certificates required from any institution as the case may be, shall be given, except in conformity with the conditions prescribed in the Regulation.

(7) Order of exemption granted in accordance with these Regulations shall be permanent."

10. The provisions, as discussed above, do not contemplate or put an embargo upon having a vocational training course after +2 Arts/Science/Commerce, but by resolution dated 20.11.2015, the examination committee of the CHSE has taken the following decision:-

"Resolved that the committee after careful consideration and thread-bare discussion for 08 (eight) nos. of cases referred to CHSE (O) in W.P.(C) No. 15319/2015 in its order dated 28.08.2015, the certificates awarded to the candidates in vocational stream be cancelled and withdrawn. Hence the first certificate obtained from the council be treated as genuine and the certificate issued later in any stream be rejected/cancelled. Further, resolved that all candidates seeking admission to any higher secondary course in any stream of the CHSE by depositing duplicate CLC/SLC shall furnish an affidavit that he/she has not obtained any higher secondary degree before hand"

11. In the above mentioned resolution, which has been issued on 20.11.2015 by the examination committee, while considering the cases referred to CHSE by this Court in W.P.(C) No.15319 of 2015 in its order dated 28.08.2015, for the first time it was contended that the certificates awarded to the candidates in vocational stream be cancelled and withdrawn, and that the first certificate obtained from the council be treated as genuine and the certificate issued later in any stream be rejected/cancelled. The order dated 28.08.2015 passed in W.P.(C) No.15319 of 2015, to which reference has been made, reads as under:-

"Heard learned counsel for the petitioner.

The petitioner files this application seeking for a direction to opposite party no.2 to dispose of her representation under Annexure-8 in accordance with law by giving opportunity of hearing to the parties within a stipulated time.

In course of hearing, learned counsel for the petitioner submits that highlighting the grievance, the petitioner has made a representation before the opposite party no.2 vide Annexure-8 and direction may be given to consider the same within a stipulated time.

In view of the aforesaid limited grievance of the petitioner, without expressing any opinion on the merits of the case, this Court disposes of the writ petition

directing the opposite party no.2 to consider and dispose of the representation in Annexure-8 and pass appropriate order within a period of three months from the date of communication of this order.

Requisites for communication of this order to opposite party no.2 shall be filed within a week.."

12. On perusal of the aforesaid order, it reveals that nowhere this Court directed to take a decision with regard to the certificate issued by the authority, rather an innocuous order has been passed to consider the representation in Annexure-8, which was filed to consider the grievance of the vocational certificate holders, those who had availed such certificates after passing the higher secondary course in other streams earlier and not been extended with the future benefit. A close reading of the provisions contained in Regulation-123 does not indicate any restriction to have a vocational qualification after obtaining +2 qualification, namely, +2 Arts/Science/Commerce, rather it states that any registered student of the council may be admitted to the annual examination in vocational courses, if he/she has completed, in any higher secondary school/junior college, recognized by the council as a vocational centre, a regular course in a vocational subject. Thereby, it does not put any restriction to a candidate who possessed +2 qualification of other stream, namely, +2 Arts/Science/Commerce, rather it expands the scope to allow to such students to prosecute their studies in vocational course for two academic years after passing the high school certificate examination of the board of secondary, Orissa or some other examination recognized by the council as equivalent thereto. The provision itself puts a mandate that minimum requisite qualification, to get a candidate admitted to the vocational course, one has to pass HSC examination of the board of secondary education, which is the minimum requirement to get admission into the vocational course. But that by itself does not put any restriction to allow a candidate to continue with vocational course, if he passed +2 Arts/Science/Commerce. Therefore, even if a candidate acquires +2 Arts/Science/Commerce qualification, he is eligible to prosecute his vocational course for a period of two years. The students may prosecute their vocational course just after passing out HSC examination of the board of secondary education or some other examination recognized by the council or even after acquisition of +2 Arts/Science/Commerce qualification in Arts/Science/Commerce for a period of two years. Thereby, the resolution passed by the examination committee resolving that all the candidates seeking admission into any

higher secondary course in any stream of the CHSE by depositing duplicate CLC/SLC shall furnish an affidavit that he/she has not obtained any higher secondary degree before hand, cannot have any justification.

13. Admittedly, the petitioners have passed HSC examination conducted by the board of secondary education and thereafter they have prosecuted two years +2 Arts/Science/Commerce examination and after acquisition of +2 H.S. qualification, they have gone for vocational training qualification by producing necessary CLC by admitting themselves into the vocational course. Since the provisions contained in the Regulations do not put any restriction to have such qualification, the examination committee cannot and should not have passed such resolution and, as such, the same is contrary to the Regulations, which are statutory one and governing the field. As such, the resolution so passed on 20.11.2015, being an outcome of a discussion of eight nos. of cases referred to CHSE, Orissa, of which W.P.(C) No.15319 of 2015 is one of them, does not speak about acquisition of vocational course after completion of +2 qualification of Arts/Science/commerce. It is apt to indicate that the students have acquired +2 qualification in Arts/Science/Commerce and if they have been permitted by the authority to prosecute vocational course for a period of two years on production of relevant documents, they cannot subsequently turn around and say that the first qualification of +2 Arts/Science/Commerce is genuine and subsequent acquisition of vocational training qualification is rejected/cancelled. Such resolution rejecting/cancelling acquisition of vocational qualification, without complying with the principles of natural justice, cannot sustain in the eye of law. Apart from the same, the authority is estopped from taking such stand, as on the basis of such certificate the petitioners are continuing as Gomitras in various Gram Panchayats of the Jagatsinghpur district. Thereby, such decision is in gross violation of principles of estoppels.

14. The CHSE, Odisha has its own Act and Regulations, as mentioned above, and on perusal of various provisions, it reveals that there was no bar in such Regulations debarring a candidate from appearing in the vocational course of the Council, if he/she has passed +2 Arts/Science/Commerce course earlier. But the examination committee on 20.11.2015 passed the resolution debarring the candidates from appearing in vocational course examination, after passing higher secondary course in any stream. In absence of any statutory restriction, the decision taken by the examination committee cannot sustain in the eye of law, as because on acquisition of vocational

qualification a right has already been accrued in favour of the petitioners. Mere passing of a resolution cannot take away the right, which has already been accrued in favour of the petitioners, and the same cannot have any justification and, as such, such decision has been taken on the caprice and whims of the committee, which is arbitrary, unreasonable and contrary to the provisions of law. More particularly, the CHSE, being a statutory body, cannot play with the lives of the students according to its own caprice and whims. As such, the said act of the Council is not acceptable, thereby the applicability of such resolution whether prospective or retrospective cannot have any consideration at this stage. More particularly, the examination committee has no authority or power to change or add anything in the statutory Regulations framed by the CHSE, rather power has been vested with academic committee of the Council, which may recommend for any change in recognition of certificate, subject etc., which is subject to acceptance by the Council. Therefore, for amendment of the Regulations of the CHSE, power is vested with executive committee. More so, the resolution having been passed by the examination committee, which has no authority to do so, cannot be made applicable so as to debar the students to get benefit of the certificates they have acquired. To have an illustration in the nature of clarifications that a candidate, even after passing B.Sc. examination, which is a graduate course in science, was allowed to take admission into B.Tech course, which is also a graduate course in technical qualification. Therefore, the vocational course is a training given to a student unlike technical trainings/courses such as ITI, Diploma and B.Tech etc. Thereby, even if a candidate acquires +2 Arts/Science/Commerce qualification, prior to its acquisition of vocational qualification, that itself cannot preclude him to have such qualification, after acquisition of the traditional +2 Arts/Science/Commerce qualification, because the vocational course qualification is a course for the students to become self employed. With the same aim and object if the course was introduced, the decision taken by the examination committee rejecting/cancelling such qualification, after acquisition of +2 Arts/Science/Commerce qualification, cannot have any justification. Thereby, the said resolution dated 20.11.2015 cannot sustain in the eye of law.

15. Apart from the same, after acquisition of +2 vocational qualification the petitioners have been selected and, being self employed, have gone training at the cost of the government. Therefore, in the event such qualification would be cancelled, it will cause immense difficulties and the

petitioners will render jobless even though they got the vocational qualification and the government has spent money for them for their training. Therefore, on the basis of the resolution passed by the examination committee, the clarifications made by the CHSE dated 12.07.2016 in Annexure-6 directing that the students can pass the +2 H.S examination only once and, if anybody has pursued and passed the 2nd +2 H.S. course fraudulently, the second course certificate is to be rejected, the council has misconstrued the acquisition of +2 H.S. course and thereafter +2 vocational course imparted by the same institution. Certainly +2 H.S. examination in Arts/Science/Commerce stream is being conducted by the Council. Similarly, the vocational course is also imparted by the Council but that itself is a technical qualification for self employment and, as such, that cannot and should not be restricted by letter dated 12.07.2016. More so, the language used in clause-3 of the said letter reads as under:-

> *"xxx xxx xxx xxx*
>
> *(iii) Since a student can pass the +2 H.S. course only once, if anybody has pursued and passed the 2nd +2 H.S. course fraudulently, the 2nd course certificate is to be rejected."*

A bare reading of the above clause would go to show that a student can pass the +2 H.S examination only once, if he/she has pursued and passed the 2nd +2 H.S. course fraudulently, the second course certificate is to be rejected. What constituted "fraud" has not been clarified. More so, acquisition of subsequent +2 H.S. qualification in vocational stream cannot be construed to be fraudulent acquisition of qualification. It does not confine any meaning whether acquisition of vocational qualification after +2 Arts/Science/Commerce is construed to be a second +2 H.S. course obtained fraudulently. Therefore, the question of acquisition of vocational qualification, after +2 H.S. course, cannot be construed to be fraudulent one. Thereby, the Council has misconstrued this fact and issued such letter, which cannot sustain in the eye of law.

16. In the case of ***Dr.(Smt.) Pranaya Ballari Mohanty v. Utkal University and others,*** this Court has taken into consideration the principles of promissory estoppels. For better appreciation, paragraphs-13, 14 and 15 thereof are quoted below"

> "*13. The reliance is placed by the learned counsel for the petitioner on the judgment in Miss.Reeta Lenka (supra). The fact of the said case is akin to the facts of the present case. In the said case one Miss.Reeta Lenka afte r having been*

admitted to Rama Devi Women's College in 1985, completed her B.Sc. from that college and thereafter obtained Diploma in Pharmacy from V.S.S.Medical College, Burla. But thereafter due to cancellation of her result because of mass copying, she approached this Court. This Court in the said case observed that in cases of mass copying, natural justice is not required to be complied with and as such, it is apparent that the candidate in question does not get an opportunity to have his say in the matter. Therefore, after thorough discussion on the principle of promissory estoppels under Section 115 of the Evidence Act, the Division Bench of this Court has held that the present is a fit case where the petitioner should be protected by applying the principle of promissory estoppel. Similar view has also been taken in the case of David C.Jhan (supra) where the petitioner in the said case was admitted to the college after being declared to have passed the High School Certificate Examination conducted by the Board of Secondary Education, but subsequently the Board notified that the candidate was wrongly declared to have passed and on the basis of such notification, the college authorities cancelled the admission of the petitioner. However, due to interference of this Court, referring to the judgment of this Court in Gita Mishra v. Utkal University, reported in I.L.R. 1971 Cuttack 24, the said notification was quashed and the petitioner in the said case was permitted to continue his studies. In Ambika Prasad Mohanty (supra) this Court applying the principle of estoppel observed that once a student is admitted after satisfying all the qualifications, subsequent cancellation of admission cannot be made since he would be deprived of pursuing his studies in any other institution.

14. The principle of promissory estoppel has been considered by the apex Court in Union of India and others v. M/s.Anglo Afghan Agencies etc., AIR 1968 SC 718, Chowgule & Company (Hind) Pvt. Ltd. v. Union of India and others, AIR 1971 SC 2021, M/s.Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh and others, AIR 1979 SC 621, Union of India and others v. Godfrey Philips India Ltd., AIR 1986 SC 806, Delhi Cloth & General Mills Ltd. v. Union of India and others, AIR 1987 SC 2414, Bharat Singh and others v. State of Haryana and others, AIR 1988 SC 2181 and many other subsequent decisions also.

15. In view of the aforesaid authoritative pronouncement, applying the same principle in the present case, the authorities after lapse of 20 years cannot unsettle the settled position by arbitrary and unreasonable exercise of power and alter the position. That apart, in the present case, before taking any decision pursuant to Annexures-3 and 3A, no opportunity whatsoever was given to the petitioner. Hence, the cancellation of result of the petitioner in M.A.Odia Non-Collegiate Examination, 1991 is vitiated. The allegation made that the petitioner has suppressed material fact and misrepresented the University, is absolutely baseless in view of the fact that in all the applications, she furnished her registration number and on consideration of the same, she was permitted to appear at the examination. Therefore, the question of fraud or misrepresentation on the part of the petitioner is absolutely misconceived. When application was filed indicating the registration number of the candidate, it is the duty of University to verify the same before allowing her to appear at the examination in question and merely on the

basis of the allegation at the behest of third party, cancellation of the result of the petitioner after 20 years without giving any opportunity of hearing, is illegal and unjustified."

17. Therefore, applying the principles laid down by this Court as well as the apex Court, this Court is of the considered view that the resolution passed by the examination committee on 20.11.2015 and consequential communication made by the Secretary, CHSE, Odisha with clarifications to the Collector-cum-District Magistrate, Jagatsinghpur on 12.07.2016, cannot sustain in the eye of law and the same are liable to be quashed. Accordingly, the same are hereby quashed. The petitioners, who have acquired vocational qualification, shall be treated as genuine and on that basis they shall be eligible to be considered for selection to the post of Livestock Inspector and other future service prospects.

18. The writ petition is accordingly allowed. However, there shall be no order as to costs.

2019 (I) ILR - CUT- 373

D.DASH, J.

RFA. NO.14 OF 2002

CHATTI JAGAN MOHAN & ORS. .....Appellants

.Vs.

CHATTI ANASURYA & ORS. .....Respondents

CODE OF CIVIL PROCEDURE, 1908 – Section 97 – Appeal questioning the order passed in the final decree proceeding – Suit for partition – Partition and allotment of property amongst the co-sharers, especially in the matter of allotment of house property in consonance with their respective shares – Principles – Indicated.

"In case of partition of property amongst the co-sharers, especially in the matter of allotment of house property in consonance with their respective shares, normally the possession/ occupation of the parties, in case of their living and enjoying the property separately for quite a long length of time with certain addition and alternation is given due regard to. But then if it is not possible to maintain status quo even with little adjustment to this side or that; next endeavour is made for the allotment in such a manner that the possession / occupation, living and all other factors connected thereto are least disturbed so as to see that the parties are put to least inconvenience. But always it may not be so possible for various other factors standing on the way which cannot be exhaustibly described; there may remain

some difference either in the area of the land, in the size of the house or in the floor space of the house etc. Looking at all such surrounding circumstances and attending factors, a view is taken as to how far the allotment of the house property would be made in division in favour of the co-sharers. Some time different methods are evolved suiting to the property as well as the parties as best as possible; as for instance, by assessing the valuation and accordingly compensating the parties getting lesser area/floor space/other aspects of convenience and inconvenience ignoring some trivial factors. So in these matters, there can be no fixed principle with formulation of straight jacket formula. In my considered view it has to be a fair play in making the distribution in a fair and reasonable manner." (Para 9)

For Appellants : M/s. S.S. Rao and B.K. Mohanty.

For Respondents : M/s. A.K. Mohanty, K. A. Guru.
M/s. B.K. Sharma, S. Kar, S.P. Kar,
N.K. Pattnaik, K.K. Nayak and R.S. Mohapatra,
Mr. S.C. Samantray.

JUDGMENT Date of Hearing: 18.07.2018 Date of Judgment: 19.11.2018

D.DASH, J.

The appellants who are the defendants in the suit i.e. T. S. No. 55 of 1967, filing this appeal under section 97 of the Code of Civil Procedure (for short, called as 'the Code') have questioned the order dated 16.02.2002 passed in the final decree proceeding in the matter of allotment of the properties described in Item nos.4 and 11 to the respondent no. 2 (plaintiff) and his sisters and Item no.13 to the appellant no.1 (defendant no.7) and his father, since dead who was defendant no. 6.

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 original suit.

3. The plaintiff in the year 1967 had filed the suit for partition of the property described in different schedules of the plaint. The suit has been preliminary decreed on 01.04.1976, by way of allotment of share over the property liable for partition in favour of the parties with the stipulation that the alienations made by the parties in the meantime shall be adjusted to the shares of the respective parties who have so alienated. A first appeal having been filed questioning the said preliminary decree, this Court in F.A. No. 158/76 has ordered for its modification to the extent that the validity of willnama (Ext. N) executed by Ammayamma in favour of Balakrishnamma, defendant no. 6 that the same, instead of remaining confined to the extent of

Venkata Swamy's interest, would be valid in toto and the purported family arrangement, Ext. A has been held to be void.

The trial court by impugned order dated 16.02.2002 has gone to decide the allotment of specific portions of property under the items from those described in schedule 'B' of the plaint amongst the co-sharers in conformity with their share as ordained in the said preliminary decree finally passed by this Court in the first appeal wherein the preliminary decree passed by the trial court stood merged/mingled.

Writ having been issued to the Amin Commissioner to measure the lands available in the schedule 'A' along with 18 nos. of houses as described in schedule 'B' of the plaint which are in possession of the parties; the Amin Commissioner made spot visit on several occasion. He found some of the suit houses to have already been alienated to different purchasers. As then it was, he having noticed the conduct of the parties proceeding for an amicable settlement as regards the allotment of the house property described in schedule 'B' keeping in view the alienations made by them to different persons, had so reported. He next however reported that since the schedule 'A' comprises of vast acreage of the landed properties of 216 Acres, it would take a long time to submit the detail report with regard to allotment of specific acreage corresponding to a number of varieties of land to the parties under several khatas and plots in consonance with their allotted share as per the preliminary decree keeping in view all said directives. The Amin Commissioner, therefore, made a prayer before the court in seisin of the final decree proceeding first to finalize the allotment of the houses described in schedule 'B' in view of the urgency and best interest of the parties, without waiting for the allotment to be made in respect of the vast acreage properties as described in schedule 'A'. The trial court has accordingly, proceeded further in so far as schedule 'B' property are concerned. In the peculiar fact situations, no fault is found with the trial courts progress in the matter for that schedule 'B' property.

4. The admitted factual position stood before the court that the plaintiff has sold the house property described in Item nos. 5, 6 and 8 (three items) of schedule 'B' for a consideration of Rs.31,250/-. The defendant nos. 6 and 7 of the other branch have sold the house property described in Item nos. 1, 2, 3, 7,9, 14, 15, 16, 17 and 18 (ten items) for a consideration of Rs.68,200/-. The parties also admitted before the court that the house property described in Item no. 12 had been sold jointly. In that view of the matter, the court

below found the house property described in Item nos. 4, 11 and 13 as available for being allotted to the co-sharers. The Amin Commissioner was then asked by the court to submit a proposal for consideration in the matter of such allotment of the house property described in Item nos. 4, 11 and 13 to the parties. In response, the Commissioner very rightly sought for necessary clarification/direction as to whether to go ahead in the matter of said allotment keeping in view the valuation of the property for proposing for allotment or by way of measurement. The parties in the meantime agreed before the court that the value of the property be taken for the purpose of division and allotment of share to them.

It was contended from the side of the plaintiff and defendant nos. 1 to 3 that defendant nos. 6 and 7 have sold more area than the plaintiff for which the house property described in Item nos. 4, 11 and 13 be allotted to the plaintiff and his sisters. The court below has not accepted the proposal by examining the matter from the point of valuation of the property. The parties then submitted the sale price of each of the house and taking note of the same, the court below has accepted the valuation of all the items of the house properties described in schedule 'B' at Rs. 1,26,450/-. The question then arose before the court below as to how those three Items of house property i.e. Item nos. 4, 11 and 13 would be divided in accordance with the shares finally assigned to the parties. Both sides staked their claim over house property described in schedule 'B'.

5. At this stage, for better appreciation, the following part of the order needs to be reflected:-

> "3. xx xx xx xx
>
> The parties were having several houses in the 'B' Schedule for amicable allotment, but instead of having an amicable settlement, both the parties are claiming the item No. 4 of the 'B' schedule. Where there are several properties, it is not necessary that each of the co-sharers should be allotted a share in each of the property. When the property is unable to be divisioned, the court may in the facts and circumstances of the case can allot one property to one co-sharer and the other property to another with a direction, if necessary to compensate the other side. It is the general rule of law that, partition should be made with due regard to the possession of the parties if it is possible to effect a just partition without disturbing the present possession of the parties. It is also the duty of the court to see that the interference with possession should be as little as avoidable in the circumstances. So, basing on the above principle of partition, the above item Nos. 4, 11 and 13 has to be allotted to the co-owners. The learned counsel for the defendants 6 and 7 contended before this Court that as per the family arrangement vide Ext.A., the item No. 4 was

allotted to the mother of the defendants 6 and 7 who has gifted the said Item to them. Further the said Gift Deed has been marked as Ext. No dt. 11-4-62. As the mother of the plaintiff trespassed into item No.4, there was a criminal case against her and subsequently she was acquitted in the criminal revision No. 22/67 in the year around 1986. The Item No.4 has been mutated in the name of the defendant No.6 and he is all along paying the cist of the said house to the municipality authorities as well as to the revenue authorities. So, by virtue of the above documents, the defendants 6 and 7 claim their possession over Item No. 4.

On the other hand, the learned counsel for the plaintiff and the defendants 1 to 3 contended before this Court that, out of the 18 houses by depriving the plaintiff and their sisters from enjoyment of the said properties. According to them, the defendants 6 and 7 sold the 11 Nos. of houses for Rs.68,200/- whereas the plaintiff and her sisters only sold 3 houses for a consideration of Rs.38,250/-. Even if the 3 houses Item Nos. 4,11 and 13 is allotted to the share of the plaintiff and their sisters, the principle of equity will be maintained. The Item No.4 has been valued at Rs.19,000/-, item No. 11 valued at Rs.5,000/- and item No. 13 value at Rs.3,000/-. So, the left out property is valued of Rs.27,000/-, but on the principle of equity while allotting the share, the possession of the parties has to be taken into account. The total value of the 18 Nos. of houses of 'B' schedule comes to Rs.1,26,450/-. As per the share defined, the plaintiff will get the value of the property worth Rs.39,515/-, the three sisters defendants 1 to 3 will get Rs.7,903/- each and the share of the defendant s 6 and 7 will come into Rs.63,224/-, but they have only sold the houses for Rs.31,250/-. So, as per the above calculation, the defendants 6 and 7 sold the properties more than their share, for which, they cannot claim equity. It is an admitted fact that, some other properties in the 'A' schedule is still left out for adjustment between the parties. Regarding the 'B' schedule properties in the allotment of item Nos. 4, 11 and 13, this court holds that each of the co-owner must get their respective shares, but when the co-owners are numbering six, the houses are only left i.e. three, the court has to guided by the principle of equity to satisfy all the co-sharers. The learned counsel of the defendants 6 and 7 taken me through the reported decision of A.I.R. 1991 Orissa page 332 between Chetting Balakrishnamma –vs- Chetti Chandrasekhar Rao and others", wherein it has been clearly decided by the Hon'ble Court in the First Appeal No. 158/76 dt.13-4-90 that the properties has to be divisioned between the parties as per the Will vide Ext.43 executed by Chetting Venkataswamy. The learned counsel also cited the reported judgment between Sukadev Bhanja-vs-Mangulu Sahu reported in 1986(1) O.L.R. page 196 and contended that a sporadic act of trespass by a party would not amount to his possession in the eye of law and would not lead to a conclusion that the other party is in possession. Further, he has also cited the criminal case instituted by the defendants 6 and 7 against the mother of the plaintiff and others. Regarding the partition, he has also cited the reported judgment between Jai Dayal –vs- Narein Das" reported in A.I.R. 1932 Lahore page 127 and contended that, it is the general rule of law that the partition should be done having regard to the possession of the parties. So, basing on the above averments made from both sides, now the question arises who is in possession over Item No. 4. The plaintiff and his sisters claim that they are in possession over the said house since a long time and on the other hand,

> the defendants 6 and 7 also claim possession over the said house. Only 3 houses are left out for allotment between the co-sharers. As a principle of equity when the defendants 6 and 7 sold 11 nos. of houses which is more than their share as per the value, they can only be allotted the item No.13 which has been valued at Rs.3,000/- to their shares. The Item No. 4 which is in the possession of the plaintiff is to be allotted to him and the other item No. 11 is allotted t o the sisters-defendants 1 to 3 which has been valued at Rs.5,000/-. The sisters defendants 1 to 3 have to get their shares worth Rs.23,709/- and it is defendants 6 and 7 have to compensate the balance amount. After allotting item No. 4 to the plaintiff, his share comes to Rs.50,250/-. But going through the argument advanced by the learned counsel of the plaintiff, it is forthcoming that both the plaintiff and his sisters jointly claim the said property for which, this court arrived at a conclusion that the item Nos. 4 and item No. 11 is to be allotted to them and the Item No. 13 to the defendants 6 and 7. So, as discussed above, this court decided that the Item Nos. 4 and 11 is allotted to the share of the plaintiff and his sisters and the Item No. 13 to the defendants 6 and 7. So, as per the above arrangement, the plaintiff and his sisters are getting the share value of Rs.55,250/- out of their share of Rs.63,224/-. So, the balance amount has to be compensated by the defendants 6 and 7 to the plaintiff and his sisters. So, accordingly, the allotment of 'B' schedule property between the parties is disposed of."

6. Learned counsel for the appellants submitted that the century old house described in Item no. 4 measures; 12 feet in width and 60 feet in length which is in a dilapidated condition. He submitted that the ground floor of the house is in possession of the defendant no. 7 and the first floor has been in possession of plaintiff as a trespasser by forcibly dispossessing the appellant no.1. He thus submitted that since the possession of the entire house has all along remained with the defendant nos. 6 and 7; now excepting that portion in which the plaintiff and others have trespassed, the residue property can very well be allotted to defendant no. 7. He submitted that the house property described in Item no. 13 was initially tenanted to one Laxman Mohapatro and the defendant nos. 6 and 7 having obtained an order of eviction, the tenant was evicted and then they have spent a sum of Rs.6.00 lakhs in the year 2000 for its renovation whereas the house property described in Item no. 11 of the schedule 'B' which measures 31' x 20' is a double storied house in good habitable condition and has been let out by the plaintiff, he is now in enjoyment of the rent. So, he submitted that the defendant no. 7 and others coming to succeed in place of defendant no. 6, have no objection, if the house property described in Item nos. 11 and 13 are allotted to the plaintiff and his sisters upon allotment of the house property described in Item no. 4 in favour of the defendant no. 7 and others who have come in after defendant no. 6.

7. Learned counsel for the respondents submitted all in favour of the order of allotment which has been passed by the court below. According to him, the approach of the court below has been just, proper and appropriate in the matter of specific allotment of those items of house property under Item nos. 4, 11 and 13 keeping in view the prevailing situations and all other relevant factors connected with the property concerning the parties.

8. The controversy in the present appeal appears to have boiled down to the allotment of the house property as described in Item no. 4 of the schedule 'B'. The court below has allotted the house property under Item nos. 4 and 11 to the plaintiff and his sisters and that in Item no. 13 to the defendant nos. 6 and 7. While doing so, having bestowed consideration upon the valuation aspect, the court below has further directed the defendant nos. 6 and 7 to compensate the plaintiff and his sisters to the tune of the differential as a measure of compensation by computing the share of the plaintiff and his sisters and finding the same to be still lesser when they are getting the house property under Item nos. 4 and 11 and accordingly, directing the defendant nos. 6 and 7 to pay a sum of Rs.7,974/- to the plaintiff and his sisters.

9. In case of partition of property amongst the co-sharers, especially in the matter of allotment of house property in consonance with their respective shares, normally the possession/ occupation of the parties, in case of their living and enjoying the property separately for quite a long length of time with certain addition and alternation is given due regard to. But then if it is not possible to maintain status quo even with little adjustment to this side or that; next endeavour is made for the allotment in such a manner that the possession / occupation, living and all other factors connected thereto are least disturbed so as to see that the parties are put to least inconvenience. But always it may not be so possible for various other factors standing on the way which cannot be exhaustibly described; there may remain some difference either in the area of the land, in the size of the house or in the floor space of the house etc. Looking at all such surrounding circumstances and attending factors, a view is taken as to how far the allotment of the house property would be made in division in favour of the co-sharers. Some time different methods are evolved suiting to the property as well as the parties as best as possible; as for instance, by assessing the valuation and accordingly compensating the parties getting lesser area/floor space/other aspects of convenience and inconvenience ignoring some trivial factors. So in these matters, there can be no fixed principle with formulation of straight jacket

formula. In my considered view it has to be a fair play in making the distribution in a fair and reasonable manner.

10. Adverting to the case in hand which has been running for more than five decades, by now, the parties are concerned with division and allotment of three houses described under Item no.4, 11 and 13. It stands undenied that the defendant nos. 6 and 7 have sold 11 numbers of houses which far exceeds their total share. The court below has found that as per the value, they cannot be allotted with Item no. 13 having been left with the valuation of Rs.3000/- as residue towards their shares. For the same, the house under Item no. 4 even though taken to be in possession of the defendant nos. 6 and 7 taking possession of a part now remaining with the plaintiff to be even by the defendant nos. 6 and 7 by accepting the case of the defendant nos. 6 and 7 that the plaintiff had trespassed over the same; the question of allotment of that very house property under Item no. 4 to defendant nos. 6 and 7 to the exclusion of others stands altogether ruled out as it is wholly inequitable, as admittedly the defendant nos. 6 and 7 from time to time have sold the house property, more than their share ignoring the right and interest of others for obvious purpose and reason. Thus said claim of defendant nos. 6 and 7 for allotment of the house property under Item no. 4 per se is untenable. In my considered view first of all no equitable consideration can come to stand for that and secondly, these defendant nos. 6 and 7 do not deserve the same for their own conduct having not done the equity cannot seek the equity. The court below, therefore is seen to have not committed any error in declining the claim of the defendant nos. 6 and 7 for allotment of house property under Item no. 4 simultaneously, allotting the property under Item no. 13 to them. The claim of the defendant nos. 6 and 7 seeking allotment of the house property under Item no. 4 and challenging the allotment of the same in favour of the plaintiff and his sisters clearly appears to be unjust, unreasonable and inequitable and thus does not merit consideration. Furthermore, while questioning the allotment of the house property under Item no. 4 in favour of the plaintiff and his sisters and seeking allotment of the same to them, no such clear picture is given in the objection nor thereafter at any point of time to show that the allotment of the house property under Item nos. 11 and 13 to the plaintiff and his sisters is not in consonance with their shares. It has also not been shown that in case of allotment of the house property under Item no. 4 to the defendant nos. 6 and 7 as to how the loss/deprivation to the plaintiff and his sisters would be made good of and under what other equitable consideration/way, the plaintiff and

his sisters would be treated so as to see that even though not property wise, but in what other way, the reduction of the available area or the space in the house property within the allottable share of the plaintiff and his sisters can be provided with justifications. In such type of objection, as has been raised by the defendant nos. 6 and 7 in relation to the house property, it is imperative that while objecting the allotment of those properties in favour of others, such objectors should clearly come out with a detail description to satisfy the court in showing that in case of acceptance of their prayer as to the allotment, the interests of all others are still taken care of and if any such deprivation, how it is proposed to be redressed or taken care of to remove the same providing strong justification for the particular allotment as asked for. In the absence of all the above, mere raising of an objection as to the allotment property is to be presumed to be for the purpose of delaying the process or to make other gains and derive sadistic pleasure.

Keeping in view the submissions, given a careful reading to the impugned order as quoted above and as per the discussion made, further bestowing anxious and thoughtful considerations covering the subject, this Court finds nothing wrong in the impugned order as to the allotment of the house property, necessitating interference in this appeal.

Accordingly, this appeal is to fail.

11. Resultantly, the appeal is dismissed. In the facts and circumstances, no order as to cost is passed.

2019 (I) ILR - CUT- 381

D.DASH, J.

R.S.A. NO. 239 OF 2006

DURGA DAS DEY & ORS. ……..Appellants.

.Vs.

JATINDRANATH GIRI & ORS. ……Respondents.

CODE OF CIVIL PROCEDURE, 1908 – Section 100 – Second appeal – Plaintiff alleged that the defendants having no right, title, interest and possession over the land caused problem in his peaceful possession of the suit land when he wanted to repair ridge – The suit filed for seeking various relieves – When can be granted ? – Held, the settled position of law is that for the purpose, the plaintiffs have to stand on

their own and they cannot take advantage of the weakness of the case of the defendants or their omissions.

"The lower appellate court has found the boundaries mentioned in the sale-deed of the respective parties to be not in order and that to, the same to have been differently stated in the evidence let in by the plaintiffs. The deed i.e. the Panchayat Patra, Ext-3 having been gone through, the boundaries as mentioned therein have been taken note of. From that, the lower appellate court has taken the view against the plaintiffs in establishing the nexus between the land as described in the sale deed which is the foundation of their case and the land in suit as stated in the plaint schedule. During hearing, although, it is stated that the appellants had filed the deed in question as has been referred to in the order of the settlement authority in one objection case so as to be taken as additional evidence, in my considered view even upon acceptance of the same as additional evidence, there would not have made any such improvement in their case so as to cast any such significant impact on the conclusion as regards non-establishment of the nexus as aforesaid. The lower appellate court has further gone to examine the documents i.e. the sale-deed in favour of defendant no. 1 to 5 with reference to the boundary of the land as finds mention therein. It has further found the oral evidence to be also inadequate to reach at a conclusion/ finding regarding possession. It has been said that the boundaries by different parties are differently stated in their respective sale deeds which are inconsistent and that the evidence of possession as laid by the parties do not land them in a place so as to be favoured with a conclusive finding in that regard. On going through the evidence on record, this Court does not find any reason or justification to accord its disagreement with the conclusion arrived at by the learned appellate court that the sale-deeds of the parties do not properly relate to the stated field position." *(Para 11)*

For Appellants : M/s. S.P. Misra, S. Dash, S. Misra, B. Mohanty, S. Nanda.

For Respondents : xxx xxx xxx xxx

JUDGMENT Date of Hearing: 23.07.2018 Date of Judgment 19.11.2018

D.DASH, J.

This appeal under section 100 of the Code of Civil Procedure (for short, called as 'the Code') has been filed by the unsuccessful plaintiffs of the suit i.e. T.S. Nos. 56/62 of 2005/2006, after having been unsuccessful in the appeal under section 96 of the Code carried by them assailing the judgment and decree passed by the trial court, dismissing their 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.

The plaintiffs' case in short is that the suit land originally belongs to one Gobardhana Das and the same as such stood recorded in his name in the settlement of the year 1930. Gobardhana Das was survived by his two sons Narayan and Nandan. It is stated that during their lifetime, they had separated themselves both in mess and estate and each one had been in separate possession and enjoyment of the properties in accordance with their half share. It is the further case of the plaintiffs that Pranakrushna son of Narayan sold the suit land by registered sale-deed to the original plaintiff and accordingly, he was in possession of the same as its owner having right, title and interest which is now with the present plaintiffs. They also state that the other son of Nanda sold his half share to Lamikanta, the father of the defendant no. 6 and 7 by another registered sale-deed. There was a boundary dispute, so the original plaintiff and Laxmikanta had caused a demarcation of the land and then a deed had come into being and accordingly, each possessed their respective half as allotted therein. The original plaintiff had alleged that the defendant no. 1 to 5 without any right, title, interest and possession over the land involved in the suit caused problem in the his peaceful possession of the suit land when he wanted to repair his ridge. This incident gave rise to the cause of action to file the suit.

The defendant no. 1 to 5 while traversing the plaint averments stated that one Baidhar Das Adhikari had purchased the land in the year 1920 from Gobardhana Das by registered sale-deed and was in possession of the same. He sold the land to Narendra, the father of the defendant no. 1 to 5 by registered sale-deed dated 27.07.1940. Accordingly the possession being delivered, presently the defendant no. 1 and 5 are in possession of said land which has also been mutated. They claim to be paying land revenue to the State and their possession is stated to be open and to the knowledge of the plaintiffs. In that way, they also alternatively claim to have perfected possessory title over the land in suit. The sale-deed is stated to have been in connection with a loan taken by the ancestors of the defendants from the original plaintiff, who was a money lender.

The defendant no. 6 and 7 also denied the plaint averments and their case is that, their father Laxmikant purchased the entire land including the suit land described in Schedule -"Ka" of the plaint from Nandan and so they are in possession.

4. The suit had once been dismissed by the trial court. The plaintiffs then preferred an appeal which was allowed and the suit was remanded to the

trial court with an observation that the sale-deed in favour of the defendant no. 1 to 5 is not valid. This was questioned by the defendant no. 1 to 5 by filing Misc. Appeal No. 236 of 1992 before this Court. The appeal stood disposed of by order dated 07.07.1994. The observation of the learned District Judge having been quashed, the suit was remanded to the court below without interference with that remand order of the learned District Judge. The trial court was directed to record finding as to the title in respect of the disputed land that it rests with whom and also to find out as who is in possession of the suit land as also to look into another aspect as to if the suit is hit under the provision of section 34 of the Specific Relief Act. It had been further directed that permission is so sought for to adduce additional evidence, be considered in accordance with law.

On remand, the defendant no. 6 and 7 filed written statement. The trial court proceeded to take a decision first on issue no. 4, i.e. whether the plaintiffs have any right, title and interest over the suit land. The answer upon evaluation of evidence in the touchstone of the pleading has been in the negative. The trial court has further held that the defendant no. 1 to 5 have failed to establish the identity of the plots of land transferred by Baidhar Das to their ancestors. Similarly, the trial court's finding has not gone in favour of the defendant no. 6 and 7 in so far as the title and possession of the suit land are concerned.

The unsuccessful plaintiffs having carried the first appeal to the court of learned District Judge, Balasore, the same came to be decided by the learned Adhoc Additional District Judge, Balasore in Title Appeal No. 56/62 of 2005/2004. The lower appellate court has dismissed the appeal. So the present move is to set aside the judgments and decrees of the courts below.

5. Learned counsel for the appellants submitted that the trial court has not gone to decide the suit in consonance with the order of remand as had been finally directed by this Court in Misc. Appeal No. 236 of 1992. He submits that when all the directions have not been complied with by the trial court; the same has also been overlooked by the lower appellate court. He further submitted that the trial court is not right in deciding the suit after remand without recasting the issues and framing specific issues strictly in consonance with the order of remand. It was submitted that although the said contention had been raised before the lower appellate court, the same has not been touched and considered in its true perspective and therefore, the ultimate result of dismissal of the suit cannot stand. He further submitted that

the lower appellate court has erred in law in disposing the appeal without duly considering the application filed by the plaintiff under order 41 rule -27 of the Code.

6. In the present suit, the plaintiffs in order to get the reliefs as have been prayed for are under definite legal obligation to establish their title over the suit land and accordingly, the right to possess the same without any interference from the defendants.

The settled position of law is that for the purpose, the plaintiffs have to stand on their own and they cannot take advantage of the weakness of the case of the defendants or their omissions. The lower appellate court has found the boundaries mentioned in the sale-deed of the respective parties to be not in order and that to, the same to have been differently stated in the evidence let in by the plaintiffs. The deed i.e. the Panchayat Patra, Ext-3 having been gone through, the boundaries as mentioned therein have been taken note of. From that, the lower appellate court has taken the view against the plaintiffs in establishing the nexus between the land as described in the sale deed which is the foundation of their case and the land in suit as stated in the plaint schedule. During hearing, although, it is stated that the appellants had filed the deed in question as has been referred to in the order of the settlement authority in one objection case so as to be taken as additional evidence, in my considered view even upon acceptance of the same as additional evidence, there would not have made any such improvement in their case so as to cast any such significant impact on the conclusion as regards non-establishment of the nexus as aforesaid. The lower appellate court has further gone to examine the documents i.e. the sale-deed in favour of defendant no. 1 to 5 with reference to the boundary of the land as finds mention therein. It has further found the oral evidence to be also inadequate to reach at a conclusion/ finding regarding possession. It has been said that the boundaries by different parties are differently stated in their respective sale deeds which are inconsistent and that the evidence of possession as laid by the parties do not land them in a place so as to be favoured with a conclusive finding in that regard. On going through the evidence on record, this Court does not find any reason or justification to accord its disagreement with the conclusion arrived at by the learned appellate court that the sale-deeds of the parties do not properly relate to the stated field position.

For the aforesaid, the submission of the learned counsel for the appellants fails and this Court finds that no substantial question of law

surfaces in the case for being answered in the appeal. In that view of the matter, the appeal does not merit admission.

12. Resultantly, the appeal stands dismissed and in the facts and circumstances without cost.

2019 (I) ILR - CUT- 386

B. RATH, J.

O.J.C. NO. 14212 OF 1999

BASANTA KUMAR SAHOO .....Petitioner

.Vs.

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

GRANT-IN-AID – Claim of – Petitioner appointed on 13.08.1984 – Entitlement of the benefit of salary components – Held, since the College became an aided educational institution with effect from 1.11.1985 as per Section 3(b) of the Orissa Education Act with clear recording that the entire Institution attained the character of an aided educational institution with effect from 1.11.1985, the consideration for extending the grant-in-aid to the petitioner is required to be seen taking into account the date of creation of the post and looking to the statutory requirement concerning the provision for benefit of the grant-in-aid to an employee.

"Now coming to the question of entitlement of grant-in-aid to the employees, this Court finds, from the series of judgments produced by the learned senior counsel for the petitioner, this Court has time and again considering the aspect that the Institution has got the character of aided educational institution since 1.11.1985 has repeatedly observed that the period of five years for entitlement of grant-in-aid is to be computed from the date of creation of the post and not from the date of appointment of the individual. In deciding a case involving Smt. Bilasini Sahoo vrs. State of Orissa (O.J.C. No.2901/1990) a Division Bench of this Court on the aegis of the then Chief Justice accepted the contention of Sri Rath, learned senior counsel appearing therein and directed the O.P.1 therein to make available 1/3rd of grant-in-aid attached to the post from 1.6.1988 and consequently directed for releasing of 2/3rd and full salary accordingly. Again deciding the case involving Birendra Kumar Mishra vrs. State Orissa (O.J.C. No.5549/92) and relying on the decision in the case of Bilasini Sahoo, this Court again reiterated the same view. This issue was again involved in another Division Bench proceeding involving Nimain Charan Sahoo arising out of O.J.C. No.2203/1996 reported in 1997(I)OLR 530, this Court in re-affirmation of the view taken in the case of Bilasini Sahoo for the observations therein that the post of Lecturer in English in the particular College being created on

9.12.1985 and since the post is existing uninterruptedly, made the petitioner therein entitled to 1/3rd grant-in-aid, 2/3rd grant-in-aid and full salary on completion of five, seven and nine years respectively from the date of creation of the post."

(Para 7 & 8)

Case Laws Relied on and Referred to :-

1. (O.J.C. No.5549/1992 : Birendra Kumar Mishra .Vs. State of Orissa.
2. (O.J.C. No.2901/1990 : Smt. Bilasini Sahoo .Vs. State of Orissa & Ors.
3. 1997(I) OLR-530 : Nimain Charan Sahoo .Vs. State of Orissa & Ors.

For Petitioner : M/s.J.K.Rath, Sr.Advocate, B.N.Sarangi, N.C.Das, S.N.Rout, P.K.Rout & S.Mishra

For Opp.Parties : M/s. K.K.Mishra, Additional Govt Adv. G.K.Mishra & B.Priyadarshi

JUDGMENT Date of Hearing : 22.06.2018 Date of Judgment : 06.07.2018

B. RATH, J.

Filing the writ application, the petitioner has made a prayer for Mandamus to O.P.2 to modify the recommendation made in Annexure-8 thereby permitting the petitioner to be eligible to receive grant-in-aid @ 1/3rd with effect from 1.6.1988 instead of 1.6.1990 and the subsequent salary component @ 2/3rd with effect from 1.6.1990 and full salary cost with effect from 1.6.1992, in the process to modify also the order at Annexure-9 to that effect and further to calculate all arrears for change of such date of eligibilities and release the arrear dues within a stipulated time and further to release the current salary of the petitioner in accordance with Rule-9 of the Recruitment Rules, 1974.

2. Short background involved in the case is Rajsunakhala College at Rajsunakhala was established in the educational session, 1978-79 having Arts and Commerce streams with approval of the competent authority. Science stream for the Rajsunakhala College was opened in the year 1983. In the meantime, all the streams involving the said College received grant-in-aid from the State. Thus the College is an aided educational institution within the meaning of Section 3(b) of the Orissa Education Act, 1969. The petitioner having secured First Class in the Post Graduate Examination and having been duly selected by the Selection Committee of the College was appointed as a Lecturer in Physics in the O.P.3-College by virtue of an appointment order issued by O.P.3-College on 13.8.1984. The petitioner joined as a Lecturer against the first post of Physics. While the petitioner was continuing as such, he alleged that on account of grudge borne by the Secretary of the Governing Body, he faced a proceeding initiated against him. The petitioner was

suspended in the process. Challenging the proceeding, the petitioner finding no ray of hope filed a writ application bearing O.J.C. No.2898/1989. In the meantime, the petitioner was terminated pending decision in the aforesaid writ application. The above numbered writ application thus became infructuous and disposed of as infructuous. In the meantime, the petitioner filed O.J.C. No.1437/1991 challenging the order of his dismissal. This writ application was decided in favour of the petitioner on 22.9.1993 with a direction to reinstate the petitioner in service with all his service benefits. In the meantime, O.P.3-College moved a Civil Review registered as Civil Review No.19/94. This Review application was finally rejected by this Court, vide order at Annexure-3 thereby confirming the judgment of this Court passed in O.J.C. No.1437/91, consequent upon which the petitioner was permitted to join in the post of Lecturer in Physics on 17.2.1997 and the petitioner is continuing as such. The petitioner alleged that in spite of there being a direction of this Court to provide benefit of continuance of service to the petitioner pursuant to this direction in O.J.C. No.1437/91 and the petitioner since entitled to salary component for the first post of Lecturer in Physics with effect from the date such post was due to get grant-in-aid, unfortunately even though such benefit was provided to many of the employees working in the same Institution, the petitioner was debarred from the same. It is also alleged that the petitioner was also not granted salary in terms of Rule-9 of the Recruitment Rules, 1974. The petitioner made a representation. The representation even though filed for consideration has not yielded any result as of now.

It is while the matter stood thus, the service of the petitioner was approved with effect from 1.6.1990 and by communications under Annexures-8 & 9 the petitioner instead of being granted at appropriate rate on completion of five years in the post the petitioner was holding, the petitioner was made entitled to the grant-in-aid at a subsequent date.

3. Sri J.K.Rath, learned senior counsel for the petitioner bringing to the notice of this Court a case of a similarly situated person, namely Trilochan Sathua appointed in the post of Lecturer in Mathematics on 18.8.1984 but was granted grant-in-aid from the subsequent date, approached this Court, vide O.J.C. No.15384/1998 for necessary direction to the competent authority to release necessary salary component involving grant-in-aid from 1988, submitted that this Court while allowing the writ application, vide Annexure-10 directed that said Sathua was entitled to 1/3rd grant-in-aid with effect from

1.6.1988, 2/3rd from 1.6.1990 and full salary from 1.6.1992. Pursuant to the direction of this Court in the aforesaid writ petition, said Sathua has been given the benefit in terms of the direction of this Court treating the post Sri Sathua was holding became eligible to grant-in-aid on completion of five years from the date of creation of the post. Sri Rath, learned senior counsel for the petitioner further taking this Court to several decisions both reported and unreported involving ***Birendra Kumar Mishra vrs. State of Orissa*** (O.J.C. No.5549/1992 disposed of on 24.9.92, ***Smt. Bilasini Sahoo vrs. State of Orissa & others*** (O.J.C. No.2901/1990 disposed of on 7.5.1992 and a reported decision involving ***Nimain Charan Sahoo vrs. State of Orissa & others*** reported in 1997(I) OLR-530 contended that the decisions of the competent authority involving Annexures-8 & 9 not only run contrary to the spirit of the statutory provision entitling one to the grant-in-aid but also remain contrary to the repeated decisions of this Court indicated herein above. It is in the above premises, Sri Rath, learned senior counsel for the petitioner prayed this Court for interfering in the impugned orders and issuing suitable directions in favour of the petitioner.

4. Sri G.K.Mishra, learned counsel for the O.P.3-College simply closed his submission while supporting the stand of the petitioner submitted that they have no objection to the claim of the petitioner.

5. Sri K.K.Mishra, learned Additional Government Advocate for O.Ps.1 & 2, on the other hand, going completely away from the stand taken by O.P.1 in its counter affidavit by O.P.1 admitted the petitioner to have joined as Lecturer in Physics in Rajsunakhala College on 13.8.1984 further admitting that the Science stream in the College was opened in 1983 and also admitting that O.P.3-College is an aided educational institution within the meaning of Section 3(b) of the Orissa Education Act, 1969 with effect from 1984-85 but however strongly relying on the reply affidavit filed by O.P.2, when O.P.2 even though admitted the date of joining of the petitioner and the date of coming into force of the Science stream in the O.P.3-College but however on the premises that there is a dispute so far as it relates to the joining of the petitioner, particularly for the fact available on record that previous to joining of the petitioner, one Pratibha Panigrahi was continuing in the post of Lecturer in Physics since 17.7.1983, the date of creation of the post and ultimately relinquished her post on 17.9.1989. In the circumstance, Sri K.K.Mishra, learned Additional Government Advocate contended that joining of the petitioner in the post of Lecturer in Physics on 13.8.1984

remains doubtful. Sri Mishra further contended that both the petitioner and O.P.3-College joined hands in suppression of such material facts and it is under the circumstance, Sri Mishra contended that for the petitioner's joining subsequently, he is not entitled to grant-in-aid upon completion of five years from the date of creation of the post on 17.7.1983. It is in the above premises, Sri Mishra, learned Additional Government Advocate contended that none of the decisions cited at Bar has any application to the case at hand.

6. Before proceeding to consider the rival contentions of the parties and the findings of this Court on merit, this Court first records the undisputed submission of the parties in contest remain that there is no dispute that O.P.3-College was originally brought up in 1978-79 with only having Arts and Commerce stream in Intermediate Post. Science stream in the College was opened in 1983-84 with Mathematics as well as Physics as subject in the education year 1983-84. The College also became an aided educational institution within the meaning of Section 3(b) of the Orissa Education Act, 1969 with effect from education year 1983-84, as clearly admitted by O.P.1 in paragraph-2 of its counter affidavit dated 29.12.2005.

Now coming to the disposal of the previous writ application at the instance of the petitioner, vide O.J.C. No.1437/1991, this Court finds, in filing the writ application the petitioner had challenged his disengagement from service by O.P.3-College. This writ application was disposed of allowing thereby in favour of the petitioner by judgment dated 22.9.1993 with the following direction :-

> "….. In the aforesaid premises, the termination of service of the petitioner is set aside and opposite party no.3 is directed to take back the petitioner in service. The order of reinstatement shall be passed within a period of one month from the date of receipt of this Court's order. The petitioner shall be entitled to all service benefits which shall be borne by the Governing Body, if it be a case where for the post in question no grant-in-aid was available to the College to which effect an averment has been made in Paragraph 3 of the counter affidavit filed on behalf of Opp. Party Nos.1 & 2."

On filing of a review application by OP.3 challenging the judgment of this Court in the aforesaid writ application, vide Civil Review No.19/1994, the Civil Review was also decided on contest of the parties, vide judgment dated 22.9.1993 as appearing at Annexure-3 with the following direction :-

> "9. Considering the above facts we are not inclined to accept the allegation of Shri Patnaik that opposite party no.3 filed O.J.C. No.1437 of 1991 suppressing material facts or by furnishing misleading facts.

> 10. For the reasons stated above, we do not find any merit in any of the points urged by Shri Patnaik in support of the review. Accordingly, we dismiss this petition being devoid of merit.
>
> 11. Before parting with the case, we may note here that opposite party no.3-Basanta Kumar Sahoo was appointed as a lecturer on 18.8.1987 in Ramamani Mahavidyalaya, Kantabada and has been continuing there since then. We consider it expedient to state that in the event of his joining in Rajsunakhala College pursuant to this judgment, he would not be entitled to any remuneration for the period he remained in service in the aforesaid college at Kantabada. He would only be entitled to the benefit of continuity of service in Rajsunakhala College for the purpose of counting seniority and other service benefits. The Director, Higher Education will also consider the case of the petitioner- Usharani Pradhan for being appointed as lecturer in some other college because of her impending dislodgement following the reinstatement of opposite party no.3- Basanta Kumar Ssahoo in Rajsunakhala College."

7. Reading the judgment in the writ application and the judgment in the Review Application, this Court finds, all through the petitioner is claiming that his initial appointment in the O.P.3-College is as per the appointment order, vide Annexure-1 is 13.8.1984, which fact has not been assailed or disputed by any concern at any point of time. This Court, therefore, observes, it is too late for the O.P.1 to raise any objection with regard to the date of appointment of the petitioner in the O.P.3-College. For the clear direction of this Court in disposal of O.J.C. No.1437/1991 and Civil Review No.19/94 granting the benefit of continuity of service, this Court observes, the question of date of joining of the petitioner is not available to be re-opened any further. Hence, the consideration for extending the grant-in-aid to the petitioner is now required to be seen taking into account the date of creation of the post looking to the statutory requirement concerning the provision for benefit of the grant-in-aid to an employee. Question of grant-in-aid whether from the date of completion of five years or from the date of creation of the post was the subject matter in the writ application already disposed of by this Court also involving the case of one of the co-employees in the same Institution decided by this Court, vide Annexure-10 appended to the writ application. In deciding the proceeding, vide Annexure-10, this Court has already accepted the stand of the State therein that the Rajsunakhala College became an aided educational institution with effect from 1.11.1985 as per Section 3(b) of the Orissa Education Act with clear recording that the entire Institution attained the character of an aided educational institution with effect from 1.11.1985.

8. Now coming to the question of entitlement of grant-in-aid to the employees, this Court finds, from the series of judgments produced by the learned senior counsel for the petitioner, this Court has time and again considering the aspect that the Institution has got the character of aided educational institution since 1.11.1985 has repeatedly observed that the period of five years for entitlement of grant-in-aid is to be computed from the date of creation of the post and not from the date of appointment of the individual. In deciding a case involving Smt. Bilasini Sahoo vrs. State of Orissa (O.J.C. No.2901/1990) a Division Bench of this Court on the aegis of the then Chief Justice accepted the contention of Sri Rath, learned senior counsel appearing therein and directed the O.P.1 therein to make available 1/3rd of grant-in-aid attached to the post from 1.6.1988 and consequently directed for releasing of 2/3rd and full salary accordingly. Again deciding the case involving Birendra Kumar Mishra vrs. State Orissa (O.J.C. No.5549/92) and relying on the decision in the case of Bilasini Sahoo, this Court again reiterated the same view. This issue was again involved in another Division Bench proceeding involving Nimain Charan Sahoo arising out of O.J.C. No.2203/1996 reported in 1997(I)OLR 530, this Court in re-affirmation of the view taken in the case of Bilasini Sahoo for the observations therein that the post of Lecturer in English in the particular College being created on 9.12.1985 and since the post is existing uninterruptedly, made the petitioner therein entitled to 1/3rd grant-in-aid, 2/3rd grant-in-aid and full salary on completion of five, seven and nine years respectively from the date of creation of the post.

9. This Court in the above circumstances finds, there remains no dispute with regard to the entitlement of grant-in-aid to the petitioner at appropriate rate on the post existing for five years and has nothing to do with the date of appointment of different individuals. The decision referred to herein above has direct application in the petitioner's case. This Court, therefore, interfering with the impugned orders at Annexures-8 & 9 directs the O.Ps.1 & 2 to treat the entitlement of the petitioner to 1/3rd grant-in-aid, 2/3rd grant-in-aid and full salary with effect from 1.6.1988, 1.6.1990 and 1.6.1992 respectively by issuing a fresh order of entitlement of grant-in-aid in favour of the petitioner in supersession of the order at Annexures-8 & 9 within a period of one month from the date of this judgment. O.Ps.1 & 2 are directed to compute the arrear entitlement of the petitioner within a further period of one month and release the same with 6% interest per annum in favour of the petitioner within a further period of one month thereafter. The writ application succeeds. No cost.

2019 (I) ILR - CUT- 393

B. RATH, J.

W.P.(C) NO.14271 OF 2018

LOKANATH PATTANAIK .....Petitioner

.Vs.

SANJAY KUMAR RATSINGH & ANR. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 227 – Writ petition – Challenge is made to an order passed in an election dispute rejecting an application seeking to summon one Officer of Orami Service Cooperative Society for production of certain loan documents – Materials support the petitioner's plea of requirement of such documents – Rejection on the ground of technicalities – Held, law has been fairly well settled that it is ultimately the duty of the court to see effective adjudication of the proceeding and no such application should be rejected on account of mere technicalities – Courts have also gone to the extent observing that in the event there is any prejudice to any of the parties for unnecessary dragging of the proceeding, their difficulty can be mitigated by way of cost.

For petitioner : M/s.D.Das, S.S.Pattanaik & N.P.Pattanaik
For Opp. Parties : M/s.B.P.Das, S.N.Das, D.Mohanty, S.Samal & A.Pattnaik, Mr.B.Behera,A.S.C.

JUDGMENT Date of Hearing & Date of Judgment : 03.12.2018

B. RATH, J.

This writ petition is filed assailing the order dated 2.5.2018, vide Anenxure-1 thereby rejecting an attempt of O.P.1 therein, the petitioner herein with a prayer to summon the Director of concerned Zone of Orami Service Cooperative Society for production of documents involving the petitioner therein, Sri Lokanath Pattanaik and for appropriate evidence. Rejection of such application gave rise to a cause of action in favour of the present petitioner to approach this Court.

2. Assailing the impugned order, Sri S.S.Pattnaik, learned counsel for the petitioner taking this court to the grounds contained in the application considered therein and the dispute involved in the Election Case contended that both calling of the loan document as well as the deposition of evidence involving the loan concerning Lokanath Pattnaik is relevant for the purpose of effective adjudication of the Election dispute involved herein. Taking this Court to the ground of rejection by the trial court, Sri Pattnaik, learned counsel for the petitioner submitted that even assuming that the petitioner had

got the scope of calling for the document and having a scope of evidence through the witness already examined in oaths considering effective adjudication of the Election dispute, the trial court would have given an opportunity of recalling the witnesses already examined for the purpose involved herein. It is thus contended that the impugned order becomes bad and unless the impugned order is interfered with and the petitioner is provided with an opportunity of calling for the loan document and leading evidence in the said regard through the witnesses already examined, the petitioner will be seriously prejudiced and there may not be any effective trial of the Election dispute involved herein.

3. To his opposition, Sri S.N.Das, learned counsel for the contesting opposite party bringing the stage of the proceeding at the relevant moment contended that not only the petitioner lacked in making such endeavours through the witnesses already examined but looking to the situation that the Election proceeding is pending at argument stage providing such opportunity at this stage of the matter will be affecting the contesting opposite party and the attempt of the petitioner appears to be an attempt to linger the disposal of the Election dispute.

4. Considering the rival contentions of the parties and looking to the nature of the dispute involved herein, further for already raising the allegations involving Lokanath Pattanaik with regard to have some loan outstanding at the time of Election involved herein, this Court observes, the petitioner's case would be heavily dependent on such materials being placed. It is observed that though the petitioner failed in his attempt or endeavour in bringing such document and bringing evidence involving such document at appropriate stage, taking into consideration that since the Election dispute is still pending final adjudication, difficulty, if any, to be faced by the contesting opposite party can be mitigated by way of cost in the interest of justice and to have a fair contest, petitioner's attempt should have been viewed seriously.

5. Law has been fairly well settled that it is ultimately the duty of the court to see effective adjudication of the proceeding and no such application should be rejected on account of mere technicalities. Courts have also gone to the extent observing that in the event there is any prejudice to any of the parties for unnecessary dragging of the proceeding, their difficulty can be mitigated by way of cost.

6. In the process, for the observation made herein and as this Court finds, depriving the petitioner from bringing the document desired for and

leading evidence involving such document will in fact land in no effective adjudication of the Election dispute. In the circumstance, this Court while observing that there is no proper consideration of the issue involved by the trial court involving the Election Petition No.5/2017 sets aside the order at Annexure-1. This Court while allowing the application at the instance of the present petitioner for summoning the Orami Service Cooperative Society for production of loan document involving Lokanath Pattanaik permits the petitioner to lead evidence involving such document with liberty to the contesting opposite party for having his/their objection and/or cross-examination involving such document, if any. Considering the suffering of the contesting opposite party for the dragging of the litigation for his fault of him, the order passed herein will be however subject to imposition of cost of Rs.3000/- (rupees three thousand), which will be paid by the petitioner to the contesting opposite party in the court below. The attempt of summoning the document and re-examination of the witnesses already examined at the instance of the petitioner will be concluded within a period of two months and the trial involving Election Petition No.5/2017 shall also be concluded within a period of two months thereafter.

7. The writ petition succeeds but however with the cost as indicated herein above.

2019 (I) ILR - CUT- 395

B. RATH, J.

W.P. (C) NO. 18636 OF 2018

PRASANTA KUMAR SAHOO .....Petitioner

.Vs.

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

ORISSA GRAMA PANCHAYAT ACT, 1964 – Section 115 – Suspension and removal of Sarpanch, Naib-Sarpanch and member – Petitioner an elected Sarpanch suspended on 30.10.2018 on contemplation of initiation of a proceeding – Writ petition filed immediately challenging the order of suspension – Scope of interference – Held, ordinarily the Court should not interfere with the order of suspension unless they are passed mala fide and without there being prima facie material on record involving the person suspended.

Case Laws Relied on and Referred to :-

1993(4) SLR 543 : U.P. Rajya Krishi Uptadan Mandi Parishad, Sanjib Rajan.

For petitioner : M/s. Pitambar Acharya, Sr.Advocate, S.Rath,A.Satpachy,G.Patra, A.K.Tripathy, S.S.Tripathy & R.Tripathy.

For Opp. Parties : Miss.Samapika Mishra, A.S.C.

JUDGMENT Date of Hearing: 29.11.2018 Date of Judgment:17.12.2018

B. RATH, J.

This writ petition involves a challenge to the order of suspension passed by the competent authority on 30.10.2018, appearing at Annexure-1.

2. Short background involved in the case is that petitioner was an elected Sarpanch of Khannagar Grama Panchayat under Dasarathpur Block in the election held in March, 2017. Petitioner claimed to have the support of the opposite party. Assailing the order at Annexure-1, the petitioner alleged that for the political opposition of the petitioner to the ruling party in the State, the candidates sponsored by the ruling party after losing the election in connivance and with aid of the government officials hatching conspiracy with ulterior motive in issuing the suspension order. On the premises that the suspension order is not disclosing any reason of suspension, further being a cryptic and vague order in absence of any disclosure on satisfaction of either of the grounds enumerated under Section 100(1) of the Orissa Grama Panchayat Act, 1964. Therefore, Sri Acharya, learned senior counsel appearing for the petitioner challenging the minor suspension order involved herein, taking this Court to the provision at Section 115 (1) and (2) of the Act contended that the attempt of the State authority in placing the petitioner under suspension is an indicator of political vendetta. On the premises of non-disclosure of any reason and for not providing the petitioner an opportunity before passing such order, Sri Acharya, learned senior counsel claimed that the impugned order since arbitrary and invalid for remaining contrary to the provisions contained in Section 115 of the Act should be interfered with and set aside. Sri Acharya, learned senior counsel further contended that once the petitioner becomes an elected representative, prevention of the petitioner from discharging his responsibility of Sarpanch will be amounting to affect the right involved with the petitioner involving a Grama Panchayat election, being an elected representative.

3. Miss. Samapika Mishra, learned Additional Standing Counsel in her opposition to the submission of Sri Acharya, taking this Court to the provision at Section 115 (2) of the Orissa Grama Panchayat Act and the suspension order at Annexure-1, contended that for the power of the competent authority under sub-Section (2) of Section 115 of the Grama Panchayat Act, further the suspension order having only been passed on 30.10.2018 on contemplation of initiation of a proceeding involving the petitioner, it is not the time to interfere in such order. Miss. Mishra, further also contended that looking to the time gap between moving of the petitioner to this Court at this stage is also otherwise premature.

4. Considering the pleadings and rival plea of the respective parities, this Court looking to the impugned order finds the impugned order has been passed by the competent authority on exercise of power under Section 115(2) of the Grama Panchayat Act, 1964. Looking to the provision contained in Section 115 (1) and (2) of the Orissa Grama Panchayat Act, this Court finds the provision reads as follows:

> **115. Suspension and removal of Sarpanch, Naib-Sarpanch and member:** (1) If the State Government, on the basis of a report of the Collector or the Project Director, District Rural Development Agency, or suo motu are of the opinion that circumstances exist to show that the Sarpanch or Naib-Sarpanch of a Grama Panchayat willfully omits or refuses to carry out or violates the provisions of this Act or the rules or orders made thereunder or abuse the powers, rights and privileges vested in him or acts in a manner prejudicial to the interest of the inhabitants of the Grama and that the further continuance of such person in office would be detrimental to the interest of the Grama Panchayat or the inhabitants of the Gram, they may after giving the person concerned reasonable opportunity of showing cause remove him from the office of Sarpanch or Naib-Sarpanch, as the case may be.
>
> (2) The State Government may, pending initiation of the proceeding on the basis of their opinion under Sub-section (1), by order, for reasons to be recorded in writing, suspend the Sarpanch or Naib-Sarpanch, as the case may be, from the office.

Reading of the aforesaid provision, provision at 115 (1) while permitting the competent authority to remove a Sarpanch or Naib-Sarpanch on being satisfied with the grounds indicated therein, Section 115 (2) authorizes a competent authority to suspend the Sarpanch or Naib-Sarpanch pending initiation of the proceeding on the basis of their opinion under Sub-section (1) by an order and for the reasons to be recorded in writing. At this stage, on perusal of the suspension order, this Court finds the suspension order is an indicator of prima facie reason recorded in writing so as to the

action of the Sarpanch are prejudicial to the interest of the inhabitants of the Grama. It is at this stage, this Court looking to the decision of Hon'ble Apex Court involving ***U.P. Rajya Krishi Uptadan Mandi Parishad, Sanjib Rajan,*** *vide 1993(4) SLR 543*, finds ordinarily the Court should not interfere with the order of suspension unless they are passed mala fide and without there being prima facie material on record involving the person suspended.

5. It is for the reasons indicated therein and for the order of suspension being passed in contemplation of initiation of a disciplinary proceeding under Sub-section (1) of Section 115 of the said Act, even though this Court finds that the petitioner is an elected representative and by the action of the competent authority, the right of an elected representative has been curtailed, but however, the action having been taken by the competent authority pending initiation of disciplinary proceeding and further keeping in view the time gap in between, this Court finds the move of the petitioner assailing the impugned order at Annexure-1 becomes premature. Dismissal of the writ petition at this stage, on being premature, shall not curtail the right of the petitioner to move this Court in the event no disciplinary proceeding is initiated and concluded within a reasonable period or in the event the petitioner is kept under suspension for long period in the garb of initiation of disciplinary proceeding.

6. For the observations made hereinabove, this Court while declining to entertain this writ petition at this stage, dismisses the same. But in the circumstances, there is no order as to cost.

2019 (I) ILR - CUT- 398

S. K. SAHOO, J.

CRLMC NO. 1226 OF 2012

BISWAJIT MOHANTY .....Petitioner

.Vs.

STATE OF ORISSA & ANR. .....Opp. parties

CODE OF CRIMINAL PROCEDURE–1973 – Section 482 – Inherent power – Prayer for quashing the order taking cognizance of offences under sections 420, 406 read with section 34 of the Indian Penal Code – Ingredients of the offences alleged are absent – No inducement, no entrustment – There is absence of any material relating to any conspiracy or connivance between the petitioner and co-accused, it

cannot be said that the petitioner has cheated in any manner or misappropriated any money being entrusted with the same – Scope of interference in exercise of inherent power – Held, even though the inherent power of this Court under section 482 of Cr.P.C. is an exceptional one which is to be used sparingly and cautiously and shifting of evidence or appreciation of evidence is not permissible but since the basic ingredients of the offences are absent in the case against the petitioner, I am of the humble view that continuance of the criminal proceeding against the petitioner would be an abuse of process and therefore, in order to prevent miscarriage of justice, the proceeding against the petitioner should be quashed. (Para 6 & 7)

For Petitioner : Mr. Santanu Ku. Sarangi, A.K. Panda, S. Sarangi
For Opp. Party : Mr. Priyabrata Tripathy, Addl. Standing Counsel
Mr. Samir Kumar Mishra

JUDGMENT Date of Judgment: 13.08.2018

S. K. SAHOO, J.

The petitioner Biswajit Mohanty has filed this application under section 482 of the Code of Criminal Procedure, 1973 challenging the order dated 21.09.2011 passed by the learned S.D.J.M., Puri in G.R. case No.1126 of 2011 in taking cognizance of offences under sections 420, 406 read with section 34 of the Indian Penal Code and issuance of process against him. The said case arises out of Kumbharpada P.S. Case No.161 of 2011.

2. The opposite party no.2 Smt. Sabita Parija filed a complaint petition in the Court of learned S.D.J.M., Puri, on the basis of which I.C.C. Case No.245 of 2011 was instituted. The said complaint petition was forwarded to the Inspector in Charge of Kumbharpada police station under section 156(3) of Cr.P.C. and accordingly, Kumbharpada P.S. Case No.161 of 2011 was registered under sections 406, 420 read with section 34 of the Indian Penal Code against the petitioner and one Pratibha Singh @ Sila Singh. On completion of investigation, charge sheet was placed against the petitioner and Pratibha Singh @ Sila Singh under sections 406, 420 read with section 34 of the Indian Penal Code and the learned S.D.J.M., Puri on receipt of the charge sheet passed the impugned order.

3. As per the complaint petition, it is the case of the opposite party no.2-complainant that she is a half-educated poor lady and used to maintain her family doing labour works. The co-accused Pratibha Singh @ Sila is a clever, shrewd and educated lady. The petitioner is the brother of co-accused

Pratibha Singh. Both the accused persons with ill-intention gave false assurance to the opposite party no.2 and other poor ladies to become the members of Share Micro Fin Ltd. (hereafter 'the company') so that they can avail loan for the purpose of doing business. The opposite party no.2 being moved by such allurement, agreed to become the member of the company and co-accused Pratibha Singh formed a group and she became the leader of the group. The co-accused Pratibha Singh collected voter identity card, electric bill, ration card, BPL card from the opposite party no.2 and others and also took their signatures in some documents. The accused persons did not give any loan amount to the opposite party no.2 or other assured persons. In the month of May 2011, the employees of the company came to the opposite party no.2 and asked for payment of the installment of the loan dues. When the opposite party no.2 told them that she had not availed any loan, the employees of the company showed documents to her relating to grant of loan and co-accused Pratibha Singh receiving the loan amount from the company on behalf of the opposite party no.2. When the opposite party no.2 went to meet the co-accused Pratibha Singh, she found that the said accused had left somewhere after locking the door of the rented house. When the petitioner was approached, he called co-accused Pratibha Singh and both the accused persons confessed to have misappropriated the loan amount and spent the same in business purpose and they assured to refund the loan amount and also the documents which had been taken from the opposite party no.2 and others. On 14.04.2011 an agreement was executed between the parties relating to the clearance of the loan amount and closing the loan account. In spite of such agreement, neither the accused persons repaid the loan amount which they had taken from the company nor did they return back the documents which they had taken from the opposite party no.2.

4. Mr. Santanu Ku. Sarangi, learned counsel appearing for the petitioner contended that the allegations leveled in the F.I.R. are false, baseless and unfounded and there is no supporting material/documentary evidence to show the justification for submission of charge sheet against the petitioner. It is further contended that the main allegation is against co-accused Pratibha Singh who obtained the loan from the company for opposite party no.2 and others and did not give it to those persons. When the opposite party no.2 and others approached the petitioner who is a government servant, he refused to pay any money which had been taken by the co-accused for which a false complaint petition has been filed intentionally to harass him. It is further contended that the co-accused Pratibha Singh is involved in a number of cases for which the petitioner and his family members were not keeping any

relationship with her. It is further stated that an agreement dated 14.04.2011 for repayment of loan amount was executed between the co-accused Pratibha Singh and the persons in whose names loans were taken by her. It is further contended that neither the petitioner had taken any documents from the opposite party no.2 to grant loan in her favour nor he had executed any document. Even during course of investigation, no clinching materials were found relating to the involvement of the petitioner in the alleged crime but all the same, charge sheet has been submitted against the petitioner in a most mechanical manner and the learned Court below has committed gross illegality in taking cognizance of the offences.

Mr. Priyabrata Tripathy, learned Addl. Standing Counsel appearing for the State of Odisha on the other hand produced the case diary and contended that during course of investigation, number of witnesses have stated about the role played by the petitioner in the crime and therefore, when prima facie case is made out against the petitioner, this Court should not interfere with the impugned order invoking its inherent powers under section 482 of the Code.

Mr. Samir Kumar Mishra, learned counsel appearing for the opposite party no.2 argued that in a pre-planned manner, innocent persons like the opposite party no.2 have been cheated and the co-accused Pratibha Singh in active connivance with the petitioner has committed the offence. He submitted that the co-accused Pratibha Singh purchased one auto and two cars after availing the loan from the company and also gave a part of the loan amount to the petitioner who purchased a flat in C.D.A., Cuttack and therefore, there was every justification on the part of the investigating agency to submit charge sheet against the petitioner.

5. Section 420 of the Indian Penal Code relates to cheating and dishonestly inducing the person deceived to deliver any property. Section 415 of the Indian Penal Code defines ‘cheating’. Cheating depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but the subsequent conduct is not the sole test. The section requires that there must be deception of any person, fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property. Similarly, intentionally inducing a person to do or omit to do anything which he would not do or omit if he were not so deceived and the act or the omission causes or likely to cause damage or harm to that person in body, mind, reputation or property also comes within the definition of ‘cheating’.

Section 406 of the Indian Penal Code on the other hand prescribes punishment for criminal breach of trust which has been defined under section 405 of the Indian Penal Code. One of the most essential ingredients of such offence is the entrustment of property to the accused and the accused dishonestly misappropriating such property or converting to his own use, in violation of any direction of law or any legal contract.

6. In the complaint petition, though the opposite party no.2 has stated that both the accused persons gave false promises and assurances to the opposite party no.2 and others to become the members of the company in order to avail loan for their business but the statements collected during investigation indicate that such promises/assurances were given by co-accused Pratibha Singh and it is she who created a group and became the leader of the group and collected various documents from the members and signatures in some papers and availed loan from the company. Even the complainant-opposite party no.2 has also stated like that in her statement recorded under section 161 Cr.P.C. In the statements of witnesses, there is nothing against the petitioner to have induced them for becoming the members of the group or to give the documents. The statement of one Alok Kumar Das, Branch Manager of the company indicates that co-accused Pratibha Swain availed the loan for some members but on inquiry, it came to light that the loan amount was not given to the concerned members but misappropriated. Some statements indicate that co-accused Pratibha Singh purchased one auto rickshaw and two cars in the loan amount receipt from the company and gave some amount to the petitioner for purchase of a plot in C.D.A., Cuttack.

Since no inducement has been made by the petitioner either to the opposite party no.2 or to any other member of the group and he has not collected any documents from them and the loan amount was never entrusted to the petitioner and there is absence of any material relating to any conspiracy or connivance between the petitioner and co-accused Pratibha Singh, it cannot be said that the petitioner had cheated the opposite party no.2 in any manner or misappropriated any money of the opposite party no.2 being entrusted with the same. If the co-accused had provided some finance to the petitioner out of the loan amount received by her from the company for purchasing a plot in C.D.A., Cuttack, it cannot be said that the petitioner is a party to the cheating or the money collected from the company towards loan was entrusted to him and he has misappropriated the same. Extending some helping hand to a brother for purchase of a plot in C.D.A., Cuttack would not

ipso facto attract the ingredients of the offences under sections 420 and 406 of the Indian Penal Code against the petitioner. Even giving assurance to repay the loan amount taken by the sister, cannot make out the ingredients of the offences against the petitioner.

7. Even though the inherent powers of this Court under section 482 of Cr.P.C. is an exceptional one which is to be used sparingly and cautiously and shifting of evidence or appreciation of evidence is not permissible but since the basic ingredients of the offences are absent in the case against the petitioner, I am of the humble view that continuance of the criminal proceeding against the petitioner would be an abuse of process and therefore, in order to prevent miscarriage of justice, the proceeding against the petitioner should be quashed.

Accordingly, the CRLMC application is allowed. The impugned order passed by the learned Sub-divisional Judicial Magistrate, Puri in G.R. case No. 1126 of 2011 in taking cognizance of the offences under sections 420/406/34 of the Indian Penal Code and issuance of process against the petitioner stands quashed. It is made clear that I have not expressed any opinion relating to the continuance of the proceeding against co-accused Pratibha Singh.

2019 (I) ILR - CUT- 403

K.R.MOHAPATRA, J.

M.A. NO. 728 OF 2000

SULACHNA JENA @ SULIA BEWA & ORS. ……..Appellant

.Vs.

ANTARYAMI PANI & ORS. ……Respondents

MOTOR VHEICLES ACT, 1988 – Section 173 – Appeal against the order rejecting the claim application on the ground that the deceased was travelling in a truck (Goods vehicle) – No evidence that the truck was plyed under a contract of employment for transportation of band party instruments and the deceased was travelling as the employee representative of the goods of the owner – Whether the claimants are entitled for compensation? – Held, yes. and Insurance Company is liable to pay the compensation amount at the first instance and to recover the same from the owner of the offending vehicle even if the deceased was travelling as a gratuitous passenger and where there is breach of policy condition.

Case Laws Relied on and Referred to :-

1. 2005 ACJ 721 : National Insurance Co. Ltd. Vs. Bommithi Subbhayamma & Ors.
2. 1994 ACJ 138 : New India Assurance Co. Ltd. Vs. Kanchan Bewa & Ors.
3. 2016 (II) OLR 448 : Maguli Juanga and others Vs. Dinabandhu Sahu & Anr.

For Appellant : M/s. R.N.Mohanty, M.K.Panda, R.C. Ojha, A.K.Jena, B.N. Rath.

For Respondents : M/s. S.Roy, P.Roy, A.A.Khan, A.Ghose,S.K.Mishra, M/s. M.K.Panda S.Majumdar, T.N.Choudhury.

ORDER Date of Order : 17.01.2019

K.R.MOHAPATRA, J.

Heard Mr.Rath, learned counsel for the Appellants and Mrs.Pati, learned counsel appearing for respondent No.2-Insurance Company

The instant Appeal under Section 173 of the Motor Vehicles Act, 1988 (for short, 'the Act') has been preferred assailing judgment and award dated 27.07.2000 passed by learned 2nd Motor Accident Claims Tribunal, Cuttack in Misc. Case No.282 of 1989 dismissing the Claim Petition under Section 166 of the Act.

On 01.02.1989 at about 11.00 AM, when the deceased, namely, Bajia Jena along with others were travelling in a truck bearing registration No.ORU 863, from Berhampura side towards Banki, it met with an accident, as a result of which the deceased succumbed to the injuries. Accordingly, his legal heirs filed Claim Petition under Section 166 of the Act claiming compensation of Rs.1.00 lakh. Owner of the offending vehicle though received notice but did not choose to appear and was set ex parte. Respondent-Insurance Company filed written statement denying its liability to pay compensation.

Learned Tribunal, on the sole ground that there was no evidence on record to show that the truck (offending vehicle) was being plied on the date of the alleged accident under a contract of employment for transportation of band party instruments, and the deceased was travelling as the employee representative of the goods of the owner, rejected the claim. Accordingly, this appeal has been filed.

Upon hearing learned counsel for the parties and on perusal of record, it appears that the ground on which the claim petition was rejected is not sustainable in the eyes of law, inasmuch as, the claimants need not prove the fact that the offending vehicle was being plied under a contract of

employment to transport the goods. In that view of the matter, the matter ought to have been remanded to learned Tribunal for fresh adjudication. Since the accident occurred on 01.02.1989 and in the meantime more than 29 years have lapsed, I, without remitting it to learned Tribunal to adjudicate the claim petition, feel it proper to decide the same on the materials available on record. In absence of any material to the effect that the deceased was working in a band party team, his notional income is assessed at Rs.15,000/- as per the 2nd Schedule of the Act and deducting 1/3rd towards his personal income, I assess the contribution to his family at Rs.10,000/- per annum. Since the deceased was 28 years of age at the time of accident, applying multiplier of 17, I assess the compensation at Rs.1.70 lakh.

Mrs. Pati, learned counsel for the claimants-appellants relying on decisions of the Hon'ble Supreme Court in the case of ***National Insurance Co. Ltd. Vs. Bommithi Subbhayamma and others***, reported in 2005 ACJ 721 and a decision of this Court in the case of ***New India Assurance Co. Ltd. Vs. Kanchan Bewa and others***, reported in 1994 ACJ 138 submitted that the Insurance Company is not liable to pay the compensation, as the deceased was travelling in a goods vehicle as a gratuitous passenger. However, Mr.Rath, learned counsel for the claimants-appellants relied upon a decision of this Court in the case of ***Maguli Juanga and others Vs. Dinabandhu Sahu and another***, reported in 2016 (II) OLR 448, in which relying upon a case law of Hon'ble Supreme Court, this Court held that for speedy release of compensation in favour of claimants, the Insurance Company has to pay the compensation at the first instance and recover the same from the owner of the offending vehicle, where there is allegation of breach of policy condition.

Mrs. Pati further raises objection alleging that since the claimants have claimed compensation of Rs.1.00 lakh, it would not be appropriate to award any amount more than that. But in view of the settled position of law that a just compensation should be awarded irrespective of the claim made by the Claimants, I assess the compensation at Rs.1.70 lakh.

In that view of the matter, this Court disposes of the appeal directing the Insurance Company to deposit the compensation of Rs.1.70 lakhs (rupees one lakh seventy thousand) with 6% interest per annum from the date of filing of application by the claimants before the Tribunal within a period of six weeks hence with a liberty to the Insurance Company to recover the same from the owner of the offending vehicle in accordance with law. On deposit of the aforesaid amount, the same shall be released in favour of the claimants on proper identification. The Appeal is, accordingly, allowed.

2019 (I) ILR – CUT- 406

J.P.DAS, J.

CRIMINAL REVISION NO. 84 OF 2018

DIBAKAR DAS .....Petitioner.

.Vs.

STATE OF ODISHA .....Opp-Party.

CODE OF CRIMINAL PROCEDURE, 1973 – Section 401 read with Section 397 – Revision – Challenge is made to the order rejecting an application under section 457 of Cr. P.C seeking release of teak wood seized by forest official – Teak trees standing on the land of the petitioner uprooted during cyclone – Petitioner submitted application to the forest authority seeking permission to transport the teak wood to his house – Application kept pending for years and no permission was granted despite repeated approach – Petitioner after cutting the teak trees into pieces took the same to his house – All of a sudden the forest official conducted raid and seized the wood – Fact positions admitted – Direction issued to release the seized wood.

"*On the backdrop of the entire scenario and the admitted facts and circumstances, I am of the considered view that keeping the application of the petitioner pending for the years together, and thereafter to prosecute him for illegal possession of the forest produce which he admitted to have removed from his own land, which also remained admitted by P.W.1 and to refuse his prayer for custody of those articles during the period of trial when those materials are lying exposed to sun and rain as submitted, can never be said to be in the interest of justice.*"

(Para 4 & 5)

For Petitioner : M/s. P.Nayak, S.K.Jena
For Opposite Party : Addl.Standing Counsel

JUDGMENT Date of Hearing : 25.07.2018 Date of Judgment : 31.07.2018

J.P.DAS, J.

This revision is directed against the order dated 12.01.2018 passed by the learned S.D.J.M., Hindol in Misc. Case No.43 of 2017 rejecting the application filed by the present petitioner under Section 457 of the Cr.P.C..

2. The backdrop of the case is that the petitioner is a practicing advocate in the local Bar of Hindol. During Phylin Storm on 12.10.2013, about 40 to 50 teak trees were uprooted and broken standing on the own recorded land of the father of the petitioner and another. On 14.11.2013, the petitioner filed a petition before the D.F.O, Dhenknal seeking permission under O.T.T. Rules to bring those teak trees to his house under the apprehension of theft and

damage. The D.F.O, Dhenkanal sent a letter to the Tahasildar, Hindol as well as concerned Range Officer, for making a joint verification and submission of report. Since there was inordinate delay in conducting the verification and there was theft of some trees, the petitioner with the help of his brother cut and converted the uprooted trees to 116 pieces of logs and brought and kept those in his house for preparing furnitures for his daughter's marriage. While sitting over the application of the petitioner to grant necessary permit, the Forest Officials conducted raid in his house on 19.10.2016 and seized the said 116 nos. of teak wood and booked the petitioner and his brother in a case of forest offence vide 2(b)CC Case No.09 of 2017 on the file of learned S.D.J.M.,Hindol. In the meantime, the petitioner moved this Court in W.P.(C) No.16870 of 2017 which was disposed of on 28.08.2017 directing the concerned forest officials to consider and dispose of the application of the petitioner within a specified time. Thereafter, a joint verification was conducted and a report was submitted that 41 nos. of stumps were available on the Recorded Holding Land of the petitioner. Despite such developments, the application of the petitioner was not disposed of and ultimately, it was rejected with the observation that the petitioner had violated the O.T.T. Rules by transporting and stacking the forest materials in his house without any valid documents which is punishable under O.F Act and O.T.T. Rules. Thereafter, the petitioner filed an application before the learned S.D.J.M., Hindol for release of those seized wood in his favour, but it has been rejected by the impugned order with the observation that at present there is no material regarding the submission of the petitioner that 116 pieces of teak wood belonged to 41 stumps found in his land and hence his claim of ownership thereof, cannot be considered.

3. It was submitted by the learned counsel for the petitioner that it remained admitted by the prosecution that the petitioner had made an application seeking necessary permission as back as in the year 2013. The concerned officials sat over the matter and all of a sudden, entering house of the petitioner on 19.10.2016 seized the teak wood. It was further submitted that the concerned Officer who seized the wood has been examined before the learned trial court in the meantime as P.W.1 who was acting as Forester during the relevant period. He has admitted in his evidence that at the time of seizure, the petitioner was absent and his brother was present in his house and had submitted that those wood related to the uprooted and broken trees on their own land and that despite their application for necessary permission, it was not granted and since the wood were apprehended to be damaged and stolen away, they brought it and kept in their house. The P.W.1 in his cross-

examination in paragraph-9 has categorically admitted that prior to the seizure, he knew the present petitioner and he had measured the stumps available on the land and was satisfied that those 116 pieces of seized teak wood belong to those 50 nos. of stumps. Thus, it is submitted that in view of such clear admission of the concerned Officer before the court, now it cannot lie in the mouth of the prosecution that the seized 116 pieces of wood did not relate to the stumps found on the admitted land of the petitioner. Certain documents have also been filed to show that the petitioner repeatedly approached the concerned authority seeking permission which was not granted and the petitioner had to approach this Court for an appropriate order. It was submitted by the learned counsel for the petitioner that sitting over the application made by the petitioner for more than three years and to seize the wood from his house all of a sudden and to book him for a forest offence, can never be justified in the eye of law. It was also submitted that it is the specific case of the petitioner that apprehending loss and theft, the wood was removed from the land to the house and it is also not the case of the prosecution that there was any allegation of theft of teak wood from any other area so as to doubt the claim and ownership of the petitioner.

4. It was submitted by learned counsel for the State that the possession of the teak wood by the petitioner wherefrom it was seized having remained admitted without any valid license or authority for the purpose, the forest produce are liable for seizure and confiscation.

5. Heard learned counsel for the both sides. On the backdrop of the entire scenario and the admitted facts and circumstances, I am of the considered view that keeping the application of the petitioner pending for the years together, and thereafter to prosecute him for illegal possession of the forest produce which he admitted to have removed from his own land, which also remained admitted by P.W.1 and to refuse his prayer for custody of those articles during the period of trial when those materials are lying exposed to sun and rain as submitted, can never be said to be in the interest of justice.

6. Accordingly, the impugned order dated 12.01.2018 passed by the learned S.D.J.M., Hindol as aforesaid, is set aside and it is directed that 116 pieces of seized wood in this case be released in favour of the petitioner with due undertaking and zimanama with imposition of any other conditions as deemed proper by the learned S.D.J.M., Hindol. The CRLREV is disposed of accordingly.

2019 (I) ILR – CUT– 409

J.P. DAS, J.

RPFAM NO. 349 OF 2017

SANJIB KUMAR PARIDA .....Petitioner.

.Vs.

SMT. SUKANTI DASH .....Opp-Party.

FAMILY COURTS ACT, 1984 – Section 19 – Revision challenging the order granting maintenance to the wife – Petitioner/husband's plea that no convincing material as to the factum of marriage and the evidence in this regard contains contradictions and the order of the court below suffers from material irregularity – Held, once it is found and held that the opposite party is the legally married wife of the petitioner/husband and the petitioner having refused to accept her as his wife and deserted her, the claim of maintenance becomes justified.

(Para 9 & 10)

For Petitioner : M/s. G.K.Mohanty, M.B.Das, P.K.Panda, D.Mishra, B.R.Biswal

For Opp. Party : M/s. D.Panda, S.Panda, D.Das M/s. D.Nanda, B.B.Mohapatra (Cavetor)

JUDGMENT Date of Hearing : 20.07.2018 Date of Judgment : 24.08.2018

J.P.DAS, J.

This is an application under Section 19 of the Family Courts Act 1984 assailing the legality of the order dated 29.11.2017 passed by the learned Judge, Family Court, Bhubaneswar in Criminal Proceeding No.186 of 2013 directing the present petitioner to pay a monthly maintenance of Rs.13,500/- per month from the date of application i.e. 13.12.2013 till the date of order i.e. 29.11.2017 and to pay Rs.15,000/- thereafter.

2. The present opposite party filed the application under Section 125 of the Cr.P.C. submitting that she came in contact with the present petitioner in the year 2008 and developed relationship with him. Thereafter, their marriage was performed in the temple of Dakhinakali, Birapratappur in the district of Puri. After the marriage, they went to a hotel at Puri and also visited different places of State and stayed in different hotels as husband and wife. Coming back to Bhubaneswar, they stayed in a flat at Bibekananda Marg, Bhubaneswar. Subsequently, some differences arose between the two and the opposite party came to know that the petitioner had an earlier wife and a daughter. She further alleged that the petitioner misbehaved and assaulted her and ultimately left her company in the month of October, 2013 whereafter she has to stay in distress having no source of income for livelihood and

maintenance. Hence, she claimed a monthly maintenance of rupees one lakh from the present petitioner –husband submitting that he is a man of sufficient means.

3. The present petitioner as opposite party entering appearance, denied the factum of marriage and pleaded that on the request of the petitioner, he had given her some financial assistance but taking advantage of her acquaintance with the family of the opposite party she created a story of marriage, managing to get some photographs. The opposite party-husband also submitted that he had a wife and a daughter of 9-year-old, apart from the fact that the petitioner-wife was having her own business with substantial income and Bank balances. He also alleged that the petitioner-wife was living in a live-in-relationship with another person at her given address.

4. The petitioner-wife examined herself besides three witnesses and the opposite party- husband examined himself besides two other witnesses. A number of documents were brought into evidence on behalf of both the sides.

5. The learned trial court on analyzing the oral as well as documentary evidence placed before it held that the petitioner was the wife of the opposite party and the opposite party-husband was liable to pay her maintenance. Considering the materials as to the financial status of both the parties, learned trial court has passed the impugned order of maintenance as stated hereinbefore.

6. The petitioner in the present application has assailed the findings of the trial court with the main contention that there being no convincing material as to the marriage of the present petitioner with the opposite party, the learned trial court erroneously reached the conclusion that there was a marriage between the parties. The learned counsel for the petitioner submitted that the evidence of the witnesses who deposed about the marriage on behalf of the opposite party-wife had a lot of contradictions, more specifically as to the duration and time of the marriage, vis-à-vis, the pleadings of the petitioner-wife before the trial court as to their consummation of the marriage in a hotel at Puri on the same day after performance of the marriage in a temple.

7. Placing the evidence of the said witnesses, it was submitted by the learned counsel for the petitioner that the versions of those witnesses are so very discrepant that it should not have been believed as to their truthfulness about the marriage between the petitioner and the opposite party. It was also submitted that the opposite party-wife stated different things at different

places as regards her relationship with the present petitioner and hence the plea of the marriage or their living as husband and wife was nothing but a myth. In this respect, it was submitted that in the petition filed before the Family Court, the opposite party submitted that she came in a contact with the present petitioner in the year 2008 and their marriage was performed in the year 2013. But, subsequently, the opposite party wife has lodged an F.I.R. before the Police Station alleging against the present petitioner wherein she has mentioned that she came to know the present petitioner in the year 2012.

8. As seen from the impugned judgment, the learned trial court has discussed in detail the evidence led on behalf of both the parties. Taking into consideration a large number of documents including photographs filed on behalf of the petitioner, the learned trial court reached the conclusion that the petitioner was the legally married wife of the opposite party namely, the present petitioner. All the documents and the specific statements have been taken into consideration and such a finding has been reached by the learned trial court. It has also been observed that in a proceeding under Section 125, Cr.P.C the legal validity of a marriage is not a question to be considered if there are sufficient materials to presume that both the parties have lived as husband and wife.

9. In the instant case, the marriage has been specifically pleaded by the wife and oral as well as a number of documentary evidence have been placed in support of such pleadings. It was submitted on behalf of the present petitioner that there was some business transactions between the parties and the opposite party-wife could manage to take some photographs in some such occasions and started black-mailing the petitioner filing police cases and ultimately claimed to be his wife and filed the case for maintenance. But going through the findings reached by the learned trial court, analyzing the evidence of both the parties placed before it, I do not find any convincing substance in the contention made on behalf of the petitioner so as to differ from the view taken by the learned trial court that there was a marriage between the present petitioner and the opposite party as per Hindu rites and customs and there was no material before the court to presume that the petitioner-wife was aware about the earlier marital status of the opposite party-husband prior to their marriage solemnized in the temple.

10. Once it is found and held that the petitioner is the legally married wife of the opposite party-husband, on the admitted facts that the petitioner refused to accept her as his wife and deserted her, the claim of maintenance becomes justified.

11. So far as quantum of maintenance and financial status of the opposite party-wife are concerned, it was submitted by learned counsel for the petitioner that the opposite party-wife is a business woman having better source of income than the present petitioner. She is C and F Agent of one Company getting Rs.60,000/- per month excluding all expenses. She is also the proprietor of one firm whereas the petitioner is merely a PHED contractor. It was also submitted that taking advantage of the relationship with the petitioner, the opposite party blackmailed him and has taken huge amount of money from him on different occasions. It was also submitted that the opposite party is staying in a live-in-relationship with one Bipin Behari Ray in her given address and in the past had threatened the present petitioner demanding money for which the petitioner had to lodge an F.I.R. at Dhauli P.S.. In this regard, it was submitted by the learned counsel for the opposite party-wife that the petitioner-husband was carrying on some of his business in the name of the present opposite party-wife when they had relationship and also after the marriage and in fact the present opposite party-wife has no relationship with those business firms which were actually owned and managed by the petitioner- husband. The learned trial court has also discussed in detail the submissions and the counter submissions made on behalf of the parties in this respect and taking into consideration the admission of the opposite party-husband that he is a B-Class contractor and claimed to have advanced huge amount of money to the opposite party at different times, the learned trial court reached the conclusion that the present petitioner–husband is a man of means and there being no substantial material to establish the income of the opposite party-wife the petitioner was liable to pay the maintenance. Observing that the wife is entitled to enjoy the status in accordance with the financial status of the opposite party-husband, and taking into consideration, the fact that the present petitioner has a family with a daughter, the learned trial court has awarded the amount of maintenance @ Rs.15,000/- per month from the date of order and Rs.13,500/- per month from the date of application i.e. 13.12.2013 till the date of order dt.29.11.2017. I do not find any cogent reason to interfere with the findings reached by the learned trial court in this respect. However, considering the submissions made on behalf of the petitioner that he has a family and a daughter and has paid some amounts to the opposite party-wife during their relationship, the amount of maintenance for the period from the date of application till the date of the order @ 13,500/- per month as awarded by the learned trial court is modified to Rs.10,000/-. The amount of maintenance @ Rs.15,000/- from the date of order stands confirmed. The R.P.F.A.M. is accordingly disposed of.

2019 (I) ILR - CUT- 413

DR. A.K. MISHRA, J.

CRLMC No. 1368 of 2008

NITYANANDA MISHRA … …..Petitioner

.Vs.

PRANATI MISHRA & ORS. …….Opp. Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 read with Section 29 of the Protection of Women from Domestic Violence Act, 2005 – Inherent power – Petition by husband seeking quashing of interim order granting monetary relief to wife – No appeal filed under section 29 of the D V Act – Whether inherent power can be exercised – Held, no. inherent power not required to be invoked when the order is appealable. (Para 10)

Case Laws Relied on and Referred to :-

1. (2013) 7 SCC 789 : Mohit @ Sanu and another .Vs. State of U.P.
2. AIR 1992 SC 604 : State of Haryana Vs. Ch. Bhajan Lal
3. (1995) 6 SCC 194 : Rupon Deol Bajaj (MRS) & Anr. Vs. Kanwar Pal Singh Gill & Anr.
4. (Criminal Appeal No. 1443 of 2018 : Dr. Dhruvaram Murlidhar Sonar Vs.. The State of Maharashtra & Ors.

For Petitioner : M/s Bhaskar Chandra Panda,Sangeeta Mishra, D.Das and J.Panda.
For Opp. Party : M/s S.Mohanry & L.Pani

JUDGMENT Date of Hearing : 03.01.2019 Date of Judgment: 10.1.2019

DR.A.K.MISHRA, J.

This petition under Section 482 Cr.P.C. has been filed with following prayer:

> "It is, therefore prayed that this Hon'ble Court may graciously be pleased to admit this case, issue notices to the opposite parties, call for the L.C.R., after hearing the counsel for the parties be pleased to setaside the order dated 29.05.2008 under Annexure-2 as well as to quash the entire proceeding i.e. 1. C.C. No. 115 of 2008 as initiated by the opposite party, before the S.D.J.M., Anandpur being illegal and abusing process of law."

2. The impugned order dated 29.05.2008 in 1 C.C. No.115 of 2008 is quoted below:

> "Respondents are absent. One respondent Nityananda Mishra is present. Advocate M.C.Pahi files a power on behalf of the respondent Nityananda Mishra. Vokalatnama is accepted. He files a petition praying for time on the ground stated therein.

> Heard. The O.P. appeared to-day is directed to pay a consideration of Rs.10,000/- to the petitioner by the date filed i.e. 30.6.2008 and it will be adjusted at the time of final order as the lady is in desert. Call on the date fixed for show cause and appear of other accused."

3. Opposite party No.1 (to be referred hereinafter as 'aggrieved') is the wife of opposite party no.2. The present petitioner is her husband's elder brother while opposite parties 3 and 4 are the nephews of the aggrieved. The aggrieved instituted 1 C.C. No. 115 of 2008 under the Protection of Women from Domestic Violence Act, 2005 (to be referred hereinafter as 'the D.V.Act') against her husband, husband's elder brother and nephews.

4. Copy of the report of the Protection Officer, Keonjhar dated 13.03.2008 vide Annexure-1 reveals that not only sexual violence but also monetary violence was committed against the aggrieved and her 5 years old daughter. The perpetrators of such harassment were husband, husband's elder brother and nephews.

5. It is noteworthy to mention that opposite party Nos. 2, 3 and 4, husband and nephews, are impleaded in this petition under Section 482 Cr.P.C. as Proforma Opposite Parties. The father name of opposite party Nos. 3 and 4 is not mentioned. For want of taking steps to issue notice for admission, the case was dismissed against opposite party No.2 vide order dated 15.2.2016.

6. The impugned order was passed on the date of appearance of the respondents when the present petitioner only appeared and interim monetary relief was granted fixing date for show-cause.

7. Learned counsel for the petitioner submitted that the husband-respondent No.2 is responsible to maintain the aggrieved wife but when no such order was passed against the husband, the impugned order asking the husband's elder brother to pay Rs. 10,000/- is illegal. It is further submitted that the total proceeding being based upon false facts is required to be quashed for the ends of justice.

8. Learned counsel for aggrieved opposite party No.1 repelled the above contention stating that the impugned order directing payment of Rs.10,000/- to the husband's elder brother, who was the member of the joint family, cannot be said illegal under Section 23 of the D.V. Act. It is also submitted that in absence of any material that the allegation of domestic violence was false, the quashing of proceeding will advance the injustice.

9. There is no material contrary to the report of Protection Officer in which the commission of domestic violence against the aggrieved has been mentioned. The present petitioner has impleaded the husband of the aggrieved and nephews as Proforma Opposite parties. The petitioner has prayed to quash the entire proceeding wherein the husband and nephews were parties as abuser. They have not come forward to put forth their say on the allegation of the aggrieved.

9-a. In this backdrop the legal position may be mirrored. The complaint in which order was passed comes under Section 12 of the D.V. Act and interim order was within the ambit of Section 23 of the D.V. Act. Section 29 of the D.V. Act provides appeal to the Court of Session against the order made by the Magistrate. The present opposite party No.1 as wife of opposite party No.2 is an aggrieved person under Section 2(a) of the D.V. Act. Besides husband, his elder brother and nephews can be respondents under Section 2 (q) of the D.V.Act for being family members living together as a joint family.

6-b. No appeal under Section 29 of the D.V. Act has been preferred against the impugned order. For quashing of total proceeding the Proforma respondents have not come forward. The present petitioner appears to have acted on their behalf stealthily. The proceedings under the D.V. Act are of summary nature.

9-c. In the decision reported in (2013) 7 SCC 789: **Mohit @ Sanu and another v. State of U.P**., the Hon'ble Apex Court has held in para-23that " it is well settled that inherent power of the Court can ordinarily be exercised when there is no express provision in the Code under which order impugned can be challenged."

9-d. The quashing of criminal proceeding or complaint is now guided on the principle enumerated in the decision reported in **AIR 1992 SC 604: State of Haryana v. Ch. Bhajan Lal** and others: their Lordships have considered the scope and ambit of Sec. 482 Cr. P.C. as follows:-

> "108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra ordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelized andinflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

1. Whether the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. Where the uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

109. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice."

9-e. Relying upon the above decisions, the Hon'ble Apex Court in **Rupon Deol Bajaj (MRS) and another v. Kanwar Pal Singh Gill and another: (1995) 6 SCC 194** has held that "it is settled principle of law that at the stage of quashing of F.I.R. or complaint the High Court is not justified in embarking upon an enquiry as to the probability, reliability or genuineness of the allegation made therein."

9-f. In the case of **Dr. Dhruvaram Murlidhar Sonar v. The State of Maharashtra & Ors.** (Criminal Appeal No. 1443 of 2018- Arising out of

SLP (Criminal) No. 6532 of 2018), Judgment dated 22.11.2018. The Hon'ble Apex Court has held in para-8 that:-

> "8. It is well settled that exercise of powers under Section 482 of the Cr.P.C. is exception and not the rule. Under this section, the High Court has inherent powers to make such orders as may be necessary to give effect to any order under the Code or to prevent the abuse of process of any court or otherwise to secure the ends of justice. But the expressions "abuse of process of law" or "to secure the ends of justice" do not confer unlimited jurisdiction on the High Court and the alleged abuse of process of law or the ends of justice could only be secured in accordance with law, including the procedural law and not otherwise."

10. In the case in hand, as the petitioner has not preferred appeal under Section 29 of the D.V. Act against the impugned order granting interim monetary relief, inherent power under Section 482 Cr.P.C. is not required to be invoked. The blame worthy participants in their domestic relationship with the aggrieved opposite party No.1 should not be allowed to re-victimize the aggrieved challenging the impugned order to quash the entire proceeding. A decade has been passed since the order of interim monetary relief of Rs.10,000/- was awarded. When this proceeding has been instituted overstepping appeal forum and proforma respondents are made sleeping partners to quash the impugned order granting succor to the aggrieved, the object of this benevolent statute is made a deadwood. Exercise of inherent jurisdiction will further injustice.

11. For the above reasons, the CRLMC is dismissed.

2019 (I) ILR – CUT- 417

DR.A.K.MISHRA, J.

BLAPL NOS.4170, 6464, 6879,8478,5353 AND
8548 OF 2017 AND 2354, 2672 AND 2674 OF 2018

PRAKASH KUMBHAR	(in BLAPL No.4170 of 2017)
SANTOSH DAS	(in BLAPL No.6464 of 2017)
RAMKUMAR RAJPUT	(in BLAPL No.6879 of 2017)
ANANTA DAS	(in BLAPL No.8478 of 2017)
GOURANGA MEHER	(in BLAPL No.5353 of 2017)
SUMANTA KHATUA (in BLAPL No.8548 of 2017)	
MANA SAHU	(in BLAPL No.2354 of 2018)
BALU KHILLA	(in BLAPL No.2672 of 2018)
SANTOSH GOLORY	(in BLAPL No.2674 of 2018)

.....Petitioners

.Vs.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Bail applications – Offences under Narcotic Drugs and Psychotropic Substances Act, 1985 – Plea that when the mandatory provisions of the NDPS Act such as Sec-42(1) and sec-50(1) are found contravened or not complied with, the trial is vitiated and accused is entitled to bail – Whether can be accepted ? – Applicability of Section 37 of the Act – Analysis of various settled laws on the issue – Legal position discussed.

"Viewing the provision of law and precedential position reiterated from time to time, it is important to advert that the concern of the Hon'ble Apex Court for the liberty of accused and his right to speedy justice has always been expressed in unambiguous words. Right to speedy trial and twin conditions test for bail u/s 37 NDPS Act are separate but interrelated. The important one is the former because of the fact that trial time has been prescribed in ***Hussain & Anr. v. Union of India*** *(supra). The same is certain, predictable and is potent enough to relax to some extent the problem of pretrial detention. The later one, twin conditions test as provided u/s 37 of NDPS Act, is uncertain and meant to be ascertained mostly by guess work. When release of the under trial prisoner (UTP) is associated with the result of guesswork or conjecture, the trial time assumes primacy. The contribution of UTP to cause delay in the proceeding should be an important factor within the ambit of "oppose the application" by the public prosecutor. Twin conditions are a much higher threshold bar than any of the conditions which are ascertainable prima facie. The cause and consequence of failure to address delay in trial and the contribution of UTP thereto while opposing the bail application by learned public prosecutor cannot be overlooked because the preemption of that step would draw court to the next step as to whether to make twin conditions test or not. In order to ensure the primacy of "****oppose to bail application stage",*** *the delaying factors are required to be placed in no uncertain terms. Attribution of fault in this regard to UTP must be specific and definite. Failure to do so, may lead such objection to implicit negation of trial time prescribed in* ***Hussain & Anr. v. Union of India*** *(supra).In such a situation, the court may not be under any compulsion to go for twin conditions test. For these reasons, when the public prosecutor does not oppose the bail application referring fault of the U.T.P. to cause delay in trial referring the direction of Hon'ble Supreme Court, there is no need to go for the Twin conditions test as provided u/s 37 of the NDPS Act."* *(Para 10)*

ORDER Date of Order : 21.01.2019

In all these petitions made U/s. 439 Cr.P.C., the petitioners have prayed bail for being accused of offences under Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act') involving commercial quantity for which bar under Section 37 of NDPS Act is required to be considered.

2. As the common question arises in all the above cases, hearing is taken up to consider the submissions of learned counsel for the parties.

3. Though several decisions are cited by learned counsel for both the parties, only relevants are referred to contextually to avoid multiplicity.

3-(a) Learned counsel S.R. Mohapatra and Mr. Manas Chand submit that when the mandatory provisions of the NDPS Act such as Sec-42(1) and sec-50(1) are found contravened or not complied with, the trial is vitiated and accused is entitled to bail. In support of his contention, they cited the decisions.

(i) (1994) 7 OCR -460 Rabi Sahoo vs State

(ii) 1991 (11)OLR-475 Satyabrata @ Sarat Mallia and another vs. State

(iii) (1996) 10 OCR-372 Umakanta Patel vs. State.

(iv) (2010)47 OCR (SC) -752 Sami Ullaha vs. Superintendent, Narcotic Central Bureu.

(v) (2013) 54 OCR-841 Thane Singh vs Central Bureau of Narcotics.

Sami Ullaha case deals with cancellation of bail under Section 439 Cr.P.C. after receipt of second report of laboratory. The said decision is no help to the point posed here. The **Thane Singh** decision has been relied upon by the learned Additional Government Advocate and the same shall be dealt with later.

It may be noted that the cited **Rabi Sahoo** decision has been referred to in the subsequent **Umakanta Patel** case.

In **Satyabrata** (supra) case it is held as follows:-

"If the accused is to be released on bail, the Court has to record its satisfaction that there are reasonable grounds to believe that the accused is not guilty of the offence charged. Sub-sec, (i)(b)(ii) of Section 37 of the Act requires that the Public Prosecutor has to be given an opportunity to oppose such application for such release. This has a definite purpose and the Public Prosecutor has a vital role to play in the whole process of reaching the satisfaction by the Court and is required to present the entire material collected against the accused effectively and in opposition to the application of bail showing that no reasonable ground exists for believing that the accused is not guilty of the offences charged". Then His Lordship granted bail In view of violation of the statutory safeguards contained in Sec, 50(1) of the Act.

In **Umakanta Patel** (supra) case it is held as follows-:

"8. xxxxxxx As has been stated earlier certain provisions including Section 50 of the Act are mandatory and non-observance thereof vitiates the trial. Resort to Sections 42 and 50 of the Act is taken at the initial stage of investigation and compliance thereof can very well be ascertained from the case diary. So in course of hearing of an application for bail if on scrutiny of the diary, it appears that the

procedural safeguards have not been followed, the Court can look to the same for the limited purpose of finding whether there are reasonable grounds to believe that the accused is not guilty. This finding of the Court, however, cannot be equated with the one which is recorded at the end of the trial to pronounce judgment. It may well be argued that even though non-observance of the statutory provisions is apparent on the face of the record, yet in course of trial it can supply the omission by leading oral evidence. To my mind, this cannot be accepted and on mere assumption of the probable evidence that may be led by the prosecution, accused cannot be refused bail."

9. In view of my discussions made above, while respectfully agreeing with the views propounded in Rabi Sahoo, (1994) 7 Ori CR 460 (supra), Fakir Sundari, (1995) 8 Ori CR 320 (supra) and Narahari Das (supra), I would hold that due to infraction of the requirements of Section 50 of the Act the accused is entitled to be released on bail".

3-(b). Learned counsel for the petitioner Mr. S. N. Das relying upon the decision reported in AIR 2017 (S.C)-5500 -(2018) 11 SCC -1 **Nikesh Tarachand Shah vs Union Of India** contended that similar provision like sec-37 of The NDPS Act has been declared unconstitutional as it violates Articles 14 and 21 of the Constitution of India.

Putting emphasis upon the word "oppose", Mr. Das further submits that in view of the direction of Hon'ble Supreme Court in **Hussain & Anr. v. Union of India** (CrA.509/201 judgment dt. 09-03-2017) reported in 2017 (5) SCC-702 to the effect that, the sessions trials where accused are in custody shall be normally concluded within two years; it is imperative to maintain consistency with that direction and the public prosecutor must address the right to speedy trial of accused and in doing so, must show the contribution of accused, if any, to cause delay in trial and where no fault is attributable, the court can ignore such 'oppose' and on consideration of other factors required u/s 439 Cr.P.C can dispose of the bail petition.

Both the above decisions will be discussed later with reference to the points urged.

3-(c). Learned Addl. Govt. Advocate, Mr. A. N. Das submits in reply that the direction of Hon'ble Supreme Court in **Husain** case (supra) is mandatory and is to be implemented but the same has no effect for the purpose of consideration of bail petition under Section 37 of the NDPS Act.

It is categorically submitted by Mr. Das on behalf of the State that in order to give effect, the direction of Hon'ble Supreme Court in Hussain Case, this Court can give any direction to speed up the trial and to ensure the completion of trial within two years. Beyond the above, nothing more can be done by this Court while considering the bail petition under 37 of NDPS Act.

Referring **A.R. Anthulle** case, 1992 1 SCC 225, **Thane Singh vrs. Central Bureau of Narcotics** reported in 2013 (2) SCC 590 and **Supreme Court Legal Aid Committee vrs. Union of India and others** reported in (1994) 6 SCC 731 learned Additional Government Advocate further contended that the interest of society is to be kept in view while releasing the accused in the case under NDPS Act and the directions of in **Hussain** judgment are to be balanced as far as possible.

It is noteworthy to mention that all the above decisions cited by learned Addl. Government Advocate, Mr. Das have been referred to in the **Hussain** case (supra) for which I do not think proper to burdensome this order further.

Lastly, Mr. Das, learned Addl. Government Advocate while opposing the bail application submits that twin conditions test as provided u/s 37 of the NDPS Act is mandatory as per the decisions rendered by the Hon'ble Supreme Court in the case of **Satpal Singh Vrs. the State of Punjab** reported in *2018 (5) SCALE 519***,** and drew the attention of this court to the following of that decision:-

> *"Under Section 37 of the NDPS Act, when a person is accused of an offence punishable under Section 19 or 24 or 27A and also for offences involving commercial quantity, he shall not be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and in case a Public Prosecutor opposes the application, the court must be satisfied that there are reasonable grounds for believing that the person is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused are to be examined to enter such a satisfaction. These limitations are in addition to those prescribed under the Cr.P.C or any other law in force on the grant of bail. In view of the seriousness of the offence, the law makers have consciously put such stringent restrictions on the discretion available to the court while considering application for release of a person on bail. It is unfortunate that the provision has not been noticed by the High Court. And it is more unfortunate that the same has not been brought to the notice of the Court."*

4. In the face of learned counsel's contention, it is apposite to refer first the decision **Hussain & Anr. v. Union of India** reported in *2017 (5) SCC-702*. The Hon'ble Apex court in that case considering the question as to the circumstances in which bail can be granted on the ground of delayed proceedings when a person is in custody on the allegation of having committed offence under Section 21(c) of the Narcotics Drugs and Psychotropic Substances Act, 1985 (the NDPS Act) ,has given direction as follows-:

"*27. To sum up:*

(i) The High Courts may issue directions to subordinate courts that –

(a) Bail applications be disposed of normally within one week;

(b) Magisterial trials, where accused are in custody, be normally concluded within six months and sessions trials where accused are in custody be normally concluded within two years;

(c) Efforts be made to dispose of all cases which are five years old by the end of the year;

(d) As a supplement to Section 436A, but consistent with the spirit thereof, if an undertrial has completed period of custody in excess of the sentence ***likely to be awarded*** *if conviction is recorded such undertrial must be released on personal bond. Such an assessment must be made by the concerned trial courts from time to time;*

(e) The above timelines may be the touchstone for assessment of judicial performance in annual confidential reports. (emphasis added)

(ii) The High Courts are requested to ensure that bail applications filed before them are decided as far as possible within one month and criminal appeals where accused are in custody for more than five years are concluded at the earliest;

(iii) The High Courts may prepare, issue and monitor appropriate action plans for the subordinate courts;

(iv)The High Courts may monitor steps for speedy investigation and trials on administrative and judicial side from time to time;

(v) The High Courts may take such stringent measures as may be found necessary in the light of judgment of this Court in Ex. Captain Harish Uppal (supra).

28. Accordingly, we request the Chief Justices of all High Courts to forthwith take appropriate steps consistent with the directions of this Court in Hussain Ara Khatoon (1995) 5 SCC 326) (supra), Akhtari Bi (Smt.) (supra), Noor Mohammed (supra), Thana Singh (supra), S.C. Legal Aid Committee (supra), Imtiaz Ahmad (supra), Ex. Captain Harish Uppal (supra) and Resolution of Chief Justices' Conference and observations hereinabove and to have appropriate monitoring mechanism in place on the administrative side as well as on the judicial side for speeding up disposal of cases of undertrials pending in subordinate courts and appeals pending in the High Courts.''

5. Having heard learned counsel for both sides, it is pertinent to note that the applicability of 37 of NDPS Act, and the conditions required to be satisfied in addition to the limitations available under Section 439 Cr.P.C. are no more res integra. Hence on this score this Court is not called upon to formulate any point for consideration. The factual aspect of each case is to be examined while going through the respective bail petitions.

Matter does not rest here. What is not agreed is the disagreement on point of the direction given in the **Hussain** decision (supra) by the Hon'ble Supreme Court. Hence, this aspect of implementing the direction of Hon'ble supreme court in **Hussain & Anr. v. Union of India** case while considering the bail application u/s 37 of NDPS Act is required to examined and for that following questions arise.

5-(a). Whether there is a need to address the Twin conditions test as provided u/s 37 of the NDPS Act when the public prosecutor while opposing the bail application does not attribute any fault to accused for the delay in trial referring the trial time as per the direction of Hon'ble supreme court in **Hussain & Anr. v. Union of India** (CrA.509/201 judgment dt.09-03-2017) to the effect that, the sessions trials where accused are in custody be normally concluded within two years?

5-(b). How can these two imperatives i.e Twin conditions test as per sec-37 of the NDPS Act and conclusion of trial within two years as per **Hussain & Anr.** be met ?

6. Plain reading of the provision under Section 37 of the NDPS Act does not postulate any ambiguity and it reads as follows-

> *"37. Offences to be cognizable and non-bailable.-(1) notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)*
>
> *(a) every offence punishable under this Act shall be cognizable;*
>
> *(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27 A and also for offences involving commercial quantity shall be released on bail or on his own bond unless*
>
> *(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and*
>
> *(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.*
>
> *(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."*

7. It is not disputed that twin conditions test is mandatory when the bail application is opposed by the public prosecutor. Since the release of accused coming under the cloud of sec 37 of NDPS Act is stiff, the trial is to be concluded at the earliest. Here the direction of Hon'ble supreme court in

Hussain & Anr. v. Union of India to conclude trial within two years is to be carried forward.

7-(a). The position on this context earlier to **Hussain** case-direction dtd.09.03.2017 needs to be encapsulated first.

In the case of **Union Of India vs Rattan Mallik @ Habul on 23 January, 2009** 2009 (1) SCC -482 the Hon'ble apex court has reiterated that-:

> "11. *The broad principles which should weigh with the Court in granting bail in a non-bailable offence have been enumerated in a catena of decisions of this Court and, therefore, for the sake of brevity, we do not propose to reiterate the same. However, when a prosecution/conviction is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising there under, including an application for grant of bail, these provisions cannot be ignored while dealing with such an application. As already noted, in the present case, the respondent has been convicted and sentenced for offences under the NDPS Act and therefore, while dealing with his application for grant of bail, in addition to the broad principles to be applied in prosecution for offences under the Indian Penal Code, 1860 the relevant provision in the said special statute in this regard had to be kept in view.*
>
> *xxx*
>
> *14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of `not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail''*

In the case of **Union of India v. Shiv Shanker Kesari**, (2007) 7 SCC 798 held as under:-

> "*The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.*
>
> *The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word "reasonable".*

8. Position post **Hussain** case may now be seen.

8-(a). The case of **Union of India v. Niyazuddin Sk. & Another** (judgment dt. 24-07-2017) reported in 2017(4) RCR (Criminal) 644, the Hon'ble Supreme Court has also held that-:

> *"The accusation in the present case is with regard to the fourth factor namely, commercial quantity. Be that as it may, once the Public Prosecutor opposes the application for bail to a person accused of the enumerated offences under Section 37 of the NDPS Act, in case, the court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of the Cr.P.C. or any other enactment. (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; (2) that person is not likely to commit any offence while on bail."*

9. Significantly though in different statute, Hon'ble Supreme Court did not show favour to twin conditions test and the rationale behind it. The said decision reported in AIR 2017 (S.C)-5500 -(2018) 11 SCC -1 **Nikesh Tarachand Shah vs Union Of India on 23 November, 2017** is helpful to answer the points posed in the case at hand. Section 45(1) of the Prevention of Money Laundering Act, 2002 has been declared unconstitutional by the Hon'ble Supreme Court insofar as it imposes two further conditions for release on bail, as it violates Articles 14 and 21 of the Constitution of India. It cannot be lost sight that Section 45(1) of the Prevention of Money Laundering Act, 2002, and section 37 the Narcotics Drugs and Psychotropic Substances Act, 1985 (the NDPS Act) are in *pari materia.* While analyzing, the Hon'ble Supreme court has observed therein as follows -:

> "33. *Also, the classification contained within the NDPS Act is completely done away with. Unequals are dealt with as if they are now equals. The offences under the NDPS Act are classified on the basis of the quantity of narcotic drugs and psychotropic substances that the accused is found with, which are categorized as: (1) a small quantity, as defined; (2) a quantity which is above small quantity, but below commercial quantity, as defined; and (3) above commercial quantity, as defined. The sentences of these offences vary from 1 year for a person found with small quantity, to 10 years for a person found with something between small and commercial quantity, and a minimum of 10 years upto 20 years when a person is found with commercial quantity. The twin conditions specified in Section 37 of the NDPS Act get attracted when bail is asked for only insofar as persons who have commercial quantities with them are concerned. A person found with a small quantity or with a quantity above small quantity, but below commercial quantity, punishable with a one year sentence or a 10 year sentence respectively, can apply for bail under Section 439 of the Code of Criminal Procedure without satisfying the same twin conditions as are contained in Section 45 of the 2002 Act, under Section*

37 of the NDPS Act. By assimilating all these three contraventions and bracketing them together, the 2002 Act treats as equal offences which are treated as unequal by the NDPS Act itself, when it comes to imposition of the further twin conditions for grant of bail. This is yet another manifestly arbitrary and discriminatory feature of the application of Section"

10. Viewing the provision of law and precedential position reiterated from time to time, it is important to advert that the concern of the Hon'ble Apex Court for the liberty of accused and his right to speedy justice has always been expressed in unambiguous words. Right to speedy trial and twin conditions test for bail u/s 37 NDPS Act are separate but interrelated. The important one is the former because of the fact that trial time has been prescribed in **Hussain & Anr. v. Union of India** (supra). The same is certain, predictable and is potent enough to relax to some extent the problem of pretrial detention.

The later one, twin conditions test as provided u/s 37 of NDPS Act, is uncertain and meant to be ascertained mostly by guess work. When release of the under trial prisoner (UTP) is associated with the result of guesswork or conjecture, the trial time assumes primacy. The contribution of UTP to cause delay in the proceeding should be an important factor within the ambit of "oppose the application" by the public prosecutor. Twin conditions are a much higher threshold bar than any of the conditions which are ascertainable prima facie.

The cause and consequence of failure to address delay in trial and the contribution of UTP thereto while opposing the bail application by learned public prosecutor cannot be overlooked because the preemption of that step would draw court to the next step as to whether to make twin conditions test or not. In order to ensure the primacy of "**oppose to bail application stage",** the delaying factors are required to be placed in no uncertain terms. Attribution of fault in this regard to UTP must be specific and definite. Failure to do so, may lead such objection to implicit negation of trial time prescribed in **Hussain & Anr. v. Union of India** (supra).In such a situation, the court may not be under any compulsion to go for twin conditions test. For these reasons, when the public prosecutor does not oppose the bail application referring fault of the U.T.P. to cause delay in trial referring the direction of Hon'ble Supreme Court, there is no need to go for the Twin conditions test as provided u/s 37 of the NDPS Act.

11. The imperatives of sec 37 of NDPS Act and the direction of Hon'ble the supreme court in case of **Hussain & Anr. v. Union of India** (supra) to

the effect that, the sessions trials where accused are in custody be normally concluded within two years, can be given effect in the following manner:-

11-(a). While opposing the bail application, the delaying factors and fault of UTP must be placed specifically by the learned public prosecutor.

11-(b). Where the trial as per **Hussain** judgment stipulation either could not have been concluded or cannot be adhered to and for such deficiency no fault is attributed to U.T.P. while opposing bail application, the court may hesitate to make twin conditions test as provided u/s 37 of the NDPS Act.

12. In view of the above legal position drawn on analysis, let the fact of the bail petitions at hand be seen specifically for disposal.

BLAPL No.4170 of 2017

In this case the petitioner, namely, Prakash Kumbhar is an accused for commission of offence under Section 20(b)(ii)(C) of NDPS Act, 1985, for having in possession of three packets containing 14 Kg. 730gms, 25kg 570gms and 21kg 195gms of Ganja in connection with Gochhapada P.S. Case No.56 of 2015 corresponding to G.R. Case No.76 of 2015 of the court of learned Sessions Judge-cum-Special Judge, Kandhamal, Phulbani.

Accused, Prakash Kumbhar is in custody since 21.09.2017.

Having regards to the quantity of contraband, I am not satisfied that accused will not commit similar type of offence after release. Hence I am inclined to reject the bail petition. The Trial Court is directed to complete the trial within four months hence.

BLAPL No.6464 of 2017

In this case the petitioner namely, Santosh Das is an accused for commission of offence under Section 20(b)(ii)(C) of NDPS Act, 1985, for having in possession of 64Kg. of Ganja in connection with P.R. No.37 of 2017-18 EI & EB Unit-II, Cuttack corresponding to 2(a) CC No.11 of 2017 of the court of learned Special Judge-cum-Sessions Judge, Cuttack.

Learned counsel for the petitioner submits that the accused was a passenger of a TATA ZEST Vehicle bearing Registration No.OD-01F-9446 and is in custody since 17.06.2017.

It is also submitted that the informant is the Investigating Officer and the trial is vitiated as per decision of **Mohan Lal Vrs. State of Punjab** (2018) SCC online SC 974. He further submits that the mandatory provision under section 42(2) of the NDPS Act has been violated as the Superior Officer has not been informed. While opposing the bail the learned Additional Standing Counsel submits that all the mandatory provisions have been complied with.

Nothing has been stated as to the delay in trial and fault of U.T.P. No criminal antecedent is shown against the accused. For the facts not disputed by State, I am inclined to grant bail.

Let the accused be admitted to bail on such terms and conditions to be imposed by the learned Trial Court.

BLAPL No.6879 of 2017

In this case the petitioner namely, Ramkumar Rajput is an accused for commission of offence under Section 20(b)(ii)(c) of NDPS Act, 1985, for having in possession of 28 Kg. 700 gms. of Ganja in connection with Padwa P.S. Case No.65 of 2017 corresponding to T.R. No.12 of 2017 of the court of learned Addl. Sessions Judge-cum-Special Judge, Koraput.

Learned counsel for the petitioner submits that three bags were seized containing contraband Ganja about 28 Kg and the number of passengers in the car were 5 and for that it cannot be said that the petitioner was in possession of contraband article more than commercial quantity.

Further it is stated that the petitioner is in custody since 28.07.2017 and trial has not yet been concluded. Added to that he submits that, the mandatory provisions for search and seizure are not followed.

Learned Additional Standing Counsel opposes the bail stating that the mandatory provisions have been complied with and seized article is more than commercial quantity.

Nothing is stated about delay in trial and the fault of U.T.P. No criminal antecedent of the petitioner is shown. Hence I am satisfied that the petitioner will not likely to commit any offence after release on bail.

Having regards to the above facts and custody period, I am inclined to release the accused on bail.

Let the accused be admitted to bail on such terms and conditions to be imposed by the learned Trial Court.

BLAPL No.8478 of 2017

In this case the petitioner namely, Ananta Das is an accused for commission of offence under Section 20(b)(ii)(C) of NDPS Act, 1985, for having in possession of 20Kg. 100Gms. of Ganja in connection with P.R. No.53 of 2017-18 of S.I. of Excise, District Mobile Squad, Angul corresponding to Special (NDPS) Case No.13 of 2017 of the court of learned Special Judge, Angul.

Learned counsel for the petitioner submits that the seized quantity of contraband article is 20 Kg. 100gms for which the accused is in custody since 21.09.2017 and the informant of this case is the Investigating Officer for which trial is vitiated as per decision of Hon'ble Supreme Court in **Mohan Lal Vrs. State of Punjab** (2018) SCC online SC 974. Further it is submitted that the mandatory provision under section 50 of the NDPS Act has not been complied with.

Learned Addl. Government Advocate opposes the bail stating that the seized contraband Ganja is 21 Kg. 100 gms. and the mandatory provisions have been complied with and there is no instruction about the cause of delay in trial.

Having regards to the above fact and custody period the petitioner is entitled to bail.

Let the accused be admitted to bail on such terms and conditions to be imposed by the learned Trial Court.

BLAPL No.5353 of 2017

In this case the petitioner namely, Gouranga Meher is an accused for commission of offence under Section 20(b)(ii)(c) of NDPS Act, 1985, for having in possession of 22 Kg. 150 Gms. of Ganja in connection with Dhama P.S. Case No.83 of 2017 corresponding to T.R. Case No.62 of 2017 of the court of learned Sessions Judge-cum-Special Judge, Sambalpur.

The learned Additional Standing Counsel opposes the bail application stating that the seized contraband Ganja involves commercial quantity and all the mandatory provisions required under the NDPS Act have been complied with.

Accused is in custody since 21.06.2017. Nothing has been stated about delay in trial. No criminal antecedent of petitioner is brought to the notice of the Court.

Having regards to the material placed, I am satisfied that the petitioner is not likely to commit any offence while on bail and prima facie is not guilty of offence. Hence, he is entitled to be released on bail.

Let the accused be admitted to bail on such terms and conditions to be imposed by the learned Trial Court.

BLAPL No.8548 of 2017

In this case the petitioner namely, Sumanta Khatua is an accused for commission of offence under Section 20(b)(ii)(c) of NDPS Act, 1985 in connection with Boudh P.R. Case No.11 of 2017 corresponding to 2(a) CC No.3 of 2017 of the court of learned Special Judge, Boudh.

It is submitted by learned counsel for the petitioner that the accused-petitioner is in custody since 09.10.2017 and has been prejudiced as the informant is the Investigating Officer of this case. Further it is submitted that the mandatory provision under section 55 and 57 of NDPS Act are not complied with and relying upon the decision of the case of ***Mohan Lal vs. State of Pubjab*** reported in ***2018 SCC online SC 974*** and persuaded the court to take a view that the chance of conviction of accused is remote.

Learned Additional Government Advocate opposes the bail stating that the investigation by the informant is not prejudicial and for that no adverse view can be taken against the prosecution. Further it is also contended that though the stage of trial is not known the mandatory provision under sections 55 and 57 are complied with and for that the accused is not to be benefited.

In view of the Three Judge Bench decision of Hon'ble Supreme Court in **Mohan Lal** case (supra), prejudice has already been caused to face fair trial. No criminal antecedent is shown for which I am satisfied that the petitioner is not likely to commit any offence while on bail.

Regards being had to the above facts, I am inclined to grant bail to the petitioner.

Let the accused be admitted to bail on such terms and conditions to be imposed by the learned Trial Court.

BLAPL No.2354 of 2018

In this case the petitioner namely, Mana Sahu is an accused for commission of offence under Section 20(b)(ii)(c) of NDPS Act, 1985, for having in possession of 145 Kg. 320 gms. of Ganja in connection with Kantamala P.S. Case No.43 of 2014 corresponding to C.T. Case No.195 of 2014 of the court of learned Addl. District & Sessions Judge-cum-Special Judge, Boudh vide Special Case (NDPS Act) No.1/2014(T).

Learned counsel for the petitioner submits that the accused-petitioner is in custody since 29.05.2014. 145Kg. 320Gms of Ganja was seized from the house, but not from the conscious possession of the accused. It is stated that accused is 72 years old and trial is yet to be completed. Learned counsel for the petitioner also referring the deposition of P.W.1-A.S.I. of Kantamal Police Station submits that while seizure of contraband article was made from the veranda of the house, the accused was found in the backside of the house but the occupants of the house were lady members and children.

Learned Additional Government Advocate opposes the bail stating that the last date to record the evidence by the lower court was 3.9.2018. With regards to possession of contraband article by the accused, it is stated that the house from where the seizure was made belonged to the accused-petitioner.

No criminal antecedent is shown against the accused. Learned Additional Government Advocate is unable to attribute any fault to the petitioner for the delay in trial since 29.5.2014.

Having regards to the age of the petitioner and custody period, I am inclined to admit the petitioner on bail.

Let the accused be admitted to bail on such terms and conditions to be imposed by the learned Trial Court.

BLAPL No.2672 of 2018

In this case the petitioner namely, Balu Khilla is an accused for commission of offence under Section 20(b)(ii)(c) of NDPS Act, 1985, for having in possession of 76 Kg. 830 gms. of Ganja in connection with Padwa P.S. Case No.03 of 2017 corresponding to T.R. Case No.01 of 2017 of the court of learned Addl. Sessions Judge-cum-Special Judge, Koraput.

Heard learned counsel for the petitioner and learned Additional Government Advocate for the State.

The report of Additional District & Sessions Judge-cum-Special Judge, Koraput dated 5.12.2018 reveals that the Commission was appointed

to examine one official witness and the date was fixed awaiting Commission Report. It is also reported therein that the case is likely to be disposed of by the end of April, 2019.

Both the learned counsel for the petitioner and learned AGA stated to have no information about further development in the trial.

Learned counsel for the petitioner submits that the accused-petitioner was a passenger in the Auto Rickshaw and is in custody since 6.1.2017 and there is no antecedent against him. He further referring substantial evidence of one Bhakta Muduli-P.W.4 stated that in the Auto, seven passengers were available.

Regards being had to the report of learned trial court that trial is to be completed by April, 2019, I am not inclined to grant bail to the petitioner. The trial court is directed to expedite trial. The petitioner is at liberty to renew the bail prayer if trial is not completed by the end of April, 2019.

BLAPL No.2674 of 2018

In this case the petitioner namely, Santosh Golory is an accused for commission of offence under Section 20(b)(ii)(c)/29 of NDPS Act, 1985, for having three nos. of polythene bags containing 60 Kg. 320 Gms. of Ganja in connection with Nandapur P.S. Case No.97 of 2017 corresponding to T.R. Case No.17 of 2017 of the court of learned Addl. Sessions Judge-cum-Special Judge, Koraput.

Learned counsel for the petitioner submits that the accused-petitioner is in custody since 13.9.2017 and trial has not yet been completed and he was one of the passengers in Toyota Qualis vehicle bearing Registration No. CH-04-1885. Learned counsel for the petitioner further submits that no independent witness was present at the time of seizure.

Learned AGA opposes the bail stating that this accused-petitioner is involved in another NDPS case and he was an occupant of the vehicle from which seizure of 61 Kgs of Ganja was made.

In view of the involvement of the petitioner in another NDPS case, the commission of this type of offence by him after release is not ruled out. Hence I am not inclined to grant bail. Accordingly the bail petition stands rejected. The learned Trial Court is directed to expedite the trial keeping in view the guideline of the Hon'ble Supreme Court in the case of **Hussain & Anr. Vrs. Union of India**, 2017 (5) SCC 702.